



Amendments to the Sentencing Guidelines

May 1, 2009

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.

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2009 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. IDENTITY THEFT ENFORCEMENT AND RESTITUTION ACT OF 2008

Reason for Amendment: This multi-part amendment responds to the directive in section 209 of the Identity Theft Enforcement and Restitution Act of 2008, Title II of Pub. L. 110–326 (the "Act"), and addresses other related issues arising from case law. Section 209(a) of the Act directed the Commission to—

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

The Act further required the Commission, in determining the appropriate sentence for the above referenced offenses, to consider the extent to which the guidelines and policy statements adequately account for 13 factors listed in section 209(b) of the Act.

In response to the congressional directive, the amendment increases penalties provided by the applicable guidelines and policy statements by adding a new enhancement and a new upward departure provision. In addition, the amendment expands both the definition of "victim" and the factors to be considered in the calculation of loss; each of these expansions may, in an appropriate case, increase penalties in comparison to those provided prior to the amendment.

First, the amendment adds a new two-level enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The new enhancement, which addresses offenses involving personal information, is at subsection (b)(15). An existing enhancement, which addresses offenses under 18 U.S.C. § 1030 (*i.e.*, computer crimes), was at subsection (b)(15) but has been redesignated as subsection (b)(16).

The new enhancement for offenses involving personal information applies if (A) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information. The "(A)" prong of the new personal information enhancement had been a prong of the existing computer crime enhancement, but the tiered structure of that enhancement was such that if a computer crime involved both an intent to obtain personal information and another harm (such as an intrusion into a government computer, an intent to cause damage, or a disruption of a critical infrastructure), only the greatest applicable increase would apply. The amendment responds to concerns that a case involving those other harms is different in kind from a case involving an intent to obtain personal information. Moving the intent to obtain personal information prong out of the computer crime enhancement and into the new enhancement ensures that a defendant convicted under section 1030 receives an incremental increase in punishment if the offense involved both an intent to obtain personal information and another harm addressed by the computer crime enhancement. The "(B)" prong of the new personal information enhancement ensures that any defendant, regardless of the statute of conviction, receives an additional incremental increase in punishment if the offense involved the unauthorized public dissemination of personal information. This prong accounts for the greater harm to privacy caused

by such an offense.

Second, the amendment amends the Commentary to §2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used unlawfully or without authority is considered a "victim." The Commentary to §2B1.1 in Application Note 1 defines "victim" in pertinent part to mean "any person who sustained any part of the actual loss determined under subsection (b)(1)". An identity theft case may involve an individual whose means of identification was taken and used but who was fully reimbursed by a third party (e.g., a bank or credit card company). Some courts have held that such an individual is not counted as a "victim" for purposes of the victims table at §2B1.1(b)(2). See United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009) (discussing various cases addressing this issue, including United States v. Armstead, 552 F.3d 769 (9th Cir. 2008); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008); United States v. Connor, 537 F.3d 480 (5th Cir. 2008); United States v. Icaza, 492 F.3d 967 (8th Cir. 2007); United States v. Lee, 427 F.3d 881 (11th Cir. 2005); and United States v. Yagar, 404 F.3d 967 (6th Cir. 2005)). The Commission determined that such an individual should be considered a "victim" for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines. The Commission received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing. This new category of "victim" for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.

Third, the amendment makes two changes to Application Note 3(C) regarding the calculation of loss. The first change specifies that the estimate of loss may be based upon the fair market value of property that is copied. This change responds to concerns that the calculation of loss does not adequately account for a case in which an owner of proprietary information retains possession of such information, but the proprietary information is unlawfully copied. The amendment recognizes, for example, that a computer crime that does not deprive the owner of the information in the computer nonetheless may cause loss inasmuch as it reduces the value of the information. The amendment makes clear that in such a case the court may use the fair market value of the copied property to estimate loss. The second change adds a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (e.g., trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense. The new provision responds to concerns that the guidelines did not adequately explain how to estimate loss in a case involving proprietary information such as trade secrets.

Fourth, the amendment moves the definitions of "means of identification" and "personal information" to Application Note 1, and clarifies that for information to be considered "personal information," it must involve information of an identifiable individual.

Fifth, the amendment amends §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, in Application Note 4 the amendment adds definitions of "means of identification" and "personal information" that are identical to the definitions of those terms in §2B1.1. The departure provision responds to concerns that the guideline may not adequately account for the rare wiretapping offense that involves a substantial number of victims.

Sixth, the amendment clarifies Application Note 2(B) of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). The first sentence of Application Note 2(B) specifies that an adjustment under §3B1.3 shall apply to

a defendant who exceeds or abuses his or her authority to "obtain" or "use" a means of identification. The second sentence then provides, as an example of such a defendant, an employee of a state motor vehicle department who exceeds or abuses his or her authority by "issuing" a means of identification. To make the two sentences consistent, the amendment clarifies the first sentence so that it expressly applies not only to obtaining or using a means of identification, but also to issuing or transferring a means of identification.

Finally, the amendment makes several technical changes. In particular, it corrects several places in the Guidelines Manual that erroneously refer to subsection "(b)(15)(iii)" of §2B1.1; the reference should be to subsection (b)(15)(A)(iii) (redesignated by the amendment as (b)(16)(A)(iii)). Also, it conforms a statutory reference in §2B1.1(b)(15)(A)(ii) (redesignated by the amendment as (b)(16)(A)(ii)), which refers to 18 U.S.C. § 1030(a)(5)(A)(i); the Act redesignated this statute as 18 U.S.C. § 1030(a)(5)(A).

