UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2007.

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

DATES: The Commission has specified an effective date of November 1, 2007, for the amendments set forth in this notice.

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

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the **Federal Register** on January 30, 2007 (*see* 72 FR 4372). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 20, 2007. On May 1, 2007, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2007.

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

Ricardo H. Hinojosa,

Chair.

1. Compassionate Release

Amendment: The Commentary to § 1B1.13 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (A) and inserting the following:

''(A) Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:

(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.

(iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).''.

The Commentary to § 1B1.13 is amended by striking ''Background'' and all that follows through the end of ''statute.'' and inserting the following:

''Background: This policy statement implements 28 U.S.C. 994(t).''.

Reason for Amendment: This amendment modifies the policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) to further effectuate the directive in 28 U.S.C. 994(t). Section 994(t) provides that the Commission ''in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.'' The amendment revises Application Note 1(A) of § 1B1.13 to provide four examples of circumstances that, provided the defendant is not a danger to the safety of any other person or to the community, would constitute ''extraordinary and compelling reasons'' for purposes of 18 U.S.C. 3582(c)(1)(A).

2. Transportation

Amendment: The Commentary to § 2A1.1 captioned ''Statutory Provisions'' is amended by inserting ''1992(a)(7),'' after ''1841(a)(2)(C),''; and by inserting ''2199, 2291,'' after ''2118(c)(2),''.

The Commentary to § 2A1.2 captioned ''Statutory Provisions'' is amended by inserting ''2199, 2291,'' after ''1841(a)(2)(C),''.

The Commentary to § 2A1.3 captioned ''Statutory Provisions'' is amended by inserting ''2199, 2291,'' after ''1841(a)(2)(C),''.

The Commentary to § 2A1.4 captioned ''Statutory Provisions'' is amended by inserting ''2199, 2291,'' after ''1841(a)(2)(C),''.

The Commentary to § 2A1.4 captioned ''Application Note'' is amended in Note 1 by striking ''18 U.S.C. 1993(c)(5)'' and inserting ''18 U.S.C. 1992(d)(7)''.

The Commentary to § 2A2.1 captioned ''Statutory Provisions'' is amended by striking ''1993(a)(6)'' and inserting ''1992(a)(7), 2199, 2291''.

The Commentary to § 2A2.2 captioned ''Statutory Provisions'' is amended by striking ''1993(a)(6),'' and inserting ''1992(a)(7), 2199, 2291,''.

The Commentary to § 2A2.3 captioned ''Statutory Provisions'' is amended by inserting '', 2199, 2291'' after ''1751(e)''.

The Commentary to § 2A2.4 captioned ''Statutory Provisions'' is amended by inserting ''2237(a)(1), (a)(2)(A),'' after ''1502,''.

Section 2A5.2 is amended in the heading by inserting ''Navigation,'' after ''Dispatch,''; and by striking ''or Ferry''.

Sections 2A5.2(a)(1) and (a)(2) are amended by striking the comma after ''facility'' each place it appears and inserting ''or''; and by striking '', or a ferry'' each place it appears.

The Commentary to § 2A5.2 captioned ''Statutory Provisions'' is amended by striking ''1993(a)(4), (5), (6), (b);'' and inserting ''1992(a)(1), (a)(4), (a)(5), (a)(6);''.

The Commentary to § 2A5.2 captioned ''Application Note'' is amended in Note 1 in the last paragraph by striking ''18 U.S.C. 1993(c)(5)'' and inserting ''18 U.S.C. 1992(d)(7)''.

The Commentary to § 2A6.1 captioned ''Statutory Provisions'' is amended by striking ''1993(a)(7), (8),'' and inserting ''1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292,''.

Section 2B1.1(b) is amended by striking subdivision (11) and inserting the following:

''(11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment,

increase by 2 levels. If the offense level is less than level 14, increase to level 14.''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''(a)(1), (a)(5)'' after ''1992''; by striking ''1993(a)(1), (a)(4),''; by inserting ''2291,'' after ''2113(b),''; and by inserting ''14915,'' after ''49 U.S.C. § ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 10 and inserting the following:

''10. Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or 'chop shop') to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, 'vehicle' means motor vehicle, vessel, or aircraft. A 'cargo shipment' includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.''.

Section 2B2.3(b)(1) is amended by striking ''secured'' each place it appears and inserting ''secure''; and by inserting ''or a seaport'' after ''airport''.

The Commentary to § 2B2.3 captioned ''Statutory Provisions'' is amended by inserting '', 2199'' after ''1036''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following:

'' 'Seaport' has the meaning given that term in 18 U.S.C. 26.''.

The Commentary to § 2B2.3 captioned ''Background'' is amended by striking ''secured'' before ''government'' and inserting ''secure''; and by striking '', such as nuclear facilities,'' and inserting ''(such as nuclear facilities) and other locations (such as airports and seaports)''.

The Commentary to § 2C1.1 captioned ''Statutory Provisions'' is amended by inserting ''226,'' after ''§§ 201(b)(1), (2),''.

The Commentary to § 2K1.4 captioned ''Statutory Provisions'' is amended by inserting ''(a)(1), (a)(2), (a)(4)'' after ''1992''; by striking ''1993(a)(1), (a)(2), (a)(3), (b),''; and by inserting ''2291,'' after ''2275,''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended in Note 1 by striking ''18 U.S.C. 1993(c)(5)'' and inserting ''18 U.S.C. 1992(d)(7)''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by striking ''1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D)),'' and inserting ''1992(a)(2), (a)(3), (a)(4), (b)(2), 2291,''.

The Commentary to § 2Q1.1 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 1992(b)(3);'' before ''33 U.S.C. 1319(c)(3);''.

Section 2X1.1 is amended in subsection (d)(1)(A) by inserting ''(a)(1)–(a)(7), (a)(9), (a)(10)'' after ''1992''; and in subsection (d)(1)(B) by inserting ''and'' after ''§ 32;''; and by striking ''18 U.S.C. 1993; and''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. 31310'' after ''14133''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 225 the following:

''18 U.S.C. 226—2C1.1''

by inserting after the line referenced to 18 U.S.C. 1035 the following:

''18 U.S.C. 1036—2B2.3'';

by striking the line referenced to 18 U.S.C. 1992 through the end of the line referenced to 18 U.S.C. 1993(b) and inserting the following:

''18 U.S.C. 1992(a)(1)—2A5.2, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. 1992(a)(2)—2K1.4, 2M6.1, 2X1.1
18 U.S.C. 1992(a)(3)—2M6.1, 2X1.1
18 U.S.C. 1992(a)(4)—2A5.2, 2K1.4, 2M6.1, 2X1.1
18 U.S.C. 1992(a)(5)—2A5.2, 2B1.1, 2X1.1
18 U.S.C. 1992(a)(6)—2A5.2, 2X1.1
18 U.S.C. 1992(a)(7)—2A1.1, 2A2.1, 2A2.2, 2X1.1
18 U.S.C. 1992(a)(8)—2X1.1
18 U.S.C. 1992(a)(9)—2A6.1, 2X1.1
18 U.S.C. 1992(a)(10)—2A6.1, 2X1.1'';

in the line referenced to 18 U.S.C. 2199 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3,'' before ''2B1.1'';

by inserting after the line referenced to 18 U.S.C. 2233 the following:

''18 U.S.C. 2237(a)(1), (a)(2)(A)—2A2.4
18 U.S.C. 2237(a)(2)(B)—2B1.1'';

by inserting after the line referenced to 18 U.S.C. 2281 the following:

''18 U.S.C. 2291—2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2K1.4, 2M6.1
18 U.S.C. 2292—2A6.1'';

by inserting after the line referenced to 49 U.S.C. 14912 the following:

''49 U.S.C. 14915—2B1.1'';

and by inserting after the line referenced to 49 U.S.C. 30170 the following:

''49 U.S.C. 31310—2X5.2''.

Reason for Amendment: This amendment implements various provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 (the ''PATRIOT Reauthorization Act'') and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 (''SAFETEA–LU''). The PATRIOT Reauthorization Act created several new offenses and increased the scope of or penalty for several existing offenses. SAFETEA–LU also created two new offenses. This amendment references both the new statutes and those with increased scope and penalties to existing guidelines. The amendment also provides a corresponding amendment to Appendix A (Statutory Index). The Commission concluded that referencing the new offenses to existing guidelines was appropriate because the type of conduct criminalized by the new statutes was adequately addressed and penalized by the guidelines.

Section 307(c) of the PATRIOT Reauthorization Act directed the Commission to review the guidelines to determine whether a sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18, United States Code. This amendment responds to the directive by revising the enhancement at subsection (b)(11) 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 amendment expands the scope of this enhancement to cover cargo theft and adds a reference to the receipt of stolen vehicles or goods to ensure application of the enhancement is consistent with the scope of 18 U.S.C. § 659 and 2313. The Commission determined that the two-level increase, and the minimum offense level of 14, appropriately responds to concerns regarding the increased instances of organized cargo theft operations.

3. Terrorism

Amendment: The Commentary to § 2A1.1 captioned ''Statutory Provisions'', as amended by Amendment 2 of this document, is further amended by inserting ''2282A,'' after ''2199,''.

The Commentary to § 2A1.2 captioned ''Statutory Provisions'', as amended by Amendment 2 of this document, is further amended by inserting ''2282A,'' after ''2199''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'', as amended by Amendment 2 of this document, is further amended by inserting ''2282A, 2282B,'' after ''2113(b),''.

The Commentary to § 2B1.5 captioned ''Statutory Provisions'' is amended by inserting ''554,'' before ''641,''.

Chapter Two, Part D, Subpart One, is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2D1.14. Narco-Terrorism

(a) Base Offense Level:

(1) The offense level from § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that § 2D1.1(a)(3)(A), (a)(3)(B), and (b)(11) shall not apply.

(b) Specific Offense Characteristic

(1) If § 3A1.4 (Terrorism) does not apply, increase by 6 levels.

Commentary

Statutory Provision: 21 U.S.C. 960a.''

Chapter Two, Part E, Subpart Four, is amended in the heading by adding at the end ''AND SMOKELESS TOBACCO''.

Section 2E4.1 is amended in the heading by adding at the end ''and Smokeless Tobacco''.

The Commentary to § 2E4.1 captioned ''Background'' is amended by striking ''60,000'' and inserting ''10,000''.

The Commentary to § 2K1.3 captioned ''Statutory Provisions'' is amended by inserting '', 2283'' after ''1716''.

Section 2K1.4 is amended in subsections (a)(1) and (a)(2) by striking ''a ferry,'' each place it appears and inserting ''a maritime facility, a vessel, or a vessel's cargo,''; in subsection (a)(2) by striking ''or'' the last place it appears; by redesignating subsection (a)(3) as subsection (a)(4); and by inserting the following after subsection (a)(2):

''(3) 16, if the offense involved the destruction of or tampering with aids to maritime navigation; or''.

