UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of: (1) Promulgation of temporary, emergency amendment to the sentencing guidelines for copyright and trademark infringement, effective May 1, 2000; (2) submission to Congress of amendments to the sentencing guidelines; and (3) request for comment.

SUMMARY: The United States Sentencing Commission hereby gives notice of the following actions: (1) Pursuant to the No Electronic Theft (NET) Act, Pub. L. 105–147, the Commission has promulgated a temporary, emergency amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark) and accompanying commentary; (2) pursuant to its authority under 28 U.S.C. 994(a) and (p) and several congressional directives, the Commission has promulgated additional, non-emergency amendments to the sentencing guidelines, policy statements, commentary, and statutory index; and (3) the Commission requests public comment regarding whether the Commission should specify any of the non-emergency amendments for retroactive application to previously sentenced defendants.

DATES: The Commission has specified an effective date of May 1, 2000, for the emergency NET Act amendment and an effective date of November 1, 2000, for all non-emergency amendments to the sentencing guidelines, policy statements, commentary, and statutory index. Comments regarding whether the Commission should specify any of the non-emergency amendments for retroactive application to previously sentenced defendants should be received by the Commission not later than July 7, 2000.

ADDRESSES: Comments should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC, 20002–8002, Attn: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4590.

SUPPLEMENTARY INFORMATION:

(1) Emergency NET Act Amendment

The NET Act directed the Commission to: (A) Ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (B) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed. The NET Act, as clarified by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1998, Pub. L. 106–160, required the Commission to promulgate a temporary, emergency guideline amendment not later than April 6, 2000. In December 1999, the Commission published three options for promulgating an emergency amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark) and accompanying commentary to implement the NET Act directive. *See* 64 FR 72129, Dec. 23, 1999. After a public hearing (which, in part, focused on proposed options to implement the NET Act) and a review of additional public comment, the Commission passed an amendment on April 3, 2000, that responds to the directive. The amendment makes a number of modifications to the guideline, including changes to the monetary calculation found in § 2B5.3 and the addition of several mitigating and aggravating factors as a means of providing just and proportionate punishment while also seeking to achieve sufficient deterrence. The Commission specified an effective date of May 1, 2000, for this amendment.

(2) Non-Emergency Amendments

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

Notice of proposed amendments was published in the **Federal Register** on December 23, 1999 (*see* 64 FR 72129), January 18, 2000 (*see* 65 FR 2663), and February 11, 2000 (*see* 65 FR 7080). The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 23, 2000. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth below (including an amendment to make permanent the temporary, emergency NET Act amendment discussed in section (1)). On May 1, 2000, the Commission submitted these amendments to Congress with an effective date of November 1, 2000.

(3) Retroactive Application

The Commission requests comment regarding which, if any, of the non-emergency amendments submitted to Congress that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). For example, should the Commission make retroactive Amendments 8, 9, or 10, as set forth below, each of which may lower the guideline range for firearm offenders in certain situations?

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

Diana E. Murphy,
Chair.

Amendments to the Sentencing Guidelines

Pursuant to section 994(p) of title 28, United States Code, the United States Sentencing Commission hereby submits to the Congress the following amendments to the sentencing guidelines and the reasons therefor. As authorized by such section, the Commission specifies an effective date of November 1, 2000, for these amendments.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. *Amendment:* Section 1B1.1 is amended by striking subsection (a) in its entirety and inserting:

''(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.''.

Section 1B1.2(a) is amended by striking ''most'' each place it appears; by striking ''Provided, however'' and inserting ''However''; and by adding at the end the following:

''Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline

referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. *See* § 2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. *See* § 1B1.9 (Class B or C Misdemeanors and Infractions).''.

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

''This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to § 2X5.1 (Other Offenses), is to be used.

In the case of a particular statute that proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and the Statutory Index will specify only one offense guideline for that offense of conviction. In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. *See* § 2X5.1 (Other Offenses).''.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended by striking Note 3 in its entirety; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

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

''This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. *See* § 1B1.2(a). In a case involving such a conviction but in which''.

Appendix A (Statutory Index) is amended by striking the entire text of the ''Introduction'' and inserting the following:

''This index specifies the offense guideline section(s) in Chapter Two (Offense Conduct) applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted. For the rules governing the determination of the offense guideline section(s) from Chapter Two, and for any exceptions to those rules, *see* § 1B1.2 (Applicable Guidelines).''.

The Commentary to § 2H1.1 captioned ''Application Notes'' is amended in Note 1 in the second paragraph by striking ''Application Note 5'' and inserting ''Application Note 4''.