The Commission determined that certain factors listed in the directive are adequately accounted for by existing provisions in the Guidelines Manual. See, e.g., §§2B1.1(b)(1), (b)(9)(C), (b)(13), (b)(16) (as redesignated by the amendment); 2B2.3(b)(1), (b)(3); 2B3.2(b)(3)(B); 2H3.1(b)(1)(B); and 3B1.4 (Using a Minor To Commit a Crime)).

Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

(15) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(+516) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved ~~(F)~~ a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or ~~(H) an intent to obtain personal information,~~ increase by 2 levels.

* * *

(B) If subdivision (A)(iii) applies, and the offense level is less than

level 24, increase to level 24.

(±617) If the offense involved—

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

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

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

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

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

* * *

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

* * *

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

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

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

- (ii) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
- (iii) *The cost of repairs to damaged property.*
- (iiiv) *The approximate number of victims multiplied by the average loss to each victim.*
- (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
- (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

* * *

4. Application of Subsection (b)(2).—

* * *

- (D) Vulnerable Victims.—*If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.*
- (E) Cases Involving Means of Identification.—*For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.*

* * *

9. Application of Subsection (b)(10).—

- (A) Definitions.—*For purposes of subsection (b)(10):*

* * *

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

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

* * *

13. Application of Subsection (b)(1516).—

(A) Definitions.—For purposes of subsection (b)(~~5~~16):

* * *

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

~~"Personal information" means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.~~

(B) Subsection (b)(~~5~~16)(A)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(~~5~~16)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(14)(B), do not apply the enhancement under subsection (b)(14)(B).

14. Application of Subsection (b)(~~6~~17).—

* * *

(B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(~~6~~17) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(~~6~~17) applies, do not apply §3B1.3.

* * *

19. Departure Considerations.—

* * *

(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(~~5~~16)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

* * *

Background:

* * *

Subsection (b)(14)(B)(i) implements, in a broader form, the instruction to the Commission in section

961(m) of Public Law 101–73.

Subsection (b)(15) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(~~15~~16) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(~~15~~16)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

* * *

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

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Commentary

* * *

Application Notes:

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

* * *

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

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

* * *

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

(i) The offense involved *personal information, means of identification, confidential phone*

records information, or tax return information of a substantial number of individuals.

* * *

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

* * *

Commentary

Application Notes:

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2. Application of Adjustment in Certain Circumstances.—*Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*

* * *

- (B) *A defendant who exceeds or abuses the authority of his or her position in order to obtain, **transfer, or issue** unlawfully, or use without authority, any means of identification. "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.*

2. RYAN HAIGHT ONLINE PHARMACY CONSUMER PROTECTION ACT OF 2008

Reason for Amendment: This amendment responds to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425 (the "Act").

The Act amended the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) to create two new offenses involving controlled substances, increased the statutory maximum terms of imprisonment for all Schedule III and IV controlled substance offenses and for second and subsequent Schedule V controlled substance offenses, and added a sentencing enhancement for Schedule III controlled substance offenses in a case in which "death or serious bodily injury results from the use of such substance". The Act also included a directive to the Commission that states:

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

First, the amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance. The statutory enhancement provides a maximum term of imprisonment of 15 years, or 30 years if the violation is committed after a prior conviction for a felony drug offense. *See* 21 U.S.C. §§ 841(b)(1)(E), 960(b)(5). The amendment addresses the statutory enhancement by amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide two new alternative base offense levels at subsections (a)(3) and (a)(4) for offenses involving Schedule III controlled substances in which death or injury results that are comparable to the alternative base offense levels at subsections (a)(1) and (a)(2) for offenses involving Schedule I and II controlled substances in which death or injury results. To reflect the harms involved in these offenses and the criminal histories of repeat drug offenders, the alternative base offense levels are set at level 30 if the defendant committed the offense after one or more prior convictions for a similar offense and level 26 otherwise.

Second, the amendment modifies the Drug Quantity Table in §2D1.1 to increase the maximum base offense level for offenses involving Schedule III hydrocodone from level 20 to level 30, without modifying any other offense level. The amendment extends the Drug Quantity Table for Schedule III hydrocodone offenses to level 30 using the existing marijuana equivalency (*i.e.*, 1 pill of Schedule III hydrocodone = 1 gram of marijuana). The Commission determined that a maximum base offense level of 30 is appropriate for Schedule III hydrocodone offenses because of data and testimony indicating a relatively high prevalence of misuse (when compared to other, non-marijuana drugs of abuse), an increasing number of emergency room visits involving this drug, and the very large volume of hydrocodone pills illicitly distributed, either over the Internet or in specialized pain clinics.

Finally, the amendment addresses the two new offenses created by the Act. The first new offense, at 21 U.S.C. § 841(h), prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment depends on the controlled substance involved. The amendment amends Appendix A (Statutory Index) to reference 21 U.S.C. § 841(h) to §2D1.1 because distribution of a controlled substance is an element of the offense. That guideline

also is appropriate because it includes an enhancement at subsection (b)(6) that provides a two-level increase in a case in which "a person distributes a controlled substance through mass-marketing by means of an interactive computer service" (e.g., sale of a controlled substance by means of the Internet).

The second new offense, at 21 U.S.C. § 843(c)(2)(A), prohibits the use of the Internet to advertise for sale a controlled substance and has a statutory maximum term of imprisonment of four years. Offenses under 21 U.S.C. § 843(c) already are referenced in Appendix A (Statutory Index) to §2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy). The amendment modifies the title of that guideline to indicate that it covers any scheduled controlled substance.

Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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

* * *

- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (35) 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.