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

The Commentary to § 2K1.4 captioned ''Statutory Provisions'', as amended by Amendment 2 of this document, is further amended by inserting ''2282A, 2282B,'' after ''2275,''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended in Note 1 by inserting after ''For purposes of this guideline:'' the following paragraph:

'' 'Aids to maritime navigation' means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.'';

by inserting after ''destructive device.'' the following paragraph:

'' 'Maritime facility' means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.'';

by striking ''1993(c)(5)'' and inserting ''1992(d)(7)''; and by adding at the end the following:

'' 'Vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.''

The Commentary to § 2M5.2 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 554;'' before ''22 U.S.C. 2778, 2780.''.

Section 2M5.3 is amended in the heading by inserting ''Specially Designated Global Terrorists, or'' after ''Organizations or''

The Commentary to § 2M5.3 captioned ''Statutory Provisions'' is amended by inserting ''2283, 2284,'' after ''18 U.S.C. ''; and by striking the period at the end and inserting ''; 50 U.S.C. 1701, 1705.''.

The Commentary to § 2M5.3 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following paragraph:

'' 'Specially designated global terrorist' has the meaning given that term in 31 CFR 594.513.''.

Section 2M6.1 is amended in the heading by striking ''Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of'' and inserting ''Activity Involving''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'', as amended by Amendment 2 of this document, is further amended by inserting ''2283,'' before ''2291,''.

The Commentary to § 2Q2.1 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''545'' and by inserting '', 554'' after ''545''.

The Commentary to § 2Q2.1 captioned ''Background'' is amended by striking ''§ 545 where'' and inserting ''§§ 545 and 554 if''.

The Commentary to § 2X1.1 captioned ''Statutory Provisions'' is amended by inserting '', 2282A, 2282B,'' after ''2271,''.

The Commentary to § 2X2.1 captioned ''Statutory Provisions'' is amended by inserting ''2284,'' after ''2,''.

The Commentary to § 2X3.1 captioned ''Statutory Provisions'' is amended by inserting ''2284,'' after ''1072,''.

Chapter Two, Part X is amended by adding at the end the following new subpart, guideline, and accompanying commentary:

''7. OFFENSES INVOLVING BORDER TUNNELS

§ 2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

(1) If the defendant was convicted under 18 U.S.C. 554(c), 4 plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level 16, increase to level 16.

(2) 16, if the defendant was convicted under 18 U.S.C. 554(a); or

(3) 8, if the defendant was convicted under 18 U.S.C. 554(b).

Commentary

Statutory Provision: 18 U.S.C. 554.

Application Note:

1. Definition.—For purposes of this guideline, 'underlying smuggling offense' means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.''.

Chapter Five, Part K is amended by adding at the end the following new policy statement and accompanying commentary:

''§ 5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. 716, an upward departure may be warranted.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, 'official insignia or uniform' has the meaning given that term in 18 U.S.C. 716(c)(3).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 553(a)(2) the following:

''18 U.S.C. 554—(Border tunnels and passages)—2X7.1''.
18 U.S.C. 554—(Smuggling goods from the United States)—2B1.5, 2M5.2, 2Q2.1''.

Appendix A (Statutory Index), as amended by Amendment 2 of this document, is further amended by inserting after the line referenced to 18 U.S.C. 2281 the following:

''18 U.S.C. 2282A—2A1.1, 2A1.2, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. 2282B—2B1.1, 2K1.4, 2X1.1
18 U.S.C. 2283—2K1.3, 2M5.3, 2M6.1
18 U.S.C. 2284—2M5.3, 2X2.1, 2X3.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2339 by inserting ''2M5.3,'' before ''2X2.1'';

by inserting after the line referenced to 21 U.S.C. 960(d)(7) the following:

''21 U.S.C. 960a—2D1.14''.

by inserting after the line referenced to 50 U.S.C. 783(c) the following:

''50 U.S.C. 1701—2M5.1, 2M5.2, 2M5.3
50 U.S.C. 1705—2M5.3'';

and by striking the line referenced to 50 U.S.C. App. § 1701.

Reason for Amendment: This amendment implements the USA PATRIOT Improvement and Reauthorization Act of 2005 (the ''PATRIOT Reauthorization Act''), Pub. L. 109–177, and the Department of Homeland Security Appropriations Act, 2007 (the ''Homeland Security Act''), Pub. L. 109–295.

First, the amendment addresses section 122 of the PATRIOT Reauthorization Act, which created a new offense at 21 U.S.C. 960a covering narco-terrorism. This new offense prohibits engaging in conduct that would be covered under 21 U.S.C. 841(a) if committed under the jurisdiction of the United States, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (This act is made up of separate parts divided by fiscal year)). The penalty is not less than twice the statutory minimum punishment under 21 U.S.C. 841(b)(1) and not more than life. Section 960a also provides a mandatory term of supervised release of at least five years.

The amendment creates a new guideline at § 2D1.14 (Narco-Terrorism) because an offense under 21 U.S.C. 960a differs from basic drug offenses because it involves trafficking that benefits terrorist activity. The guideline also provides that the base offense level is the offense level determined under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for the underlying offense, except that the ''mitigating role cap'' in § 2D1.1(a)(3)(A) and (B) and the two-level reduction for meeting the criteria set forth in subdivisions (1)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) shall not apply. The Commission determined that these exclusions are appropriate to reflect that this is not a typical drug offense, in that an individual convicted under this provision must have had knowledge that the person or organization receiving the funds or support generated by the drug trafficking ''has engaged or engages in terrorist activity * * * or terrorism * * *.'' The guideline also contains a specific offense characteristic that provides a six-level increase if the adjustment in § 3A1.4 (Terrorism) does not apply. This six-level increase fully effectuates the statute's doubling of the minimum punishment for the underlying drug offense, while avoiding potential double counting with the 12-level adjustment at § 3A1.4. The amendment also provides a corresponding reference for the new offense to § 2D1.14 in Appendix A (Statutory Index).

Second, the amendment responds to the directive in section 551 of the Homeland Security Act, which created a new offense in 18 U.S.C. 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country. Section 551(c) of the Homeland Security Act directed the Commission to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. 554 and required the Commission to consider a number of factors. Section 554(a) prohibits the construction or financing of such tunnels and passages and provides a statutory maximum term of imprisonment of 20 years. Section 554(b) prohibits the knowing or reckless disregard of the construction on land the person owns or controls and provides a statutory maximum term of imprisonment of 10 years. Section 554(c) prohibits the use of the tunnels to smuggle an alien, goods (in violation of 18 U.S.C. 545), controlled substances, weapons of mass destruction (including biological weapons), or a member of a terrorist organization (defined in 18 U.S.C. 2339B(g)(6)) and provides a penalty of twice the maximum term of imprisonment that otherwise would have been applicable had the unlawful activity not made use of the tunnel or passage.

The amendment creates a new guideline at § 2X7.1 (Border Tunnels and Subterranean Passages) for convictions under 18 U.S.C. 554. The new guideline provides that a conviction under 18 U.S.C. 554(a) receives a base offense level 16, which is commensurate with certain other offenses with statutory maximum terms of imprisonment of 20 years and ensures a sentence of imprisonment. A conviction under 18 U.S.C. 554(c) will receive a four-level increase over the offense level applicable to the underlying smuggling offense, which ensures that the seriousness of the underlying offense is the primary measure of offense severity. The four-level increase also satisfies the directive's instruction to account for the aggravating nature of the use of a tunnel or subterranean passage to breach the border to accomplish the smuggling offense and effectuates the statute's doubling of the statutory maximum penalty. A conviction under 18 U.S.C. 554(b) receives a base offense level of 8, which reflects the less aggravated nature of this offense.

Third, the amendment addresses other new offenses created by the PATRIOT Reauthorization Act. Based on an assessment of similar offenses already covered by the relevant guidelines, the amendment provides as follows:

(A) The new offense in 18 U.S.C. 554, pertaining to smuggling of goods from the United States, is referenced to §§ 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

(B) The new offense in 18 U.S.C. 2282A, pertaining to mining of United States navigable waters, is referenced to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 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), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The amendment also adds vessel, maritime facility, and a vessel's cargo to § 2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. 2282A. The definitions provided for ''vessel,'' ''maritime facility,'' and ''aids to maritime navigation'' come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.

Section 2282B, pertaining to violence against maritime navigational aids, is referenced to §§ 2B1.1, 2K1.4, and 2X1.1. Section 2K1.4(a) is amended to provide a new base offense level of 16 if the offense involved the destruction of or tampering with aids to maritime navigation.

(C) The new offense in 18 U.S.C. 2283 pertaining to transporting biological and

chemical weapons is referenced to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations or For a Terrorist Purpose), and 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy). The new offense in 18 U.S.C. 2284 pertaining to transporting terrorists is referenced to §§ 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose), 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).

(D) Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. 2342 and 2344 from 60,000 to 10,000. The amendment makes conforming changes to the background commentary of § 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes) and expands the headings of Chapter Two, Part E, Subpart 4 and § 2E4.1 to include smokeless tobacco.

(E) The Patriot Reauthorization Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. 1705) from 10 years to 20 years' imprisonment. The amendment references 50 U.S.C. 1705 to § 2M5.3 and modifies the heading of the guideline to include ''specially designated global terrorist''.

Fourth, the amendment sets forth the statutory references in Appendix A (Statutory Index) for the new offenses. Appendix A is amended to provide a parenthetical description for the two statutory references to 18 U.S.C. 554 created by the PATRIOT Reauthorization Act.

Fifth, the amendment implements a directive in section 1191(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162. The Act directed the Commission to amend the guidelines ''to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor.'' Section 716 of title 18, United States Code, is a Class B misdemeanor which is not covered by the guidelines, see § 1B1.9 (Class B or C Misdemeanors and Infractions); however, the amendment creates a new policy statement at § 5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform) providing that an upward departure may be warranted if, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. 716.

4. Sex Offenses

Amendment: Chapter Two, Part A, Subpart Three, is amended in the heading by adding at the end ''AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER''.

Section 2A3.1(a) is amended by striking ''30'' and inserting the following:

''(1) 38, if the defendant was convicted under 18 U.S.C. 2241(c); or

(2) 30, otherwise.''.

Section 2A3.1(b)(2) is amended by striking ''(A) If'' and inserting ''If subsection (a)(2) applies and (A)''; and by striking ''if'' after ''(B)''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''(A) Definitions.–'' before ''For purposes of''; and by adding at the end the following subdivision:

''(B) Application in Cases Involving a Conviction under 18 U.S.C. 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. 2241(a) or (b), do not apply subsection (b)(1).''.

The Commentary to § 2A3.1 is amended by striking ''Background'' and all that follows through the end of ''abduction.''.

Section 2A3.3(a) is amended by striking ''12'' and inserting ''14''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended in Note 1 by striking '' 'Minor' means an individual who had not attained the age of 18 years.'' and inserting the following:

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

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by adding at the end the following:

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

The Commentary to § 2A3.3 is amended by striking ''Background'' and all that follows through the end of ''year.''.