Reason for Amendment: This amendment addresses a circuit conflict regarding whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. *Compare United States* v. *Chandler,* 125 F.3d 892, 897–98 (5th Cir. 1997) (''First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.' '' Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); *United States* v. *Locklear,* 24 F.3d 641 (4th Cir. 1994) (finding that § 2D1.2 does not apply to convictions under 21 U.S.C. 841 based on the fact that the commentary to § 2D1.2 lists as the ''Statutory Provisions'' to which it is applicable 21 U.S.C. 859, 860, and 861, but not § 841. ''[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by § 2D1.1, but rather to define the base offense level for violations of 21 U.S.C. 859, 860 and 861.''); *United States* v. *Saavedra,* 148 F.3d 1311 (11th Cir. 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to the defendant's offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross references), *with United States* v. *Clay,* 117 F.3d 317 (6th Cir.), *cert. denied,* 118 S. Ct. 395 (1997) (applying § 2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. 841 but not convicted of any statute referenced to § 2D1.2 based on underlying facts indicating defendant involved a juvenile in drug sales); *United States* v. *Oppedahl,* 998 F.2d 584 (8th Cir. 1993) (applying § 2D1.2 to defendant convicted of conspiracy to distribute and possess with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of a school); *United States* v. *Robles,* 814 F. Supp. 1249 (E.D. Pa), aff'd (unpub.), 8 F.3d 814 (3d Cir. 1993) (looking to relevant conduct to determine appropriate guideline).

In promulgating this amendment, the Commission also was aware of case law that raises a similar issue regarding selection of a Chapter Two (Offense Conduct) guideline, different from that referenced in the Statutory Index (Appendix A), based on factors other than the conduct charged in the offense of conviction. *See United States* v. *Smith,* 186 F.3d 290 (3d Cir. 1999) (determining that § 2F1.1 (Fraud and Deceit) was most appropriate guideline rather than the listed guideline of § 2S1.1 (Laundering of Monetary Instruments)); *United States* v. *Brunson,* 882 F. 2d 151, 157 (5th Cir. 1989) (''It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an 'atypical' case.'').

The amendment modifies §§ 1B1.1(a), 1B1.2(a), and the Statutory Index's introductory commentary to clarify the inter-relationship among these provisions. The clarification is intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited ''stipulation'' exception set forth in § 1B1.2(a). Therefore, in order for the enhanced

penalties in § 2D1.2 to apply, the defendant must be convicted of an offense referenced to § 2D1.2, rather than simply have engaged in conduct described by that guideline. Furthermore, the amendment deletes Application Note 3 of § 1B1.2 (Applicable Guidelines), which provided that in many instances it would be appropriate for the court to consider the actual conduct of the offender, even if such conduct did not constitute an element of the offense. This application note describes a consideration that is more appropriate when applying § 1B1.3 (Relevant Conduct), and its current placement in § 1B1.2 apparently has caused confusion in applying that guideline's principles to determine the offense conduct guideline in Chapter Two most appropriate for the offense of conviction. In particular, the note has been used by some courts to permit a court to decline to use the offense guideline referenced in the Statutory Index in cases that were allegedly ''atypical'' or ''outside the heartland.'' *See United States* v. *Smith,* supra.

Due to the absence of sufficient data, the Commission decided to defer to another amendment cycle the question of whether to delete § 2D1.2 and add an enhancement to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) for either (1) the real offense conduct of selling drugs in protected locations or involving protected individuals; or (2) a conviction for such conduct.

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

''(6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an Internet-access device, increase by 2 levels.''.

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

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

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

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''the base offense level under subsection (a).'' the following paragraph:

''Prohibited sexual conduct'' (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following:

''4. The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

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

Chapter Two, Part A, Subpart 3 is amended by striking § 2A3.2 in its entirety and inserting the following:

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

(a) Base Offense Level:

(1) 18, if the offense involved a violation of chapter 117 of title 18, United States Code; or

(2) 15, otherwise.

(b) Specific Offense Characteristics:

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If subsection (b)(1) does not apply; and—

(A) the offense involved the knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or

(B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct,

increase by 2 levels.

(3) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct, increase by 2 levels.

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

(c) Cross Reference:

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. 2241 or 2242), apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the ''consent'' of the victim.

Commentary

Statutory Provision: 18 U.S.C. 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

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

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

'Victim' means (A) an individual who, except as provided in subdivision (B),

had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

2. If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

3. Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is 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 victim and not simply to the legal status of the defendant-victim relationship.

4. If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

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

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

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

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

If the victim was threatened or placed in fear, the cross reference in subsection (c)(1) will apply.

6. Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.

7. Subsection (c)(1) provides a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. 2241 or 2242. For example, the cross reference to 2A3.1 shall apply if (A) the victim had not attained the age of 12 years (*see* 18 U.S.C. 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (*see* 18 U.S.C. 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (*see* 18 U.S.C. 2242(1)).