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (5) * * * **Level 30**
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - **700,000 or more units of Schedule III Hydrocodone;**
 - At least 43,750 but less than 62,500 units of Flunitrazepam.
- (6) * * * **Level 28**
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
 - **At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;**
 - At least 25,000 but less than 43,750 units of Flunitrazepam.
- (7) * * * **Level 26**
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - **At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;**
 - At least 6,250 but less than 25,000 units of Flunitrazepam.
- (8) * * * **Level 24**
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 - **At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;**
 - At least 5,000 but less than 6,250 units of Flunitrazepam.
- (9) * * * **Level 22**
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - **At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;**
 - At least 3,750 but less than 5,000 units of Flunitrazepam.
- (10) * * * **Level 20**
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - **At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;**
 - 40,000 or more units of Schedule III substances (except Ketamine **or Hydrocodone**);
 - At least 2,500 but less than 3,750 units of Flunitrazepam.
- (11) * * * **Level 18**
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
 - **At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;**
 - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine **or Hydrocodone**);
 - At least 1,250 but less than 2,500 units of Flunitrazepam.
- (12) * * * **Level 16**

- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

* * *

(13)

- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

Level 14

(14)

* * *

- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;

Level 12

(15)

* * *

- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 62 but less than 156 units of Flunitrazepam;

Level 10

(16)

* * *

- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III Hydrocodone;
- At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- Less than 62 units of Flunitrazepam;

Level 8

* * *

(17)

* * *

- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III Hydrocodone;
- Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);

Level 6

* * *

Commentary

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Application Notes:

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10. Use of Drug Equivalency Tables.—

* * *

(E) Drug Equivalency Tables.—

Schedule III Substances (except ketamine and hydrocodone)***

1 unit of a Schedule III Substance = 1 gm of marihuana

****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

*****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 999.99 kilograms of marihuana.

* * *

Schedule IV Substances (except flunitrazepam)*****

1 unit of a Schedule IV Substance (except Flunitrazepam)= 0.0625 gm of marihuana

***** *Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

***** *Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

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

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

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

* * *

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

* * *

APPENDIX A - STATUTORY INDEX

* * *

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

3. DRUG TRAFFICKING VESSEL INTERDICTION ACT OF 2008

Reason for Amendment: This amendment responds to the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. 110-407 (the "Act"). The Act created a new offense at 18 U.S.C. § 2285 making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submersible vessel in international waters with the intent to evade detection. Section 103 of the Act directed the Commission to amend the guidelines, or promulgate new guidelines, to provide adequate penalties for persons convicted of offenses under 18 U.S.C. § 2285 and included a list of circumstances for the Commission to consider.

First, the amendment amends §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if a submersible or semi-submersible vessel was used in a drug importation offense. The Commission determined that a drug importation offense involving the use of a submersible or semi-submersible vessel poses similar risks and harms as a drug importation offense involving an unscheduled aircraft (which subsection (b)(2) already covers). The amendment also makes a conforming change to a reference in Application Note 8.

Second, the amendment creates a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. The new guideline provides a base offense level of 26 and includes a tiered specific offense characteristic and upward departure provisions to address certain aggravating circumstances listed in the directive. Public testimony indicates that submersible and semi-submersible vessels to date have been used for the purpose of transporting drugs. Such conduct receives a minimum offense level of 26 under §2D1.1(b)(2), discussed above, regardless of the type or quantity of drug involved in the offense. The Commission determined that a base offense level of 26 in §2X7.2 for an offense under section 2285 would be appropriate to promote proportionality.

The specific offense characteristic in §2X7.2 provides a two-level enhancement for failing to heave to, a four-level enhancement for attempting to sink the vessel, and an eight-level enhancement for sinking the vessel; the greatest applicable enhancement applies. Offenses involving such conduct are more serious because they create greater risk of harm to the crew of the illegal vessel and the interdicting law enforcement personnel, particularly in a case in which the illegal vessel is sunk and its crew must be rescued. In addition, sinking the vessel destroys evidence of illegal activity. The upward departure provisions provide that an upward departure may be warranted if the defendant engaged in a pattern of activity involving the use of a submersible or semi-submersible vessel, or if the offense involved the use of the vessel as a part of an ongoing criminal organization or criminal enterprise.

Third, the amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 2285 to §2X7.2.

Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, ~~or~~ (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

* * *

Commentary

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Application Notes:

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Note, however, that if an adjustment from subsection (b)(2)(BC) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

7. OFFENSES INVOLVING BORDER TUNNELS AND SUBMERSIBLE AND SEMI-SUBMERSIBLE VESSELS

* * *

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

- (a) Base Offense Level: 26
- (b) Specific Offense Characteristic
- (1) (Apply the greatest) If the offense involved—
- (A) a failure to heave to when directed by law enforcement officers, increase by 2 levels;
- (B) an attempt to sink the vessel, increase by 4 levels; or
- (C) the sinking of the vessel, increase by 8 levels.

Commentary

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

Application Note:

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

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

* * *

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* * *

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

4. COURT SECURITY IMPROVEMENT ACT OF 2007

Reason for Amendment: This amendment responds to the Court Security Improvement Act of 2007, Pub. L. 110–177 (the "Act"), and other related issues.

First, the amendment responds to the directive in section 209 of the Act, which required the Commission to review the guidelines applicable to threats punishable under 18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member) that occur over the Internet, and determine "whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code." The directive further required the Commission to consider the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.

The amendment implements the directive by amending §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to provide a new two-level enhancement for a case in which the defendant is convicted under 18 U.S.C. § 115, made a public threatening communication, and knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115. The Commission determined that the policy concerns underlying the directive regarding threats occurring over the Internet apply equally to threats made public by other means (*e.g.*, radio, television broadcast) and that the response to the directive therefore should be technology neutral. The threat guideline, §2A6.1, adequately accounts for offenses involving multiple threats and multiple victims through the existing specific offense characteristic at subsection (b)(2) and the upward departure provision in Application Note 4.