Section 2A3.4(b)(1) is amended by striking ''20'' each place it appears and inserting ''22''.

The Commentary to § 2A3.4 captioned ''Statutory Provisions'' is amended by striking ''(a)(1), (2), (3)'' after ''§ 2244''.

The Commentary to § 2A3.4 captioned ''Background'' is amended by striking ''Enhancements are provided'' and all that follows through the end of ''sixteen years.''.

Chapter Two, Part A, Subpart Three, is amended by adding at the end the following new guidelines and accompanying commentaries:

''§ 2A3.5. Failure To Register as a Sex Offender

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

(1) 16, if the defendant was required to register as a Tier III offender;

(2) 14, if the defendant was required to register as a Tier II offender; or

(3) 12, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

(1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

(A) a sex offense against someone other than a minor increase by 6 levels;

(B) a felony offense against a minor not otherwise covered by subdivision (C), increase by 6 levels; or

(C) a sex offense against a minor, increase by 8 levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. 2250(a).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

'Sex offense' has the meaning given that term in 42 U.S.C. 16911(5).

''Tier I offender','tier II offender', and ''tier III offender' have the meaning given those terms in 42 U.S.C. 16911(2), (3) and (4), respectively.

2. Application of Subsection (b)(2).—

(A) In General.—In order for subsection (b)(2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) Interaction with Subsection (b)(1).—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

§ 2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under—

(a) 18 U.S.C. 2250(c), the guideline sentence is the minimum term of imprisonment required by statute; or

(b) 18 U.S.C. 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. 2250(c), 2260A.

Application Notes:

1. In General.—Section 2250(c) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. 2250(a). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.

2. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. 2250(c) or § 2260A.

4. Upward Departure.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. 2250(c) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.''.

Section 2G1.1(a) is amended by striking ''14'' and inserting the following:

''(1) 34, if the offense of conviction is 18 U.S.C. 1591(b)(1); or

(2) 14, otherwise.''.

Section 2G1.1(b)(1) is amended by inserting ''(A) subsection (a)(2) applies; and (B)'' after ''If''.

The Commentary to § 2G1.1 is amended by striking ''Background'' and all that follows through the end of ''Minor).''.

Section 2G1.3(a) is amended by striking ''24'' and inserting the following:

''(1) 34, if the defendant was convicted under 18 U.S.C. 1591(b)(1);

(2) 30, if the defendant was convicted under 18 U.S.C. 1591(b)(2);

(3) 28, if the defendant was convicted under 18 U.S.C. 2422(b) or § 2423(a); or

(4) 24, otherwise.''.

Section 2G1.3(b) is amended by striking subdivision (4) and inserting the following:

''(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.''.

Section 2G1.3(b)(5) is amended by inserting ''(A) subsection (a)(3) or (a)(4) applies; and (B)'' after ''If''.

The Commentary to § 2G1.3 captioned ''Statutory Provisions'' is amended by striking ''2422(b),''.

The Commentary to § 2G1.3 is amended by striking ''Background'' and all that follows through the end of ''Minor).''.

The Commentary to § 2G2.5 captioned ''Statutory Provisions'' is amended by inserting ''§ '' after ''18 U.S.C. § ''; and by inserting '', 2257A'' after ''2257''.

Chapter Two, Part G, Subpart Two, is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2G2.6. Child Exploitation Enterprises

(a) Base Offense Level: 35

(b) Specific Offense Characteristics

(1) If a victim (A) had not attained the age of 12 years, increase by 4 levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by 2 levels.

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

(3) If the offense involved conduct described in 18 U.S.C. 2241(a) or (b), increase by 2 levels.

(4) If a computer or an interactive computer service was used in furtherance of the offense, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. 2252A(g).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

2. Application of Subsection (b)(2).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

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

3. Application of Subsection (b)(3).—For purposes of subsection (b)(3), 'conduct described in 18 U.S.C. 2241(a) or (b)' is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.''.

Section 2G3.1(b) is amended by striking subdivision (2) and inserting the following:

''(2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a Web site, increase by 2 levels.''.

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

The Commentary to § 2G3.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''or § 2252C'' after ''2252B''.

Section 2J1.2(b) is amended in subdivision (1) by striking ''greater'' and inserting ''greatest''; by redesignating subdivisions (A) and (B) as subdivisions (B) and (C), respectively; by inserting before subdivision (B), as redesignated by this amendment, the following:

''(A) If the (i) defendant was convicted under 18 U.S.C. 1001; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to sex offenses under 18 U.S.C. 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, increase by 4 levels.'';

and by striking subdivision (C), as redesignated by this amendment, and inserting the following:

''(C) If the (i) defendant was convicted under 18 U.S.C. 1001 or 1505; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, increase by 12 levels.''.

The Commentary to § 2J1.2 captioned ''Statutory Provisions'' is amended by striking ''when the statutory maximum'' and all that follows through ''applicable,'' and inserting the following:

''(when the statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code),''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 2(B) by striking ''(b)(1)(B)'' and inserting ''(b)(1)(C)''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 4 by inserting ''or a particularly serious sex offense'' after ''face)''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 5 by inserting ''(B)'' after ''Subsection (b)(1)'' each place it appears; and by inserting ''(B)'' after ''under subsection (b)(1)''.

Section 3D1.2(d) is amended by inserting as a new line ''§ 2A3.5;'' before the line that begins ''§§ 2B1.1''; and by inserting ''(except § 2A3.5)'' after ''Chapter Two, Part A''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

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

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in Note 2 by inserting ''or (iv) 18 U.S.C. 1591;'' after ''individual;''; and by striking ''(iii)'' after ''through'' and inserting ''(iv)''.

The Commentary to § 4B1.5 captioned ''Background'' is amended by striking the first and second sentences and inserting: ''This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public.''.

Section 5B1.3(a)(9) is amended by inserting ''(A) in a state in which the requirements of the Sex Offender Registration and Notification Act (*see* 42 U.S.C. 16911 and 16913) do not apply,'' before ''a defendant convicted''; by inserting ''(Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997)'' after ''4042(c)(4)''; by inserting ''or'' after ''student;'' and by adding at the end the following:

''(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. 16915;''.

Section 5B1.3(d)(7) is amended by adding at the end the following:

''(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.''.

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

Commentary

Application Note:

1. Application of Subsection (b)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (b)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (b)(9)(B) will apply. (*See* 42 U.S.C. 16911 and 16913.)''.

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

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

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. 1201; or (vi) an offense under 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

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

Section 5D1.3(a)(7) is amended by inserting ''(A) in a state in which the requirements of the Sex Offender Registration and Notification Act (*see* 42 U.S.C. 16911 and 16913) do not apply,'' before ''a defendant''; by inserting ''(Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997)'' after ''4042(c)(4)''; by inserting ''or'' after ''student;'' and by adding at the end the following:

''(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. 16915;''.

Section 5D1.3(d)(7) is amended by adding at the end the following:

''(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.''.

Section 5D1.3 is amended by adding at the end the following:

''*Commentary*

Application Note:

1. Application of Subsection (b)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (b)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (b)(7)(B) will apply. (*See* 42 U.S.C. 16911 and 16913.)''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1001 by striking ''when the statutory'' and all that follows through ''applicable'' and inserting the following:

''(when the statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2245 the following:

''18 U.S.C. 2250(a)—2A3.5
18 U.S.C. 2250(c)—2A3.6'';

by inserting after the line referenced to 18 U.S.C. 2252B the following:

''18 U.S.C. 2252C—2G3.1'';

by inserting after the line referenced to 18 U.S.C. 2257 the following:

''18 U.S.C. 2257A—2G2.5'';

and by inserting after the line referenced to 18 U.S.C. 2260(b) the following:

''18 U.S.C. 2260A 2A3.6''—

Reason for Amendment: This amendment responds to the Adam Walsh Child Protection and Safety Act of 2006 (the ''Adam Walsh Act''), Pub. L. 109–248, which contained a directive to the Commission, created new sexual offenses, and enhanced penalties for existing sexual offenses. The amendment implements the directive by creating two new guidelines, §§ 2A3.5 (Criminal Sexual Abuse and Offenses Related to Registration as a Sex Offender) and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender). It further addresses relevant provisions in the Adam Walsh Act by making changes to Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) and Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), § 2J1.2 (Obstruction of Justice), § 3D1.2 (Groups of Closely Related Counts), § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), § 5B1.3 (Conditions of Probation), § 5D1.2 (Term of Supervised Release), § 5D1.3 (Conditions of Supervised Release) and Appendix A (Statutory Index).

First, section 206 of the Adam Walsh Act amended 18 U.S.C. 2241(c) to add a new mandatory minimum term of imprisonment of 30 years for offenses related to the aggravated sexual abuse of a child under 12 years old, or of a child between 12 and 16 years old if force, threat, or other means was used. In response to the new mandatory minimum for these offenses, the amendment increases the base offense level at § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) from level 30 to level 38. The base offense level of 30 has been retained for all other offenses. At least one specific offense characteristic applied to every conviction under 18 U.S.C. 2241(c) sentenced under § 2A3.1 in fiscal year 2006. Accordingly, the mandatory minimum 360 months' imprisonment is expected to be reached or exceeded in every case with a base offense level of 38.

The amendment provides a new application note that precludes application of the specific offense characteristic at § 2A3.1(b)(1) regarding conduct described in 18 U.S.C. 2241(a) or (b) if the conduct that forms the basis for a conviction under 18 U.S.C. 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. 2241(a) or (b) (force, threat, or other means). The amendment also precludes application of the specific offense characteristic for the age of a victim at § 2A3.1(b)(2) if the defendant was convicted under section 2241(c). The heightened base offense level of 38 takes into account the age of the victim. These instructions, therefore, avoid unwarranted double counting.

Second, section 207 of the Adam Walsh Act increased the statutory maximum term of imprisonment under 18 U.S.C. 2243(b) from 5 years to 15 years for the sexual abuse of a person in official detention or under custodial authority. In response to increased penalty, the amendment increases the base offense level from 12 to 14 in § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The amendment also adds a new definition of ''minor'' consistent with how this term is defined elsewhere in the guidelines manual. In addition, the amendment includes an application note precluding application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) for these offenses because an abuse of position of trust is assumed in all such cases and, therefore, is built into the base offense level.

Third, section 206 of the Adam Walsh Act created a new subsection at 18 U.S.C. 2244. Section 2244(a)(5) provides a penalty of any term of years if the sexual conduct would have violated 18 U.S.C. 2241(c) had the contact been a sexual act. Section 2241(c) conduct involves the aggravated sexual abuse of a child under 12 years old or of a child between 12 and 16 years old if force, threat, or other means was used, as defined in 18 U.S.C. 2241(a) and (b). Prior to the Adam Walsh Act, the penalty for offenses involving children under 12 years old was ''twice that otherwise provided,'' and the penalty for sexual contact involving behavior described in 18 U.S.C. 2241 was a statutory maximum term of imprisonment of 10 years.