8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. 2243(a) that would be lawful but for the age of the victim, it also applies to cases, prosecuted under 18 U.S.C. 2243(a) or chapter 117 of title 18, United States Code, in which a participant took active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim's behavior was compromised. A two-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. 2243(a). A two-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the victim had not attained the age of 12 years, § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the ''consent'' of the victim.''.

Section 2A3.3 is amended by inserting after subsection (a) the following:

''(b) Specific Offense Characteristics

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

(2) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.''.

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

''1. For purposes of this guideline—

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

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

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

'Ward' means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.'';

by redesignating Note 2 as Note 4; and by inserting after Note 1 the following:

''2. The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice,

or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(1) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

3. Subsection (b)(2) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.''.

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

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

(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.''.

Section 2A3.4(c)(2) is amended by inserting ''Under the Age of Sixteen Years'' before ''(Statutory Rape)''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by redesignating Note 5 as Note 8; by redesignating Notes 1 through 4 as Notes 2 through 5, respectively; by inserting before redesignated Note 2 (formerly Note 1) the following:

''1. For purposes of this guideline—

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

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

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

and by adding after redesignated Note 5 (formerly Note 4), the following:

''6. The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

7. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.''.

Chapter Two, Part G, Subpart One is amended by striking the text of the title to Subpart One in its entirety and inserting the following:

''PROMOTING PROSTITUTION OR PROHIBITED SEXUAL CONDUCT'';

and by striking § 2G1.1 in its entirety and inserting the following:

''§ 2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level:

(1) 19, if the offense involved a minor; or

(2) 14, otherwise.

(b) Specific Offense Characteristics:

(1) If the offense involved (A) prostitution; and (B) the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

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

(3) If subsection (b)(2) applies; and—

(A) the defendant was a parent, relative, or legal guardian of the victim; or

(B) the victim was otherwise in the custody, care, or supervisory control of the defendant,

increase by 2 levels.

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

(A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution; or

(B) a participant otherwise unduly influenced a minor to engage in prostitution,

increase by 2 levels.

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

(c) Cross References:

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for

the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

(2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the 'consent' of the victim.

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

(d) Special Instruction:

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

Commentary

Statutory Provisions: 8 U.S.C. 1328; 18 U.S.C. 2421, 2422, 2423(a), 2425.

Application Notes:

1. For purposes of this guideline—

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

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

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

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

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

2. Subsection (b)(1) provides an enhancement for physical force, or coercion, that occurs as part of a prostitution offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1), 'coercion' includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

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

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

5. Subsection (b)(3) 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 victim and not simply to the legal status of the defendant-victim relationship.

6. If the enhancement in subsection (b)(3) applies, do not apply subsection (b)(4) or § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

7. The enhancement in subsection (b)(4)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution. Subsection (b)(4)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution.

Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

In determining whether subsection (b)(4)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(4)(B), that such participant unduly influenced the minor to engage in prostitution. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

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

9. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of

producing any visual depiction of such conduct. For purposes of subsection (c)(1), ''sexually explicit conduct'' has the meaning given that term in 18 U.S.C. 2256.

10. Subsection (c)(2) provides a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. 2241 or 2242. For example, the cross reference to § 2A3.1 shall apply if the offense involved criminal sexual abuse; and (A) the victim had not attained the age of 12 years (*see* 18 U.S.C. 2241(c)); (B) the victim had attained the age of 12 years but had not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (*see* 18 U.S.C. 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (*see* 18 U.S.C. 2242(1)).

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

Background: This guideline covers offenses under chapter 117 of title 18, United States Code. Those offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).''.

Section 2G2.1(b) is amended by striking subdivision (3) in its entirety and inserting the following:

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

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 3 as Notes 2 through 4, respectively; by inserting before redesignated Note 2 (formerly Note 1) the following:

''1. For purposes of this guideline, ''minor'' means an individual who had not attained the age of 18 years.'';

and by adding at the end the following:

''5. The enhancement in subsection (b)(3)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(3)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(3)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

Subsection (b)(3)(B)(i) provides an enhancement if a computer or an Internet-access device was used to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(3)(B)(i) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.''.

Section 2G2.2(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than 5 levels.

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

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

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

(E) Distribution other than distribution described in subdivisions (A) through

(D), increase by 2 levels.''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.

'Distribution for pecuniary gain' means distribution for profit.

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

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

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

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

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

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. ''Sexual abuse or exploitation'' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

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

The Commentary to § 2G2.4 is amended by adding at the end the following:

''Application Notes:

1. For purposes of this guideline—

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

'Visual depiction' means any visual depiction described in 18 U.S.C. 2256(5) and (8).

2. For purposes of subsection (b)(2), a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.

If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.''.

Section 2G3.1 is amended in the title by adding at the end ''; Transferring Obscene Matter to a Minor''.

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

''(1) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than 5 levels.

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

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

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

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

The Commentary to § 2G3.1 captioned ''Statutory Provisions'' is amended by inserting ''1470'' after ''1466''.