Second, the amendment amends Appendix A (Statutory Index) to add references for 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant) to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 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), in addition to §2J1.2 (Obstruction of Justice). The additional references more adequately reflect the range of conduct covered by 18 U.S.C. § 1513, including killing or attempting to kill a witness, causing bodily injury to a witness, and damaging the tangible property of a witness. In addition, 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant), which covers a similar range of conduct, including killing or attempting to kill a witness and using physical force against a witness, is referenced to the same Chapter Two, Part A guidelines.

Amendment:

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

* * *

(b) Specific Offense Characteristics

* * *

(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds

to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

- (5) If the defendant (A) is convicted under 18 U.S.C. § 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115, increase by 2 levels.
- (56) If (A) subsection (a)(2) and subdivisions (1), (2), (3), ~~and (4)~~, and (5) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by 4 levels.

* * *

Commentary

* * *

Application Notes:

* * *

Background: These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

Subsection (b)(5) implements, in a broader form, the directive to the Commission in section 209 of the Court Security Improvement Act of 2007, Public Law 110-177.

* * *

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18 U.S.C. § 1513	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1, 2J1.2
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5. WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

Reason for Amendment: This amendment responds to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (the "Act"), which included a directive to the Commission and created two new offenses.

First, the amendment responds to the directive in section 222(g) of the Act. It directed the Commission to—

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

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

The amendment amends §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative prong to the enhancement at subsection (b)(8), which covers cases in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment. The new alternative prong, at subsection (b)(8)(B), applies in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under §3B1.1 (Aggravating Role). In such a case, a two-level increase applies, but if the alien engaging in the prostitution had not attained the age of 18 years, a six-level increase applies. Because this is an alternative enhancement, it does not apply if the enhancement for coercion at §2L1.1(b)(8)(A) is greater.

The amendment also amends Application Note 6 to provide that, while an adjustment under §3A1.3 (Restraint of Victim) does not apply in a case that receives an enhancement under §2L1.1(b)(8)(A), such an adjustment may apply in a case that receives an enhancement under §2L1.1(b)(8)(B).

Second, the amendment responds to a new offense created by the Act, 18 U.S.C. § 1351 (Fraud in foreign labor contracting). The new offense has a statutory maximum term of imprisonment of five years. Because this new offense has fraud as an element, the amendment references this new offense in Appendix A (Statutory Index) 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).

Third, the amendment responds to another new offense created by the Act, 18 U.S.C. § 1593A (Benefitting financially from peonage, slavery, and trafficking in persons). This new offense applies when a person has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. §§ 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation. The amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 1593A to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) because that guideline covers the relevant underlying statutes, 18 U.S.C. §§ 1581(a) and 1592. The amendment also amends §2H4.1 to provide that a defendant convicted of 18 U.S.C. § 1593A receives the same base offense level as if the defendant were convicted of committing the underlying violation. Accordingly, if the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation

of 18 U.S.C. § 1592, the defendant would receive the same base offense level, 18, as if the defendant had been convicted of 18 U.S.C. § 1592. If the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation of 18 U.S.C. § 1581(a), the defendant would receive the same base offense level, 22, as if the defendant had been convicted of 18 U.S.C. § 1581(a).

The amendment also amends the Commentary to §2H4.1 to provide that a downward departure may be warranted in a case in which the defendant is convicted under 18 U.S.C. §§ 1589(b) or 1593A if the defendant benefitted from participating in a venture described in those sections in reckless disregard of the fact that the venture had engaged in the criminal activities described in those sections. This downward departure provision recognizes that a defendant who commits such an offense in reckless disregard of the fact that the venture engaged in such criminal activities may be less culpable than a defendant who acts with knowledge of that fact.

Finally, the amendment makes a technical change to §2H4.1(a) by striking the phrase "(Apply the greater)".

Amendment:

Part A (Directive Regarding Alien Harboring Committed in Furtherance of Prostitution)

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

* * *

(b) Specific Offense Characteristics

* * *

~~(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.~~

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6

levels.

* * *

Part B (New Offense Under 18 U.S.C. § 1351 (Fraud in Foreign Labor Contracting))

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18 U.S.C. § 1350 2B1.1
18 U.S.C. § 1351 2B1.1

* * *

Part C (New Offense Under 18 U.S.C. § 1593A (Benefitting Financially from Peonage, Slavery, and Trafficking in Persons))

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18 U.S.C. § 1592 2H4.1
18 U.S.C. § 1593A 2H4.1

* * *

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

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

- (1) **22**; or
- (2) **18**, if (A) the defendant was convicted of an offense under 18 U.S.C. § 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. § 1593A based on an act in violation of 18 U.S.C. § 1592.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1590, 1592, 1593A.

Application Notes:

* * *

- 3. *If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.*
- 4. *In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in*

those sections without knowing that (i.e., in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.

6. COUNTERFEITING

Reason for Amendment: This amendment amends §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to clarify guideline application issues regarding the sentencing of counterfeiting offenses involving "bleached notes." A bleached note is genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be a note of higher denomination. The amendment responds to concerns expressed by federal judges and members of Congress regarding which guideline should apply to offenses involving bleached notes.

Courts in different circuits have resolved differently the question of whether an offense involving bleached notes should be sentenced under §2B5.1 or §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Compare United States v. Schreckengost, 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under §2B1.1), and United States v. Inclema, 363 F.3d 1177 (11th Cir. 2004) (same), with United States v. Dison, 2008 WL 351935 (W.D. La. Feb. 8, 2008) (applying §2B5.1 in a case involving bleached notes), and United States v. Vice, 2008 WL 113970 (W.D. La. Jan. 3, 2008) (same).