The amendment addresses this new offense by increasing the minimum offense level in the age enhancement in subsection (b)(1) of § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) from level 20 to level 22.

Fourth, section 141 of the Adam Walsh Act created a new offense under 18 U.S.C. 2250(a) for the failure to register as a sex offender. The basic offense carries a statutory maximum term of imprisonment of 10 years. Section 141 also included a directive to the Commission that when promulgating guidelines for the offense, to consider, among other factors, the seriousness of the sex offender's conviction that gave rise to the requirement to register; relevant further offense conduct during the period for which the defendant failed to register; and the offender's criminal history.

The amendment creates a new guideline, § 2A3.5 (Failure to Register as a Sex Offender), to address the directive. The new guideline provides three alternative base offense levels based on the tiered category of the sex offender: level 16 if the defendant was required to register as a Tier III offender; level 14 if the defendant was required to register as a Tier II offender; and level 12 if the defendant was required to register as a Tier I offender.

The amendment also provides two specific offense characteristics. First, subsection (b)(1) provides a tiered enhancement to address criminal conduct committed while the defendant is in a failure to register status. Specifically, § 2A3.5(b)(1) provides a six-level increase if, while in a failure to register status, the defendant committed a sex offense against an adult, a six-level increase if the defendant committed a felony offense against a minor, and an

eight-level increase if the defendant committed a sex offense against a minor. Second, § 2A3.5(b)(2) provides a three-level decrease if the defendant voluntarily corrected the failure to register or voluntarily attempted to register but was prevented from registering by uncontrollable circumstances, and the defendant did not contribute to the creation of those circumstances. The reduction covers cases in which (1) the defendant either does not attempt to register until after the relevant registration period has expired but subsequently successfully registers, thereby correcting the failure to register status, or (2) the defendant, either before or after the registration period has expired, attempted to register but circumstances beyond the defendant's control prevented the defendant from successfully registering. An application note specifies that the voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register. The application note also provides that the reduction does not apply if the enhancement for committing one of the enumerated offenses in § 2A3.5(b)(1) applies.

Additionally, the amendment adds § 2A3.5 to the list of offenses that are considered groupable under § 3D1.2(d) because the failure to register offense is an ongoing and continuous offense.

Fifth, section 141 of the Adam Walsh Act created two new aggravated offenses relating to the registration as a sex offender. Section 141 of the Act created 18 U.S.C. 2250(c), which carries a mandatory minimum term of imprisonment of 5 years and a statutory maximum term of imprisonment of 30 years if a defendant commits a crime of violence while in a failure to register status, with the sentence to be consecutive to the punishment provided for the failure to register. Section 702 of the Adam Walsh Act created a new offense at 18 U.S.C. 2260A that prohibits the commission of various enumerated offenses while in a failure to register status. The penalty for this offense is a mandatory term of imprisonment of 10 years to be imposed consecutively to the underlying offense.

The amendment creates a new guideline at § 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to address these new offenses. The new guideline provides that for offenses under section 2250(c), the guideline sentence is the minimum term of imprisonment required by statute, and for offenses under section 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four are not to apply. This is consistent with how the guidelines treat other offenses that carry both a specified term of imprisonment and a requirement that such term be imposed consecutively. See §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

The guideline includes an application note that provides an upward departure stating that a sentence above the minimum term required by section 2250(c) is an upward departure from the guideline sentence. An upward departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

Sixth, section 208 of the Adam Walsh Act added a new mandatory minimum term of imprisonment of 15 years under 18 U.S.C. 1591(b)(1) for sex trafficking of an adult by force, fraud, or coercion. In response, the amendment provides a new base offense level of 34 in § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) if the offense of conviction is 18 U.S.C. 1591(b)(1), but retains a base offense level of 14 for all other offenses. In addition, the amendment limits application of the specific offense characteristic at § 2G1.1(b)(1) that applies if the offense involved fraud or coercion only to those offenses receiving a base offense level of 14. Offenses under 18 U.S.C. 1591(b)(1) necessarily involve fraud and coercion and, therefore, such conduct is built into the heightened base offense level of 34. This limitation thus avoids unwarranted double counting.

Seventh, section 208 of the Adam Walsh Act added a new mandatory minimum term of imprisonment of 15 years under 18 U.S.C. 1591(b)(1) for sex trafficking of children under 14 years of age and added a new mandatory minimum term of imprisonment of 10 years and increased the statutory maximum term of imprisonment from 40 years to life under 18 U.S.C. 1591(b)(2) for sex trafficking of children who had attained the age of 14 years but had not attained the age of 18 years. Further, the Adam Walsh Act increased the mandatory minimum term of imprisonment from 5 years to 10 years and increased the statutory maximum term of imprisonment from 30 years to life under both 18 U.S.C. 2422(b), for persuading or enticing any person who has not attained the age of 18 years to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, and 18 U.S.C. 2423(a), for transporting a person who has not attained the age of 18 years in interstate or foreign commerce, with the intent that the person engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense.

In response, the amendment provides alternative base offense levels in § 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) based on the statute of conviction and the conduct described in that conviction. For convictions under 18 U.S.C. 1591(b)(1), the base offense level is 34. For convictions under 18 U.S.C. 1591(b)(2), the base offense level is 30.

The amendment further provides a base offense level of 28 for convictions under 18 U.S.C. § 2422(b) and 2423(a). The two-level enhancement for the use of a computer at § 2G1.3(b)(3) applied to 95 percent of offenders convicted under 18 U.S.C. 2422(b) and sentenced under § 2G1.3 in fiscal year 2006. In addition, the two-level enhancement for the offense involving a sexual act or sexual contact at § 2G1.3(b)(4) applied to 95 percent of offenders convicted under 18 U.S.C. 2423(a) and sentenced under this guideline in fiscal year 2006. With application of either enhancement, the mandatory minimum term of imprisonment of 120 months will be reached in the majority of convictions under 18 U.S.C. 2422(b) and 2423(a), before application of other guidelines adjustments.

Further, the amendment addresses the interaction of two specific offense characteristics with the alternative base offense levels. First, every conviction under 18 U.S.C. 1591 necessarily involves a commercial sex act. With the base offense levels being determined based on the statute of conviction, the amendment clarifies that § 2G1.3(b)(4)(B), which provides a two-level enhancement if the offense involved a commercial sex act, does not apply if the defendant is convicted under 18 U.S.C. 1591. Second, the amendment precludes application of the age enhancement in § 2G1.3(b)(5) if the base offense level is determined under subsection (a)(1) of § 2G1.3 for a conviction under 18 U.S.C. 1591(b)(1). The base offense level provided by subsection (a)(1) of § 2G1.3 takes into

account the age of the victim and, therefore, limitations on application of subsections (b)(4)(B) and (b)(5) of § 2G1.3 avoid unwarranted double counting.

Eighth, section 503 of the Adam Walsh Act created a new section, 18 U.S.C. 2257A, adopting new recordkeeping obligations for the production of any book, magazine, periodical, film, videotape, or digital image that contains a visual depiction of simulated sexually explicit conduct. Section 2257A has a statutory maximum of one year imprisonment for the failure to comply with the recordkeeping requirements and a statutory maximum term of imprisonment of five years if the violation was to conceal a substantive offense that involves either causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction or trafficking in material involving the sexual exploitation of a minor. The new offense is similar to 18 U.S.C. 2257, which is referenced to § 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Mail). Accordingly, the amendment refers the new offense to § 2G2.5.

Ninth, section 701 of the Adam Walsh Act created a new offense in 18 U.S.C. 2252A(g) that prohibits engaging in child exploitation enterprises, defined as violating 18 U.S.C. 1591, 1201 (if the victim is a minor), chapter 109A (involving a minor victim), chapter 110 (except for 18 U.S.C. 2257 and 2257A), or chapter 117 (involving a minor victim), as part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and committing those offenses in concert with three or more other people. The statute provides a mandatory minimum term of imprisonment of 20 years.

The amendment creates a new guideline at § 2G2.6 (Child Exploitation Enterprises) to cover this new offense. The guideline provides a base offense level of 35 and four specific offense characteristics. The Commission anticipates these offenses typically will involve conduct encompassing at least one of the specific offense characteristics, resulting in an offense level of at least level 37. Thus, the mandatory minimum term of imprisonment of 240 months typically is expected to be reached or exceeded, before application of other guideline adjustments.

Tenth, section 206 of the Adam Walsh Act increased the statutory maximum term of imprisonment from 4 years to 10 years under 18 U.S.C. 2252B(b) for knowingly using a misleading domain name with the intent to deceive a minor into viewing material harmful to minors on the Internet. In addition, section 703 of the Act created a new section, 18 U.S.C. 2252C, that carries a statutory maximum term of imprisonment of 10 years for knowingly embedding words or digital images into the source code of a Web site with the intent to deceive a person into viewing material constituting obscenity. Section 2252C(b) carries a statutory maximum term of imprisonment of 20 years for knowingly embedding words or digital images into the source code of a Web site with the intent to deceive a minor into viewing material harmful to minors on the Internet.

In response to the new offense, the amendment expands the scope of subsection (b)(2) of § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) by adding to this enhancement ''embedded words or digital images into the source code on a Web site.''

Eleventh, section 141 of the Adam Walsh Act added a new provision in 18 U.S.C. 1001 that carries a statutory maximum term of imprisonment of 8 years for falsifying or covering up by any scheme or making materially false or fraudulent statements or making or using any false writings or documents that relate to offenses under chapters 109A, 109B, 110, and 117, and under section 1591 of chapter 77. The amendment adds a new specific offense characteristic at subsection (b)(1)(A) of § 2J1.2 (Obstruction of Justice) enhancing the offense level by four levels if the defendant was convicted under 18 U.S.C. 1001 and the statutory maximum term of 8 years' imprisonment applies because the matter relates to sex offenses. The amendment also added language to Application Note 4 stating an upward departure may be warranted under the guideline in a case involving a particularly serious sex offense.

Twelfth, section 206 of the Adam Walsh Act added 18 U.S.C. 1591 to the list of offenses for which a defendant is to be sentenced to life under 18 U.S.C. 3559(e)(2)(A). The amendment adds 18 U.S.C. 1591 to the list of instant offenses of convictions that are covered sex crimes under § 4B1.5.

Thirteenth, section 141 of the Adam Walsh Act amended 18 U.S.C. 3563 and 3583. The amendment adds a new subdivision to (a)(9) of § 5B1.3 and to (a)(7) of § 5D1.3 to require a defendant to comply with the new registration requirements provided by the Adam Walsh Act. The amendment also modifies the language in §§ 5B1.3(a)(9) and 5D1.3(a)(7) relating to defendants convicted of a sexual offense described in 18 U.S.C. 4042(c)(4). Not all states have implemented the new requirements, continuing to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act. Thus, it is necessary to maintain the language in the guidelines providing for conditions of probation and supervised release for those offenders.