The amendment resolves this issue by providing that an offense involving bleached notes is sentenced under §2B5.1. The amendment does so by deleting Application Note 3 and revising the definition of "counterfeit" to more closely parallel relevant counterfeiting statutes, including 18 U.S.C. §§ 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). It establishes a new definition at Application Note 1 providing that counterfeit "refers to an instrument that has been falsely made, manufactured, or altered." Under the new definition, altered instruments are treated as counterfeit and sentenced under §2B5.1. Technological advances in counterfeiting, such as bleaching notes, have rendered obsolete the previous distinction in the guidelines between an instrument falsely made or manufactured in its entirety and a genuine instrument that is altered.

The amendment also adds a prong to the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed. Blank or partially blank bleached notes are similar to counterfeiting paper in how they are involved in counterfeiting offenses. Accordingly, this new prong ensures that an offender who controlled or possessed blank or partially blank bleached notes is subject to the same two-level enhancement as an offender who controlled or possessed "counterfeiting paper similar to a distinctive paper", as subsection (b)(2)(B)(i) already provides.

Finally, the amendment amends Appendix A (Statutory Index) by striking the reference to §2B1.1 for two offenses that do not involve elements of fraud. Specifically, the amendment deletes the reference to §2B1.1 for offenses under 18 U.S.C. §§ 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities).

Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the defendant (A) manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; (ii) **genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed;** or (iii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

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

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

* * *

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

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

* * *

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

7. INFLUENCING A MINOR

Reason for Amendment: This amendment addresses a circuit conflict regarding application of the undue influence enhancement at subsection (b)(2)(B)(ii) of §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and at subsection (b)(2)(B) of §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). The undue influence enhancement applies if "a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct." The Commentary to both guidelines states that in determining whether the undue influence enhancement applies, "the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." The Commentary also provides for a rebuttable presumption of undue influence "[i]n a case in which a participant is at least 10 years older than the minor."

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

Three circuits have expressed different views on two issues: first, whether the undue influence enhancement can apply in a case involving attempted sexual conduct; and second, whether the undue influence enhancement can apply in a case in which the only minor involved is a law enforcement officer. Compare United States v. Root, 296 F.3d 1222, 1234 (11th Cir. 2002) (holding that the undue influence enhancement in §2A3.2 can apply in instances of attempted sexual conduct, including a case in which the only "victim" involved in the case is an undercover law enforcement officer), and United States v. Vance, 494 F.3d 985, 996 (11th Cir. 2007) (holding that the undue influence enhancement in §2G1.3 can apply in a case in which the minor is fictitious), with United States v. Mitchell, 353 F.3d 552, 554, 557 (7th Cir. 2003) (holding that the undue influence enhancement in §2A3.2 "cannot apply in the case of an attempt where the victim is an undercover police officer", and suggesting that it cannot apply in any case in which "the offender and victim have not engaged in illicit sexual conduct"), and United States v. Chriswell, 401 F.3d 459, 469 (6th Cir. 2005) (holding that the undue influence enhancement in §2A3.2 "is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen" but leaving open the possibility that it can apply in other instances of attempted sexual conduct).

The amendment resolves the first issue by providing that the undue influence enhancement can apply in a case involving attempted sexual conduct. Specifically, the amendment amends the Commentary in §§2A3.2 and 2G1.3 to provide that "[t]he voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring."

The amendment resolves the second issue by providing in the Commentary to §§2A3.2 and 2G1.3 that the undue influence enhancement does not apply in a case in which the only "minor" involved in the offense is an undercover law enforcement officer. The Commission determined that the undue influence enhancement should not apply in a case involving only an undercover law enforcement officer because, unlike other enhancements in the sex offense guidelines, the undue influence enhancement is properly focused on the effect of the defendant's actions on the minor's behavior.

The amendment also makes a stylistic change to the language in the Commentary of both §§2A3.2 and 2G1.3,

and makes a technical change to the Background of §2A3.2.

Amendment:

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

* * *

Commentary

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Application Notes:

* * *

3. Application of Subsection (b)(2).—

* * *

(B) Undue Influence.—*In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior. **The voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.***

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

*In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption **that**, for purposes of subsection (b)(2)(B)(ii), ~~that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ **applies**. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.*

* * *

Background: *This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the minor, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor’s behavior was compromised. ~~A two-level~~ **four-level** enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the minor and the defendant, as specified in 18 U.S.C. § 2243(a). ~~A two-level~~ **four-level** enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor*

under his supervision or care. However, if the minor had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the minor.

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

3. Application of Subsection (b)(2).—

* * *

(B) Undue Influence.—*In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior. **The voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.***

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

*In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption **that**, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct **applies**. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.*

8. MISCELLANEOUS AMENDMENTS

Reason for Amendment: This multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

First, the amendment amends Appendix A (Statutory Index) to include offenses created by the Housing and Economic Recovery Act of 2008, Pub. L. 110–289, and other offenses similar to those offenses, as follows:

- (1) The new offense at 12 U.S.C. § 4636b is referenced to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The similar existing offense at 12 U.S.C. § 1818(j) is also referenced to §2B1.1. These offenses are similar to economic crimes and are best accounted for by §2B1.1.
- (2) The new offense at 12 U.S.C. § 4641 is referenced to §2J1.1 (Contempt) and §2J1.5 (Failure to Appear by Material Witness); similar existing offenses (2 U.S.C. §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1844(f), 2273, 3108(b)(6); 15 U.S.C. §§ 78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 U.S.C. § 825f(c); 26 U.S.C. § 7210; 33 U.S.C. § 1227(b); 42 U.S.C. § 3611; 47 U.S.C. § 409(m); 49 U.S.C. §§ 14909, 16104) are also referenced to §2J1.1 and §2J1.5. Contempt offenses can involve a range of conduct. The Commission determined that referencing these offenses to both §2J1.1 and §2J1.5 will best account for the range of conduct involved. Another similar offense, 33 U.S.C. § 506, is deleted from Appendix A (Statutory Index) because it has been repealed.

Second, the amendment amends Appendix A (Statutory Index) to include offenses upgraded from misdemeanors to felonies by the Consumer Product Safety Improvement Act of 2008, Pub. L. 110–314. These offenses (15 U.S.C. §§ 1192, 1197(b), 1202(c), 1263, 2068) are referenced to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). These offenses cover a range of conduct (from paperwork violations to making or selling a nonconforming product) and a range of mental states (from strict liability to knowing, willful, or intentional misconduct). The Commission determined that these offenses are similar to offenses referenced to §2N2.1, which has provisions to account for aggravating and mitigating circumstances that may be involved in such offenses. Technical and conforming changes are also made to indicate that §2N2.1 covers consumer product safety offenses.

Third, the amendment amends Appendix A (Statutory Index) to include an offense created by the Veterans' Benefits Improvement Act of 2008, Pub. L. 110–389. The new offense, 50 U.S.C. App. § 527(e), is a Class A misdemeanor and, accordingly, is referenced to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The amendment also references 10 U.S.C. § 987(f), a similar Class A misdemeanor, to §2X5.2.

Fourth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162. The offense, 18 U.S.C. § 117, covers domestic assault by a person with two or more prior convictions for domestic assault offenses. It is similar to the offenses referenced to §2A6.2 (Stalking or Domestic Violence) and, therefore, is referenced to that guideline.

Fifth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008, Pub. L. 110–340. The offense, 18 U.S.C. § 2442, is referenced to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). The offenses currently indexed to §2H4.1 include five offenses that relate to illegal use of an individual’s labor and have the same statutory maximum term of imprisonment as the new child soldiers offense (20 years imprisonment or, if death results, life). Likewise, §2H4.1 has provisions to account for aggravating and mitigating circumstances that may be involved in a child soldiers offense. Technical and conforming changes are also made to indicate that §2H4.1 applies to the new offense.

Sixth, the amendment makes changes throughout the Guidelines Manual to reflect the amendments made by the Judicial Administration and Technical Amendments Act of 2008, Pub. L. 110–406, to the probation and supervised release statutes (18 U.S.C. §§ 3563, 3583). The changes include a new guideline for intermittent confinement at §5F1.8 (Intermittent Confinement) that parallels the statutory language, as well as technical and conforming changes. These changes conform the Guidelines Manual to reflect what Congress has provided.

Seventh, the amendment responds to the Let Our Veterans Rest in Peace Act of 2008, Pub. L. 110–384, which directed the Commission to review and, if appropriate, amend the guidelines to "provide adequate sentencing enhancements" for any offense involving "desecration, theft, or trafficking" in a veteran’s grave marker. There is a specific offense characteristic at subsection (b)(6) of §2B1.1 for damage, destruction, or theft of a veteran’s grave marker. The amendment amends this specific offense characteristic so that it also covers trafficking in a veteran’s grave marker.

Eighth, the amendment makes changes in the child pornography guidelines, §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) and §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), so that they reflect the amendments made to the child pornography statutes (18 U.S.C. §§ 2251 et seq.) by the Effective Child Pornography Prosecution Act of 2007, Pub. L. 110–358, and the PROTECT Our Children Act of 2008, Pub. L. 110–401. The changes relate primarily to cases in which child pornography is transmitted over the Internet. Under the amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. The amendment also amends the child pornography guidelines so that the term "distribution" includes "transmission", and the term "material" includes any visual depiction, as now defined by 18 U.S.C. § 2256 (i.e., to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format). These changes conform the child pornography guidelines to reflect what Congress has provided.

Ninth, the amendment amends Appendix A (Statutory Index) so that the threat guideline, §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. § 2280 and § 2332a are referenced. A person may be charged and convicted of committing such an offense by threat. In such a case, §2A6.1 may be the most appropriate guideline.

Tenth, the amendment addresses subsection (a)(7) of 18 U.S.C. § 2252A, a new child pornography offense created by the PROTECT Our Children Act of 2008, Pub. L. 110–401. The offense makes it unlawful to

knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor." A violator is subject to a maximum term of imprisonment of 15 years. This offense is already referenced in Appendix A (Statutory Index) to the child pornography distribution guideline, §2G2.2, by virtue of the fact that all offenses under section 2252A(a) are referenced to that guideline. The Commission determined that the distribution guideline is the appropriate guideline for this offense because distribution is a required element of this offense, in that the offender must either distribute the material or produce it with intent to distribute. The distribution guideline also has provisions to account for aggravating and mitigating circumstances that may be involved in these offenses. The amendment provides a base offense level of 18 for this offense, which is four levels lower than the base offense level for other child pornography distribution offenses referenced to §2G2.2. The Commission determined that the lower base offense level was appropriate for this offense because, unlike for other child pornography distribution offenses, the process of creating the image does not involve the sexual exploitation of a child, and Congress provided a lower penalty structure for this offense (a maximum term of imprisonment of 15 years, and no mandatory minimum term of imprisonment) than for other child pornography distribution offenses (typically, a maximum term of imprisonment of 20 years and a mandatory minimum of 5 years). The lower base offense level also accounts for the fact that the enhancements at subsections (b)(3) (for distribution) and (b)(6) (for use of a computer) will likely apply in these cases. Finally, to ensure that §2G2.2 treats material involving an adapted or modified image in the same manner as it treats material involving any other form of child pornography, the amendment provides a new Application Note to §2G2.2 to clarify that, if the offense involved material that is an adapted or modified depiction of an identifiable minor, the term "material involving the sexual exploitation of a minor" includes such material.