Fourteenth, section 141 of the Act amended 18 U.S.C. 3583(k), which provides that the authorized term of supervised release for any offense under enumerated sex offenses is any term of years or life. In response, the amendment adds offenses under chapter 109B and sections 1201 and 1591 of title 18 United States Code or 18 U.S.C. § 1201 and 1591 to the definition of sex offense under § 5D1.2(b)(2) for which the length of the term of supervised release shall be not less than the minimum term of years specified for the offense and may be up to life.

Finally, the amendment provides a definition of ''minor'' in relevant guidelines that is consistent with how this term is defined elsewhere in the guidelines. Outdated background commentary also is deleted by this amendment.

5. Corrections to §§ 2B1.1 and 2L1.1

Amendment: Section 2B1.1(b)(13)(C) is amended by striking ''(b)(12)(B)'' and inserting ''(b)(13)(B)''.

Section 2L1.1(b)(1) is amended by striking ''(a)(2)'' and inserting ''(a)(3)''.

Reason for Amendment: This amendment corrects typographical errors in subsection (b)(13)(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) and subsection (b)(1) of § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

The typographical error to § 2B1.1(b)(13)(C) stems from redesignations made to § 2B1.1 in 2004 when the Commission added a new subsection (b)(7) in response to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''CAN–SPAM Act''), Pub. L. 108–187. (USSG App. C Amendment 665) (November 1, 2004).

The typographical error in § 2L1.1(b)(1) stems from redesignations

made to § 2L1.1 in 2006 when the Commission added a new subsection (a)(1) for aliens who are inadmissible for national security related reasons. (USSG App. C Amendment 692) (November 1, 2006).

The Commission has determined that this amendment should be applied retroactively because (A) the purpose of the amendment is to correct typographical errors; (B) the number of cases involved is minimal even given the potential change in guideline ranges (i.e., ensuring application of the maximum increase of 8 levels in § 2B1.1(b)(13)(C) and providing correct application of the three-level reduction in § 2L1.1(b)(1)); and (C) the amendment would not be difficult to apply retroactively. These factors, combined, meet the standards set forth in the relevant background commentary to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

6. Miscellaneous Laws

Amendment: Section 2B2.3(b)(1) is amended by redesignating subdivision (F) as subdivision (G); and by inserting ''(F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration;'' after ''residence;''.

The Commentary to § 2B2.3 captioned ''Statutory Provisions'' is amended by inserting ''38 U.S.C. 2413;'' after ''1036;''.

The Commentary to § 2E3.1 captioned ''Statutory Provisions'' is amended by inserting ''; 31 U.S.C. 5363'' after ''1955''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 31 U.S.C. 5332 the following:

''31 U.S.C. 5363—2E3.1'';

and by inserting after the line referenced to 38 U.S.C. 787 the following:

''38 U.S.C. 2413—2B2.3''.

Reason for Amendment: This amendment addresses two new offenses, 38 U.S.C. 2413, which was created by the Respect for America's Fallen Heroes Act, Pub. L. 109–228, and 31 U.S.C. 5363, which was created by the Security and Accountability for Every Port Act of 2006, Pub. L. 109–347.

The new offense at 38 U.S.C. 2413 prohibits certain demonstrations at Arlington National Cemetery and at cemeteries controlled by the National Cemetery Administration and provides a statutory maximum penalty of imprisonment of not more than one year, a fine, or both. The amendment references convictions under 38 U.S.C. 2413 to § 2B2.3 (Trespass) and expands the scope of the two-level enhancement at § 2B2.3(b)(1) for trespass offenses that occur in certain locations to include trespass at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration. The Commission determined that the need to protect the final resting places of the nation's war dead and the need to discourage violent confrontations at the funerals of veterans who are killed in action justifies expanding the scope of the enhancement to cover such conduct.

The new offense at 31 U.S.C. 5363 prohibits acceptance of any financial instrument for unlawful Internet gambling and provides a statutory maximum term of imprisonment of five years. The amendment references convictions under 31 U.S.C. 5363 to § 2E3.1 (Gambling Offenses).

7. Repromulgation of Emergency Amendment on Intellectual Property

Amendment: The amendment to § 2B5.3, effective September 12, 2006 (*see* Appendix C amendment 682), is repromulgated with the following changes:

Section 2B5.3(b)(3) is amended by inserting ''(A)'' before ''offense involved'' and by inserting ''; or (B) defendant was convicted under 17 U.S.C. 1201 and 1204 for trafficking in circumvention devices'' after ''items''.

The Commentary to § 2B5.3 captioned ''Statutory Provisions'' is amended by inserting ''§ '' after ''17 U.S.C. ''; and by inserting '', 1201, 1204'' after ''506(a)''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 1 by inserting after ''Definitions.—For purposes of this guideline:'' the following paragraph:

'' 'Circumvention devices' are devices used to perform the activity described in 17 U.S.C. § 1201(a)(3)(A) and 1201(b)(2)(A).''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 2(A) by adding at the end the following:

''(vii) A case under 18 U.S.C. 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service.

(viii) A case under 17 U.S.C. § 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the 'retail value of the infringed item' is the price the user would have paid to access lawfully the copyrighted work, and the 'infringed item' is the accessed work.''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 3 by striking ''shall'' and inserting ''may''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 4 by striking ''Upward'' before ''Departure''; by inserting ''or overstates'' after ''understates''; and by striking ''an upward'' each place it appears and inserting ''a''; and by adding at the end the following:

''(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 17 U.S.C. 506(a) the following new lines:

''17 U.S.C. 1201—2B5.3
17 U.S.C. 1204—2B5.3''.

Reason for Amendment: This amendment re-promulgates as permanent the temporary, emergency amendment (effective Sept. 12, 2006) that implemented the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181 (2006). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to ''review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code.''

In carrying out [the directive], the United States Sentencing Commission shall determine whether the definition of ''infringement amount'' set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code,] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as *U.S.* v. *Sung*, 87 F.3d 194 (7th Cir. 1996).

The amendment adds subdivision (vii) to Application Note 2(A) of § 2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (i) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the ''infringed item'' is the identifiable, genuine good or service.

In addition to re-promulgating the emergency amendment, the amendment responds to the directive by addressing violations of 17 U.S.C. 1201 and 1204 involving circumvention devices. The amendment addresses circumvention devices in two ways. First, the amendment adds an application note regarding the determination of the infringement amount in cases under 17 U.S.C. 1201 and 1204 in which the defendant used a circumvention device and thus obtained unauthorized access to a copyrighted work. Such an offense would involve an identifiable copyrighted work. Accordingly, consistent with the existing rules in § 2B5.3, the ''retail value of the infringed item'' would be used for purposes of determining the infringement amount. The amendment adds subsection (viii) to Application Note 2(A), and explains that the ''retail value of the infringed item'' is the price the user would have paid to access lawfully the copyrighted work, and the ''infringed item'' is the accessed work. If the defendant violated 17 U.S.C. 1201 and 1204 by conduct that did not include use of a circumvention device, Application Note 2(B) would apply by default. Thus, as it does in any case not otherwise covered by Application Note 2(A), the infringement amount would be determined by reference to the value of the infringing item, which in these cases would be the circumvention device.

Second, the amendment expands the sentencing enhancement in § 2B5.3(b)(3) to include convictions under 17 U.S.C. 1201 and 1204 for trafficking in circumvention devices. Prior to the amendment, § 2B5.3(b)(3) provided a two-level enhancement and a minimum offense level of 12 for cases involving the manufacture, importation, or uploading of infringing items. The purpose of the enhancement in § 2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce in a manner that enables others to infringe the copyright or trademark. The Commission determined that trafficking in circumvention devices similarly enables others to infringe a copyright and warrants greater punishment.

The amendment also strikes language in Application Note 3 mandating an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) in every case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. Instead, the note indicates that application of the adjustment may be appropriate in such a case because the Commission determined that not every case involving de-encryption or circumvention requires the level of skill contemplated by the special skill adjustment.

Finally, the amendment modifies Application Note 4 to address downward departures. The addition of this language recognizes that in some instances the method for calculating the infringement amount may be based on a formula or extrapolation that overstates the actual pecuniary harm to the copyright or trademark owner. This language is analogous to departure language 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) and thus promotes consistency between these two economic crime guidelines.

8. Drugs

Amendment: Section 2D1.1(b) is amended by redesingating subdivisions (8) and (9), as subdivisions (10) and (11), respectively; by redesignating subdivisions (5) through (7) as subdivisions (6) through (8), respectively; by inserting after subdivision (4) the following:

''(5) If the defendant is convicted under 21 U.S.C. 865, increase by 2 levels.'';

and by inserting after subdivision (8), as redesignated by this amendment, the following:

''(9) If the defendant was convicted under 21 U.S.C. 841(g)(1)(A), increase by 2 levels.''.

Section 2D1.1(b) is amended in subdivision (10), as redesignated by this amendment, by striking ''greater'' and inserting ''greatest''; by redesignating subdivision (C) as subdivision (D); and by striking subdivision (B) and inserting the following:

''(B) If the defendant was convicted under 21 U.S.C. 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(C) If—

(i) the defendant was convicted under 21 U.S.C. 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.''.

Section 2D1.1(c)(1) is amended by inserting ''30,000,000 units or more of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(2) is amended by inserting ''At least 10,000,000 but less than 30,000,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(3) is amended by inserting ''At least 3,000,000 but less than 10,000,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(4) is amended by inserting ''At least 1,000,000 but less than 3,000,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(5) is amended by inserting ''At least 700,000 but less than 1,000,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(6) is amended by inserting ''At least 400,000 but less than 700,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(7) is amended by inserting ''At least 100,000 but less than 400,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(8) is amended by inserting ''At least 80,000 but less than 100,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(9) is amended by inserting ''At least 60,000 but less than 80,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''.

Section 2D1.1(c)(10) is amended by inserting ''At least 40,000 but less than 60,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(11) is amended by inserting ''At least 20,000 but less than

40,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(12) is amended by inserting ''At least 10,000 but less than 20,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(13) is amended by inserting ''At least 5,000 but less than 10,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(14) is amended by inserting ''At least 2,500 but less than 5,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(15) is amended by inserting ''At least 1,000 units but less than 2,500 units of Ketamine; '' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(16) is amended by inserting ''At least 250 units but less than 1,000 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

Section 2D1.1(c)(17) is amended by inserting ''Less than 250 units of Ketamine;'' after the line referenced to ''Hashish Oil''; and by inserting ''(except Ketamine)'' after ''Schedule III substances''.