Amendment:

Part A (Housing and Economic Recovery Act of 2008)

APPENDIX A - STATUTORY INDEX

2 U.S.C. § 192	2J1.1, 2J1.5	
2 U.S.C. § 390	2J1.1, 2J1.5	
2 U.S.C. § 437g(d)	2C1.8	
		* * *
7 U.S.C. § 87b	2N2.1	
7 U.S.C. § 87f(e)	2J1.1, 2J1.5	
		* * *
12 U.S.C. § 631	2B1.1	
12 U.S.C. § 1818(j)	2B1.1	
12 U.S.C. § 1844(f)	2J1.1, 2J1.5	
12 U.S.C. § 2273	2J1.1, 2J1.5	
12 U.S.C. § 3108(b)(6)	2J1.1, 2J1.5	
12 U.S.C. § 4636b	2B1.1	
12 U.S.C. § 4641	2J1.1, 2J1.5	
		* * *
15 U.S.C. § 78ff	2B1.1, 2C1.1	
15 U.S.C. § 78u(c)	2J1.1, 2J1.5	
15 U.S.C. § 80a-41(c)	2J1.1, 2J1.5	
15 U.S.C. § 80b-6	2B1.1	
15 U.S.C. § 80b-9(c)	2J1.1, 2J1.5	

15 U.S.C. § 714m(c)	2B1.1	* * *
15 U.S.C. § 717m(d)	2J1.1, 2J1.5	* * *
16 U.S.C. § 773g	2A2.4	
16 U.S.C. § 825f(c)	2J1.1, 2J1.5	
26 U.S.C. § 7210	2J1.1, 2J1.5	* * *
33 U.S.C. § 506	2J1.1	* * *
33 U.S.C. § 1227(b)	2J1.1, 2J1.5	
42 U.S.C. § 3611(f)	2J1.1, 2J1.5	* * *
47 U.S.C. § 223(b)(1)(A)	2G3.2	
47 U.S.C. § 409(m)	2J1.1, 2J1.5	* * *
49 U.S.C. § 14909	2J1.1, 2J1.5	* * *
49 U.S.C. § 16104	2J1.1, 2J1.5	* * *

Part B (Consumer Product Safety Improvement Act of 2008)

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

* * *

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

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

* * *

APPENDIX A - STATUTORY INDEX

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

* * *

15 U.S.C. § 1990c
15 U.S.C. § 2068

2N3.1 (for offenses committed prior to July 5, 1994)
2N2.1

* * *

Part C (Veterans' Benefits Improvement Act of 2008)

APPENDIX A - STATUTORY INDEX

* * *

8 U.S.C. § 1375a(d)(3)(C),
(d)(5)(B)
10 U.S.C. § 987(f)

2H3.1
2X5.2

* * *

50 U.S.C. § 783(c)
50 U.S.C. App. § 527(e)

2M3.3
2X5.2

* * *

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

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 115(b)(3)
18 U.S.C. § 117

2A1.1, 2A1.2, 2A2.1, 2X1.1
2A6.2

* * *

Part E (Child Soldiers Accountability Act of 2008)

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

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

* * *

Commentary

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

Application Notes:

1. For purposes of this guideline—

* * *

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

"Peonage or involuntary servitude" includes forced labor, slavery, and recruitment or use of a child soldier.

* * *

APPENDIX A - STATUTORY INDEX

* * *

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

* * *

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

§5B1.3. Conditions of Probation

(a) Mandatory Conditions--

- (1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));
- (2) for a felony, the defendant shall (A) make restitution, ~~(B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area;~~ (B) **work in community service, or (C) both, unless the court has imposed a fine,** or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

~~Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now~~

~~referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).~~

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. [See §5F1.1 \(Community Confinement\)](#).

* * *

(6) Intermittent Confinement

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

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

* * *

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

* * *

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

* * *

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

* * *

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

* * *

Commentary

Application Notes:

* * *

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

* * *

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

* * *

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

* * *

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

* * *

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

completion of the treatment program will eliminate that problem.

* * *

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b), intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.~~

§5D1.3. Conditions of Supervised Release

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b), intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It~~

would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

* * *

(5) Curfew

* * *

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

* * *

§5F1.1. Community Confinement

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

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

* * *

§5F1.8. Intermittent Confinement

Intermittent confinement may be imposed as a condition of probation during the first year of probation. See 18 U.S.C. § 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See 18 U.S.C. § 3583(d).

Commentary

Application Note:

- 1. *"Intermittent confinement" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b)(10).*

* * *

CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

- (b) Supervised Release.

* * *

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

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C.~~

~~§ 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

* * *

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

* * *

Commentary

Application Notes:

* * *

5. *Intermittent confinement is authorized ~~only~~ as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. §3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).**

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.~~

* * *

§8D1.3.

Conditions of Probation - Organizations

* * *

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

~~Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).~~

* * *

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

§2B1.1.

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

* * *

- (b) Specific Offense Characteristics

* * *

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

* * *

Commentary

* * *

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

* * *

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

* * *

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

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

* * *

(b) Specific Offense Characteristics

* * *

- (6) If, for the purpose of producing sexually explicit material **or for the purpose of transmitting such material live**, the offense involved (A) the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

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

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

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

* * *

4. Application of Subsection (b)(6).—

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

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

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

* * *

§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

* * *

(b) Specific Offense Characteristics

* * *

- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, **or for accessing with intent to view the material**, increase by 2 levels.