The Commentary to § 2D1.1 captioned ''Statutory Provisions'' is amended by inserting ''(g), 860a, 865,'' after ''(3), (7),''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the section captioned ''Drug Equivalency Tables'' in the subdivision captioned ''Schedule III Substances'' by inserting in the heading ''(except ketamine)'' after ''Substances'';

by adding after the subdivision captioned ''Schedule III Substances'' the following new subdivision:

''Ketamine

1 unit of ketamine = 1 gm of marihuana'';

and by adding after the subdivision captioned ''List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)'' the following new subdivision:

''Date Rape Drugs (except flunitrazipam, GHB, or ketamine)

1 ml of 1,4-butanediol = 8.8 gm marihuana

1 ml of gamma butyrolactone = 8.8 gm marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 19 by striking ''(b)(8)'' each place it appears and inserting ''(b)(10)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 in subdivision (A) by striking ''(b)(8)(B) or (C)'' and inserting ''(b)(10)(C)(ii) or (D)''; and in subdivision (B) by striking ''(b)(8)(C)'' and inserting ''(b)(10)(D)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 by striking ''(9)'' each place it appears and inserting ''(11)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by redesignating Notes 22 through 25 as Notes 23 through 26, respectively; and by inserting after Note 21 the following:

''22. Imposition of Consecutive Sentence for 21 U.S.C. 860a or 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. 860a or 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. 860a or 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a 'total punishment' of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. 860a or 865 would achieve the 'total punishment' in a manner that satisfies the statutory requirement of a consecutive sentence.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 23, as redesignated by this amendment, by striking ''(5)'' each place it appears and inserting ''(6)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 25, as redesignated by this amendment, by striking ''(6)'' each place it appears and inserting ''(7)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 26, as redesignated by this amendment, by striking ''(7)'' each place it appears and inserting ''(8)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the ninth paragraph by striking ''(b)(8)'' and inserting ''(b)(10)''; and in the last paragraph by striking ''(b)(8)(B) and (C)'' and inserting ''(b)(10)(C)(ii) and (D)''.

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

''(5) If the defendant is convicted under 21 U.S.C. 865, increase by 2 levels.''.

The Commentary to § 2D1.11 captioned ''Statutory Provisions'' is amended by inserting ''865,'' after ''(f)(1),''.

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

''8. Imposition of Consecutive Sentence for 21 U.S.C. 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate 'total punishment' and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a 'total punishment' of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. 865 would achieve the 'total punishment' in a manner that satisfies the statutory requirement of a consecutive sentence.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. 841(f)(1) the following:

''21 U.S.C. 841(g)—2D1.1'';

by inserting after the line referenced to 21 U.S.C. 860 the following:

''21 U.S.C. 860a—2D1.1'';

and by inserting after the line referenced to 21 U.S.C. 864 the following:

''21 U.S.C. 865—2D1.1, 2D1.11''.

Reason for Amendment: This amendment responds to the new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the ''PATRIOT Reauthorization Act''), Pub. L. 109–177, and the Adam Walsh Child Protection and Safety Act of 2006 (the ''Adam Walsh Act''), Pub. L. 109–248.

First, the amendment addresses section 731 of the PATRIOT Reauthorization Act, which created a new offense at 21 U.S.C. 865. The new offense provides a mandatory consecutive sentence of 15 years' imprisonment for smuggling of methamphetamine or its precursor chemicals into the United States by a person enrolled in, or acting on behalf of someone or some entity enrolled in, any dedicated commuter lane, alternative or accelerated inspection system, or other facilitated entry program administered by the federal government for use in entering the United States. The amendment refers

the new offense to both §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and provides a new two-level enhancement in §§ 2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted under 21 U.S.C. 865. The Commission determined that a two-level enhancement is appropriate because such conduct is analogous to abusing a position of trust, which receives a two-level adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Second, the amendment modifies § 2D1.1 to address the new offense in 21 U.S.C. 841(g) (Internet Sales of Date Rape Drugs) created by the Adam Walsh Act. This offense, which is punishable up to statutory maximum term of imprisonment of 20 years, prohibits the use of the Internet to distribute a date rape drug to any person, ''knowing or with reasonable cause to believe that—(A) The drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser.'' The statute defines ''date rape drug'' as ''(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol; (ii) ketamine; (iii) flunitrazipam; or (iv) any substance which the Attorney General designates * * * to be used in committing rape or sexual assault.'' The amendment provides a new two-level enhancement in § 2D1.1(b)(9) that is tailored to focus on the more serious conduct covered by the new statute, specifically conviction under 21 U.S.C. 841(g)(A), which covers individuals who know or have reasonable cause to believe the drug would be used in the commission of criminal sexual conduct.

Third, the amendment eliminates the maximum base offense level of level 20 for ketamine offenses. Ketamine is a Schedule III controlled substance. The Drug Quantity Table at § 2D1.1(c) provides a maximum offense level of 20 for most Schedule III substances because such substances are subject to a statutory maximum term of imprisonment of 5 years. If a defendant is convicted under 21 U.S.C. 841(g) for distributing ketamine, however, the defendant is subject to a statutory maximum term of imprisonment of 20 years. Accordingly, the amendment modifies the Drug Quantity Table in order to allow for appropriate sentencing of 21 U.S.C. 841(g) offenses involving larger quantities of ketamine that correspond to offense levels greater than level 20. This approach is consistent with how other drug offenses with a statutory maximum term of imprisonment of 20 years are penalized and with how other date rape drugs are penalized. The amendment also provides a marihuana equivalency in Application Note 10 for ketamine (1 unit of ketamine = 1 gram of marihuana).

Fourth, the amendment adds to § 2D1.1, Application Note 10, a new drug equivalency for 1,4-butanediol (BD) and gamma butyrolactone (GBL), both of which are included in the definition of date rape drugs under 21 U.S.C. 841(g). Neither is a controlled substance. The drug equivalency is 1 ml of BD or GBL equals 8.8 grams of marihuana. The Commission has received testimony that both substances are at least equipotent as GHB, which is punished at the same marihuana equivalency.

Fifth, the amendment addresses the new offense in 21 U.S.C. 860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside), created by the PATRIOT Reauthorization Act. The new offense provides that a term of not more than 20 years' imprisonment is to be imposed, in addition to any other sentence imposed, for manufacturing, distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises where a minor is present or resides. The amendment modifies § 2D1.1(b)(8)(C) to provide a two-level increase (with a minimum offense level of 14) if the defendant is convicted under 21 U.S.C. 860a involving the distribution or possession with intent to distribute methamphetamine and a three-level increase (with a minimum offense level of 27) if the defendant is convicted under 21 U.S.C. 860a involving the manufacture or possession with intent to manufacture methamphetamine.

To account for the spectrum of harms created by methamphetamine offenses, and to address the specific harms created by 21 U.S.C. 860a, the amendment builds on the ''substantial risk enhancement.'' This multi-tiered enhancement was added to § 2D1.1 in 2000 in response to the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, Title XXXVI. *See* USSG App. C (Amendments 608 and 620 (effective Dec. 12, 2000, and Nov. 1, 2001, respectively)). Prior to this amendment, the first tier provided a two-level increase for basic environmental harms, such as discharging hazardous substances into the environment. The second tier provided a three-level increase, and a minimum offense level of 27, for the substantial risk of harm to the life of someone other than a minor or an incompetent. The final tier provided a six-level increase and a minimum offense level of 30 for the substantial risk of harm to the life of a minor or incompetent or the environment.

The Commission determined that distributing, or possessing with the intent to distribute, methamphetamine on a premises where a minor is present or resides presents a greater harm than discharging a hazardous substance into the environment, but is a lesser harm than the substantial risk of harm to adults or to the environment created by the manufacture of methamphetamine. Therefore, the amendment adds a new tier to the enhancement in the new subdivision (b)(10)(B) in order to account for this conduct. A defendant convicted under 21 U.S.C. 860a for distributing, or possessing with the intent to distribute, methamphetamine on a premises where a minor is present or resides will receive a two-level enhancement, with a minimum offense level of 14.

To address the overlap of conduct covered by the enhancement for the substantial risk of harm to the life of a minor and the new offense of manufacturing, or possessing with the intent to manufacture, methamphetamine on a premises where a minor is present or resides, a three-level enhancement and a minimum offense level of level 27 will apply in a case in which a minor is present, but in which the offense did not create a substantial risk of harm to the life of a minor. In any methamphetamine manufacturing offense which creates a substantial risk of harm to the life of a minor, a six-level enhancement and a minimum offense level of level 30 will apply.

Sixth, the amendment updates Appendix A (Statutory Index) to include references to the new offenses created by the PATRIOT Reauthorization and Adam Walsh Acts.

9. Cocaine Base Sentencing

Amendment: Section 2D1.1(c)(1) is amended by striking ''1.5 KG or more of Cocaine Base'' and inserting ''4.5 KG or more of Cocaine Base''.

Section 2D1.1(c)(2) is amended by striking ''At least 500 G but less than 1.5 KG of Cocaine Base'' and inserting ''At least 1.5 KG but less than 4.5 KG of Cocaine Base''.

Section 2D1.1(c)(3) is amended by striking ''At least 150 G but less than 500 G of Cocaine Base'' and inserting ''At least 500 G but less than 1.5 KG of Cocaine Base''.

Section 2D1.1(c)(4) is amended by striking ''At least 50 G but less than 150 G of Cocaine Base'' and inserting ''At least 150 G but less than 500 G of Cocaine Base''.

Section 2D1.1(c)(5) is amended by striking ''At least 35 G but less than 50 G of Cocaine Base'' and inserting ''At least 50 G but less than 150 G of Cocaine Base''.

Section 2D1.1(c)(6) is amended by striking ''At least 20 G but less than 35 G of Cocaine Base'' and inserting ''At least 35 G but less than 50 G of Cocaine Base''.

Section 2D1.1(c)(7) is amended by striking ''At least 5 G but less than 20 G of Cocaine Base'' and inserting ''At least 20 G but less than 35 G of Cocaine Base''.

Section 2D1.1(c)(8) is amended by striking ''At least 4 G but less than 5 G of Cocaine Base'' and inserting ''At least 5 G but less than 20 G of Cocaine Base''.

Section 2D1.1(c)(9) is amended by striking ''At least 3 G but less than 4 G of Cocaine Base'' and inserting ''At least 4 G but less than 5 G of Cocaine Base''.

Section 2D1.1(c)(10) is amended by striking ''At least 2 G but less than 3 G of Cocaine Base'' and inserting ''At least 3 G but less than 4 G of Cocaine Base''.

Section 2D1.1(c)(11) is amended by striking ''At least 1 G but less than 2 G of Cocaine Base'' and inserting ''At least 2 G but less than 3 G of Cocaine Base''.

Section 2D1.1(c)(12) is amended by striking ''At least 500 MG but less than 1 G of Cocaine Base'' and inserting ''At least 1 G but less than 2 G of Cocaine Base''.

Section 2D1.1(c)(13) is amended by striking ''At least 250 MG but less than 500 MG of Cocaine Base'' and inserting ''At least 500 MG but less than 1 G of Cocaine Base''.