* * *

(c) Cross Reference

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

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

* * *

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

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

* * *

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

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

* * *

4. Application of Subsection (b)(7).—

* * *

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

* * *

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

5. Application of Subsection (c)(1).—

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

* * *

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

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3,

2A1.4, 2A2.1, 2A2.2,
2A2.3, 2A4.1, 2A6.1, 2B1.1,
2B3.1, 2B3.2, 2K1.4,
2X1.1

* * *

18 U.S.C. § 2332a 2A6.1, 2K1.4, 2M6.1

* * *

Part J (Child Pornography Offenses Involving "Morphed Images")

§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), or § 2252A(a)(7).
- (2) **22**, otherwise.

* * *

Commentary

* * *

Application Notes:

* * *

- 6. *Cases Involving Adapted or Modified Depictions.*—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.
- 67. *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.

* * *

9. §3C1.3 (COMMISSION OF OFFENSE WHILE ON RELEASE)

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

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to §2J1.7 (now Application Note 1 to §3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level adjustment. See United States v. Confredo, 528 F.3d 143 (2d Cir. 2008); United States v. Stevens, 66 F.3d 431 (2d Cir. 1995); United States v. Wilson, 966 F.2d 243 (7th Cir. 1992).

The amendment clarifies that the court determines the applicable guideline range for a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147 as in any other case. Therefore, under ordinary guideline application principles, only one guideline range applies to such a defendant. See §1B1.1 (Application Instructions) (instructing the sentencing court to, in this order: (1) determine the offense guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level and specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) "[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above"). At that point, the court determines an appropriate "total punishment" using that applicable guideline range, and then divides the total sentence between the underlying offense and the section 3147 enhancement as the court considers appropriate.

Amendment:

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

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

Commentary

Application Note:

1. *Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, **including, as in any other case in which a Chapter Three adjustment applies (see §1B1.1 (Application Instructions)), the adjustment provided by as adjusted***

by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement. Similarly, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

10. PRIORITIZING RESOURCES AND ORGANIZATION FOR INTELLECTUAL PROPERTY ACT OF 2008

Reason for Amendment: This amendment responds to the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110–403, which added two sentencing enhancements to violations of 18 U.S.C. § 2320 (Trafficking in counterfeit goods or services). Under those sentencing enhancements, if the offender causes or attempts to cause serious bodily injury, the statutory maximum term of imprisonment is increased from 10 years to 20 years; if the offender causes or attempts to cause death, the statutory maximum is increased to any term of years (or to life).

The amendment amends §2B5.3 (Criminal Infringement of Copyright or Trademark) at subsection (b)(5) to clarify that the enhancement in that subsection, which applies when the offense involved the risk of serious bodily injury, also applies when the offense involved the risk of death. This brings the language of that enhancement back into parallel with the corresponding enhancement in subsection (b)(13) 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). The Commission envisioned, when it added the enhancement to §2B5.3, that paralleling the fraud guideline would promote proportionality. See Appendix C to the Guidelines Manual, Amendment 590 ("The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore, this enhancement is consistent with an identical provision in the fraud guideline."). Accordingly, the amendment also increases the minimum offense level in §2B5.3(b)(5) from level 13 to level 14, bringing it back into parallel with the minimum offense level in §2B1.1(b)(13).

Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

- (5) If the offense involved (A) the conscious or reckless risk of **death** or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level ~~13~~**14**, increase to level ~~13~~**14**.

* * *

11. TECHNICAL AMENDMENTS

Reason for Amendment: This multi-part amendment makes various technical and conforming changes to the guidelines.

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

The amendment also resolves certain technical issues that have arisen in the Guidelines Manual with respect to child pornography offenses. First, it makes technical changes to the Commentary in §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) to more accurately indicate which offenses under 18 U.S.C. § 2251 are referenced to §2G2.1. Second, it makes technical changes to the Commentary in §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) to address the fact that offenses under 18 U.S.C. § 2252A(g) are now covered by §2G2.6 (Child Exploitation Enterprises)(see Appendix C to the Guidelines Manual, Amendment 701), while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2. Third, it makes a technical change to the Commentary in §2G2.3 (Selling or Buying of Children for Use in the Production of Pornography) to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is now 30 years imprisonment. Fourth, it makes technical changes in subsection (c)(1) of §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) to address the fact that §2G2.4 no longer exists, having been consolidated into §2G2.2 effective November 1, 2004 (see Appendix C to the Guidelines Manual, Amendment 664). Fifth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. § 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. In doing so, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by

§2G2.2.

Amendment:

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

§1B1.8. Use of Certain Information

* * *

Commentary

Application Notes:

* * *

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

* * *

§2J1.1. Contempt

* * *

Commentary

* * *

Application Notes:

* * *

- 3. *Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(78)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.*

* * *

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

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

* * *

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

* * *

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

* * *

Commentary

Application Notes:

* * *

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

* * *

§5D1.2. Term of Supervised Release

* * *

Commentary

* * *

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (bc) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

* * *

APPENDIX A - STATUTORY INDEX

* * *

42 U.S.C. § 3611(fc) 2J1.1

* * *

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

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed

Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

* * *

Commentary

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

* * *

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

* * *

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

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

* * *

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

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

Commentary

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

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

* * *

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

* * *

(c) Cross Reference

- (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, **Soliciting**, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; **Possessing Material Involving the Sexual Exploitation of a Minor**) ~~or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)~~, as appropriate.

* * *

APPENDIX A - STATUTORY INDEX

* * *

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

* * *