Section 2D1.1(c)(14) is amended by striking ''Less than 250 MG of Cocaine Base'' and inserting ''Less than 500 MG of Cocaine Base''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the first paragraph by inserting before ''The Commission has used the sentences'' the following:

''Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—'';

by striking ''(A)'' before ''Use'' and inserting ''(i)''; by striking ''(B)'' before ''Find'' and inserting ''(ii)''; and by striking ''(C)'' before ''Use'' and inserting ''(iii)'';

in the second paragraph by striking ''The Drug Equivalency Tables also provide'' and inserting the following:

''(B) Combining Differing Controlled Substances (Except Cocaine Base).—The Drug Equivalency Tables also provide'';

and by adding at the end the following:

''To determine a single offense level in a case involving cocaine base and other controlled substances, *see* subdivision (D) of this note.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the subdivision captioned ''Examples:'' by striking ''Examples:'' and inserting the following:

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

and by redesignating examples ''a.'' through ''d.'' as examples (i) through (iv), respectively.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 by inserting after example (iv), as redesignated by this amendment, the following:

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

(i) In General.—If the offense involves cocaine base ('crack') and one or more other controlled substance, determine the base offense level as follows:

(I) Determine the combined base offense level for the other controlled substance or controlled substances as provided in subdivision (B) of this note.

(II) Use the combined base offense level determined under subdivision (B) of this note to obtain the appropriate marihuana equivalency for the cocaine base involved in the offense using the following table:

Base offense level	Marihuana equivalency
38	6.7 kg of marihuana
36	6.7 kg of marihuana
34	6 kg of marihuana.
32	6.7 kg of marihuana.
30	14 kg of marihuana.
28	11.4 kg of marihuana.
26	5 kg of marihuana.
24	16 kg of marihuana.
22	15 kg of marihuana.
20	13.3 kg of marihuana.
18	10 kg of marihuana.
16	10 kg of marihuana.
14	10 kg of marihuana.
12	10 kg of marihuana.

(III) Using the marihuana equivalency obtained from the table in subdivision (II), convert the quantity of cocaine base involved in the offense to its equivalent quantity of marihuana.

(IV) Add the quantity of marihuana determined under subdivisions (I) and (III), and look up the total in the Drug Quantity Table to obtain the combined base offense level for all the controlled substances involved in the offense.

(ii) Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg × 200 g = 300 kg), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of 5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg (20 g × 5 kg = 100 kg). Adding the quantities of marihuana of all three controlled substances results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 by striking ''DRUG EQUIVALENCY TABLES'' and inserting the following:

''(E) Drug Equivalency Tables.—'';

and in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)'' by striking ''1 gm of Cocaine Base ('Crack') = 20 kg of marihuana''.

Reason for Amendment: The Commission identified as a policy priority for the amendment cycle ending May 1, 2007, ''continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy,'' including reevaluating the Commission's 2002 report to Congress, Cocaine and Federal Sentencing Policy. As a result of the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, 21 U.S.C. 841(b)(1) requires a five-year mandatory minimum penalty for a first-time trafficking offense involving 5 grams or more of crack cocaine, or 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because 100 times more powder cocaine than crack cocaine is required to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the ''100-to-1 drug quantity ratio.''

To assist the Commission in its consideration of Federal cocaine sentencing policy, the Commission received statements and heard expert testimony from the Executive Branch, the Federal judiciary, defense

practitioners, state and local law enforcement representatives, medical and treatment experts, academicians, social scientists, and interested community representatives at hearings on November 14, 2006, and March 20, 2007. The Commission also received substantial written public comment on Federal cocaine sentencing policy throughout the amendment cycle.

During the amendment cycle, the Commission updated its analysis of key sentencing data about cocaine offenses and offenders; reviewed recent scientific literature regarding cocaine use, effects, dependency, prenatal effects, and prevalence; researched trends in cocaine trafficking patterns, price, and use; surveyed the state laws regarding cocaine penalties; and monitored case law developments.

Current data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere. These findings will be more thoroughly explained in a forthcoming report that will present to Congress, on or before May 15, 2007, a number of recommendations for modifications to the statutory penalties for crack cocaine offenses. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

The Commission's recommendation and strong desire for prompt legislative action notwithstanding, the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems. The Commission has concluded that the manner in which the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine offenses is an area in which the Federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio.

When Congress passed the 1986 Act, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The drug quantity thresholds in the Drug Quantity Table are set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities were set accordingly using the 100-to-1 drug quantity ratio.

This amendment modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties. Accordingly, pursuant to the amendment, 5 grams of cocaine base are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels. The amendment also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

The Commission's prison impact model predicts that, assuming no change in the existing statutory mandatory minimum penalties, this modification to the Drug Quantity Table will affect 69.7 percent of crack cocaine offenses sentenced under § 2D1.1 and will result in a reduction in the estimated average sentence of all crack cocaine offenses from 121 months to 106 months, based on an analysis of cases sentenced in fiscal year 2006 under § 2D1.1 involving crack cocaine.

Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. Accordingly, the Commission tailored the amendment to fit within the existing statutory penalty scheme by assigning base offense levels that provide guideline ranges that include the statutory mandatory minimum penalties for crack cocaine offenses. The Commission, however, views the amendment only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress.

10. Technical Amendments

Amendment: Section 2D1.11(a) is amended by striking ''(e)'' after ''under subsection'' and inserting ''(d)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 14 in subdivision (B) by striking ''(b)(1)'' and inserting ''(b)(6)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 930 the following:

''18 U.S.C. 931—2K2.6'':

and by striking the following:

''18 U.S.C. 3147—2J1.7''.

Chapter Three, Part D is amended in the Introductory Commentary in the first paragraph by inserting after the first sentence the following:

''These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.''.

The Commentary to § 3D1.1 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; by redesignating Note 1 as Note 2; and by inserting the following as new Note 1:

''1. In General—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.''.

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

First, the amendment corrects typographical errors in subsection (a) of § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and Application Note 14 of

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

Second, the amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim. P. 20(a).

The amendment adopts the reasoning of recent case law and clarifies that the grouping rules apply not only to multiple counts in the same indictment, but also to multiple counts contained in different indictments when a defendant is sentenced on the indictments simultaneously. The amendment provides clarifying language in the Introductory Commentary of Chapter Three, Part D, as well as in § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts). The language is the same as that provided in *5G1.2 (Sentencing on Multiple Counts of Conviction).

11. Repromulgation of Emergency Amendment on Pretexting

Amendment: The amendments to § 2H3.1 and Appendix A, effective May 1, 2007 (*see* 72 FR 20576 (April 25, 2007)), are repromulgated with the following changes:

Section 2H3.1 is amended in the heading by striking ''Tax Return Information'' and inserting ''Certain Private or Protected Information''.

Section 2H3.1(a) is amended by striking subdivision (2) and inserting the following:

''(2) 6, if the offense of conviction has a statutory maximum term of imprisonment of one year or less but more than six months.''.

Section 2H3.1(b)(1) is amended by inserting ''(A) the defendant is convicted under 18 U.S.C. 1039(d) or (e); or (B)'' after ''If''.

The Commentary to § 2H3.1 captioned ''Statutory Provisions'' is amended by inserting ''8 U.S.C. 1375a(d)(3)(C), (d)(5)(B);'' before ''18 U.S.C.''; by inserting ''§ 1039, 1905,'' after ''18 U.S.C.''; and by inserting ''42 U.S.C. 16962, 16984'' after ''7216;''.

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended by striking Note 1; by redesignating Note 2 as Note 1; and by adding at the end the following:

''2. Imposition of Sentence for 18 U.S.C. 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. 1039(d) or (e). For example, if the applicable adjusted guideline range is 15–21 months and the court determines a 'total punishment' of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. 1039(a) plus 12 months for 18 U.S.C. 1039(d) conduct would achieve the 'total punishment' in a manner that satisfies the statutory requirement.

3. 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 confidential phone records information or tax return information of a substantial number of individuals.

(ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.''.

The Commentary to § 2H3.1 is amended by striking ''Background'' through the end of ''and 7216.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 8 U.S.C. 1328 the following:

''8 U.S.C. 1375a(d)(3)(C), (d)(5)(B)2H3.1'';

by inserting after the line referenced to 18 U.S.C. 1038 the following:

''18 U.S.C. 1039—2H3.1''

and by inserting after the line referenced to 42 U.S.C. 14905 the following:

''42 U.S.C. 16962—2H3.1
42 U.S.C. 16984—2H3.1''.

Reason for Amendment: This amendment addresses several offenses that pertain to unauthorized access or disclosure of private or protected information. Specifically, this amendment pertains to (A) the re-promulgation of the emergency amendment that implemented the directive in section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476 (the ''Telephone Records Act''); (B) offenses involving improper use of a child's fingerprints under 42 U.S.C. 16984 and 16962; and (C) various other offenses related to private or protected information.

This amendment re-promulgates as permanent the temporary emergency amendment (effective May 1, 2007) that implemented the directive in section 4 of the Telephone Records Act. The amendment refers the new offense at 18 U.S.C. 1039 to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Information). The Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced to this guideline. In addition, this guideline includes a cross reference, instructing that if the purpose of the 18 U.S.C. 1039 offense was to facilitate another offense, the guideline applicable to an attempt to commit the other offense should be applied, if the resulting offense level is higher. The Commission concluded that operation of the cross reference would capture the harms associated with the aggravated forms of this offense referenced at 18 U.S.C. 1039(d) or (e). The amendment also expands the scope of the existing three-level enhancement in the guideline to include cases in which the defendant is convicted under 18 U.S.C. 1039(d) or (e). Thus, in a case in which the cross reference does not apply, application of the enhancement will capture the increased harms associated with the aggravated offenses. Finally, the amendment expands the upward departure note to include tax return information of a substantial number of individuals.

Section 153 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248 (the ''Adam Walsh Act''), added a new offense at 42 U.S.C. 16962, which provides a statutory maximum term of imprisonment of 10 years for the improper release of information obtained in fingerprint-based checks for the background check of either foster or adoptive parents or of individuals employed by, or considering employment with, a private or public educational agency. Additionally, section 627 of the Adam Walsh Act added a new Class A Misdemeanor offense at 42 U.S.C. 16984 prohibiting the use of a child's fingerprints for any purpose other than providing those fingerprints to the child's parent or legal guardian. This amendment references both offenses to § 2H3.1, providing a base offense level of 9 under § 2H3.1(a)(1) if the defendant was convicted of violating 42 U.S.C. 16962, and a base offense level of 6 if the defendant was convicted of violating 42 U.S.C. 16984.

Finally, this amendment implements the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162 (''VAWA''). VAWA included the International Marriage Broker Regulation Act of 2005 (''IMBRA''), which requires marriage brokers to keep

private information gathered in the course of their business confidential. New offenses at 8 U.S.C. § 1375a(d)(3)(C) and 1375a(d)(5)(B) involve invasions of protected privacy interests and, as such, are referenced to § 2H3.1.

The Commission concluded that referencing these new offenses to § 2H3.1 was appropriate because each of the new offenses is similar to the types of privacy offenses referenced to this guideline.

12. Criminal History

Amendment: Section 4A1.1(f) is amended by striking ''was considered related to another sentence resulting from a conviction of a crime of violence'' and inserting ''was counted as a single sentence''; and by striking the last sentence.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 6 by striking the first paragraph and inserting the following:

''§ 4A1.1(f). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (*see* § 4A1.2(a)(2)), one point is added under § 4A1.1(f) for each such sentence that did not result in any additional points under § 4A1.1(a), (b), or (c). A total of up to 3 points may be added under § 4A1.1(f). For purposes of this guideline, 'crime of violence' has the meaning given that term in § 4B1.2(a). See § 4A1.2(p).'';

and in the second paragraph by striking ''that were consolidated for sentencing and therefore are treated as related.'' and inserting ''. The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. *See* § 4A1.2(a)(2).''.

Section 4A1.2(a) is amended in the heading by striking ''Defined''; and by striking subdivision (2) and inserting the following:

''(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(f).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.''.

Section 4A1.2(c)(1) is amended by striking ''at least one'' and inserting ''more than one''; by striking ''Fish and game violations''; and by striking ''Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)''.

Section 4A1.2(c)(2) is amended by inserting ''Fish and game violations'' as a new line before the line referenced to ''Hitchhiking''; and by inserting ''Local ordinance violations (except those violations that are also violations under state criminal law)'' as a new line before the line referenced to ''Loitering''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended by striking Note 3 and inserting the following:

''3. Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 12 by striking ''Local Ordinance Violations.'' and inserting the following:

''Application of Subsection (c).—

(A) In General.—In determining whether an unlisted offense is similar to an offense listed in subdivision (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) Local Ordinance Violations.—'';

by striking ''§ 4A1.2(c)(1)'' after ''violations in'' and inserting ''§ 4A1.2(c)(2)''; and by inserting at the end the following:

''(C) Insufficient Funds Check.—'Insufficient funds check,' as used in § 4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended by striking Note 13.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins ''A violation of 18 U.S.C. 924(c)'' by inserting ''sentences for the'' before ''two prior''; and by striking ''treated as related cases'' and inserting ''counted as a single sentence''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 4(B) by striking ''considered 'related cases', as that term is defined in Application Note 3'' and inserting ''counted as a single sentence pursuant to subsection (a)(2)''.

Reason for Amendment: This amendment addresses two areas of the Chapter Four criminal history rules: The counting of multiple prior sentences and the use of misdemeanor and petty offenses in determining a defendant's criminal history score. In November 2006 the Commission hosted round-table discussions to receive input on criminal history issues from federal judges, prosecutors, defense attorneys, probation officers, and members of academia. In addition, the Commission gathered information through its training programs, the public comment process, and comments received during a public hearing of the Commission in March 2007. This amendment addresses two issues that were raised during this process.

First, the amendment addresses the counting of multiple prior sentences. The Commission has heard from a number of practitioners throughout the criminal justice system that the ''related cases'' rules at subsection (a)(2) of § 4A1.2 (Definitions and Instructions for Computing Criminal History) and Application Note 3 of § 4A1.2 are too complex and lead to confusion. Moreover, a significant amount of litigation has arisen concerning application of the rules, and circuit conflicts have developed over the meaning of terms in the commentary that define when prior sentences may be considered ''related.'' For example, the commentary provides that prior sentences for offenses not separated by an intervening arrest are to be considered related if the sentences resulted from offenses that were consolidated for sentencing. In determining whether offenses were consolidated for sentencing, some courts have required that the record reflect a formal order of consolidation, while others have not. Compare, e.g., United States v. Correa, 114 F.3d 314, 317 (1st Cir. 1997) (order required) with

United States v. Huskey, 137 F.3d 283, 288 (5th Cir. 1998) (order not required).

The amendment simplifies the rules for counting multiple prior sentences and promotes consistency in the application of the guideline. The amendment eliminates use of the term ''related cases'' at § 4A1.2(a)(2) and instead uses the terms ''single'' and ''separate'' sentences. This change in terminology was made because some have misunderstood the term ''related cases'' to suggest a relationship between the prior sentences and the instant offense. Prior sentences for conduct that is part of the instant offense are separately addressed at § 4A1.2(a)(1) and Application Note 1 of that guideline.

Under the amendment, the initial inquiry will be whether the prior sentences were for offenses that were separated by an intervening arrest (i.e., the defendant was arrested for the first offense prior to committing the second offense). If so, they are to be considered separate sentences, counted separately, and no further inquiry is required.

If the prior sentences were for offenses that were not separated by an intervening arrest, the sentences are to be counted as separate sentences unless the sentences (1) were for offenses that were named in the same charging document, or (2) were imposed on the same day. In either of these situations they are treated as a single sentence.

The amendment further provides that in the case of a single sentence that comprises multiple concurrent sentences of varying lengths, the longest sentence is to be used for purposes of applying subsection (a), (b) and (c) of § 4A1.1 (Criminal History Category). In the case of a single sentence that comprises multiple sentences that include one or more consecutive sentences, the aggregate sentence is to be used for purposes of applying § 4A1.1(a), (b), and (c).

Instances may arise in which a single sentence comprises multiple prior sentences for crimes of violence. In such a case, § 4A1.1(f) will apply. Consistent with § 4A1.1(f) and Application Note 6 to § 4A1.1, additional criminal history points will be awarded for certain sentences that otherwise do not receive points because they have been determined to be part of a single sentence. For example, if a defendant's criminal history contains two robbery convictions for which the defendant received concurrent five-year sentences of imprisonment and the sentences are considered a single sentence because the offenses were not separated by an intervening arrest and were imposed on the same day, a total of 3 points would be added under § 4A1.1(a). An additional point would be added under § 4A1.1(f) because the second sentence was for a crime of violence that did not receive any points under § 4A1.1(a), (b), or (c).

The amendment also provides for an upward departure at Application Note 12(A) to § 4A1.1 if counting multiple prior sentences as a single sentence would underrepresent the seriousness of the defendant's criminal history and the danger that the defendant presents to the public.

Second, the amendment addresses the use of misdemeanor and petty offenses in determining a defendant's criminal history score. Sections 4A1.2(c)(1) and (2) govern whether and when certain misdemeanor and petty offenses are counted. Section 4A1.2(c)(1) lists offenses that are counted only when the prior sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days. Section 4A1.2(c)(2) lists offenses that are never counted toward the defendant's criminal history score. The amendment responds to concerns that (1) some misdemeanor and petty offenses counted under the guidelines involve conduct that is not serious enough to warrant increased punishment upon sentencing for a subsequent offense; (2) the presence of a prior misdemeanor or petty offense in a rare case can affect the sentence in the instant offense in a way that is greatly disproportionate to the seriousness of the prior offense (such as when such a prior offense alone disqualifies a defendant from safety valve eligibility); and (3) jurisdictional differences in defining misdemeanor and petty offenses can result in inconsistent application of criminal history points for substantially similar conduct.

To evaluate these concerns, the Commission conducted a study of misdemeanor and petty offenses and the criminal history rules that govern them, particularly § 4A1.2(c)(1). The Commission examined a sample of 11,300 offenders sentenced in fiscal year 2006 to determine the type of misdemeanor and petty offenses counted in the criminal history score, the frequency with which they occurred, and the particular guideline provisions that caused them to be counted. In addition, the Commission examined a sample of offenders sentenced in 1992 who were subsequently released from imprisonment and monitored for two years for evidence of recidivism. (*See* U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (2004) for additional information concerning this sample.) Furthermore, the Commission examined how state guidelines treat minor offenses.

The results of these analyses led the Commission to make three modifications to § 4A1.2(c)(1) and (2). First, the amendment moves from § 4A1.2(c)(1) to § 4A1.2(c)(2) two classes of offenses: fish and game violations and local ordinance violations (except those violations that are also violations under state criminal law). Second, the amendment changes the probation criterion at § 4A1.2(c)(1) from a term of ''at least'' one year to a term of ''more than'' one year. Finally, the amendment resolves a circuit conflict over the manner in which a non-listed offense is determined to be ''similar to'' an offense listed at § 4A1.2(c)(1) and (2).

Fish and game violations were moved from § 4A1.2(c)(1) to § 4A1.2(c)(2) so that they will not be counted in a defendant's criminal history score. Fish and game violations generally do not involve criminal conduct that is more serious than the offense of conviction, and the relatively minor sentences received by fish and game offenders in the fiscal year 2006 study suggest that these offenses are not considered to be among the more serious offenses listed at § 4A1.2(c)(1).

In addition, local ordinance violations (except those that are also violations of state law) were moved from § 4A1.2(c)(1) to § 4A1.2(c)(2) so that they also will not be counted in a defendant's criminal history score. Similar to fish and game violations, local ordinance violations generally do not represent conduct criminalized under state law. Moreover, these offenses also frequently received minor sentences. The exception in this amendment for violations that are also criminal violations under state law will ensure that only the more serious prior criminal conduct will continue to be included in the criminal history score.

Section 4A1.2(c)(1)(A) is amended to provide that the offenses listed at § 4A1.2(c)(1) will be counted ''only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense'' (emphasis added). The Commission received comment that some sentences of a one-year term of probation constitute a default punishment summarily imposed by the state sentencing authority, particularly in those instances in which the probation imposed lacked a supervision component or was imposed in lieu of a fine or to enable the payment of a fine.

The Commission determined that prior misdemeanor and petty offenses that receive such a relatively minor default sentence should not be counted for criminal history purposes.

The amendment resolves a circuit conflict over the manner in which a court should determine whether a non-listed offense is ''similar to'' an offense listed at § 4A1.2(c)(1) or (2). Some courts have adopted a ''common sense approach,'' first articulated by the Fifth Circuit in *United States* v. *Hardeman*, 933 F.2d 278, 281 (5th Cir. 1991). This common sense approach includes consideration of all relevant factors of similarity such as ''punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.'' *Id. See also United States* v. *Martinez-Santos*, 184 F.3d 196, 205–06 (2d Cir. 1999) (adopting *Hardeman* approach); *United States* v. *Booker*, 71 F.3d 685, 689 (7th Cir. 1995) (same). Other courts have adopted a strict ''elements'' test, which involves solely a comparison between the elements of the two offenses to determine whether or not the offenses are similar. *See United States* v. *Elmore*, 108 F.3d 23, 27 (3d Cir. 1997); *United States* v. *Tigney*, 367 F.3d 200, 201–02 (4th Cir. 2004); *United States* v. *Borer*, 412 F.3d 987, 992 (8th Cir. 2005). This amendment, at Application Note 12(A), adopts the *Hardeman* ''common sense approach'' as a means of ensuring that courts are guided by a number of relevant factors that may help them determine whether a non-listed offense is similar to a listed one.

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