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

''1. For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of obscene matter.

'Distribution for pecuniary gain' means distribution for profit.

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

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

'Minor' means an individual who had not attained the age of 16 years.

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

The Commentary to § 2G3.2 captioned ''Background'' is amended by inserting ''Transferring Obscene Matter to a Minor'' after ''Transporting Obscene Matter''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 1468'' the following new line:

''18 U.S.C. 1470 2G3.1''

and by inserting after the line referenced to ''18 U.S.C. § 2423(b)'' the following new line:

''18 U.S.C. 2425 2G1.1''.

Reason for Amendment: This is a six-part amendment. The amendment is promulgated primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the ''Act''), which contained several directives to the Commission.

First, the amendment addresses the Act's directives to provide enhancements to the guidelines covering aggravated sexual abuse, sexual abuse, and sexual abuse of a minor if (1) the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual activity; and (2) the defendant knowingly misrepresented the defendant's actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct. The legislative history of the Act indicates congressional intent to ensure that persons who misrepresent themselves to a minor, or use computers or Internet-access devices to locate and gain access to a minor, are severely punished.

In response to these directives, the amendment provides separate, cumulative two-level enhancements in the sexual abuse guidelines, §§ 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), and in § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) for (1) the use of a computer or Internet-access device with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct; and (2) misrepresentation of a criminally responsible person's identity with such an intent. The Commission has determined that, for offenses sentenced under these guidelines, the use of a computer or Internet-access device and the misrepresentation of identity represent separate, additional harms and increase the culpability of a defendant or criminal participant who engages, or attempts to engage, in such conduct. With respect to §§ 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), the amendment treats these two types of aggravating conduct as alternative triggers for one enhancement. In these guidelines, the substantially higher base offense levels and other specific offense characteristics provide alternative guideline mechanisms to account, at least in part, for these harms and the defendant's increased culpability. Accordingly, the Commission determined that, in these guidelines, a single, two-level increase for the use of a computer or

misrepresentation adequately addresses the increased seriousness of these offenses.

Second, this amendment responds to the directive in the Act to provide a sentencing enhancement for offenses under chapter 117 of title 18, United States Code (relating to the transportation of minors for illegal sexual activity), while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines. In furtherance of this directive, the Commission initiated a comprehensive examination of §§ 2A3.2 and 2G1.1, the guidelines under which most cases prosecuted under such chapter are sentenced. The Commission intends to continue its comprehensive review of these guidelines and other guidelines that cover chapter 117 offenses in the next amendment cycle.

The amendment implements the directive to provide an enhancement for chapter 117 offenses, in part, through the enhancements provided in §§ 2A3.2 and 2G1.1 for misrepresentation of identity and use of a computer to facilitate such offenses. In addition, the amendment provides an alternative basis for a sentencing enhancement if a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct. Despite the fact that § 2A3.2 nominally applies to consensual sexual acts with a person who had not attained the age of 16 years, Commission data indicated that many of the cases sentenced under § 2A3.2, directly or via a cross reference from § 2G1.1, involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person. Analysis of these cases revealed conduct such as coercion, enticement, or other forms of undue influence by the defendant that compromised the voluntariness of the victim's behavior and, accordingly, increased the defendant's culpability for the crime. This prong of the new enhancement is designed to allow courts to consider closely the facts of the individual case. Furthermore, a rebuttable presumption is created that the offense involved undue influence if a participant was at least 10 years older than the victim. Data reviewed by the Commission suggested that such a presumption is appropriate because persons who are much older than a minor are frequently in a position to manipulate the minor due to increased knowledge, influence, and resources.

As a result of the Commission's comprehensive assessment of §§ 2A3.2 and 2G1.1, the amendment also makes several other modifications to these guidelines. The amendment provides, in § 2A3.2, an alternative base offense level of level 18 if the offense involved a violation of chapter 117 of title 18, United States Code. This alternative base offense level more fully implements a directive in the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104–71, to provide at least a three-level increase for offenses under 18 U.S.C. § 2423(a) involving the transportation of minors for prostitution or other prohibited sexual conduct. However, the amendment also provides for a three-level decrease if a defendant receives the higher alternative base offense level of level 18 and none of certain listed aggravating specific offense characteristics apply. This reduction recognizes that not all defendants convicted under chapter 117 have necessarily engaged in a more aggravated form of statutory rape conduct. The amendment also adds several definitions to § 2A3.2, including clarifying that ''victim'' includes an undercover police officer who represents to the perpetrator of the offense that the officer was under the age of 16 years. This change was made to ensure that offenders who are apprehended in an undercover operation are appropriately punished. In § 2G1.1, the amendment reallocates, without substantive change, five offense levels from subsection (b)(2) to the base offense level, for offenses involving a minor. Section 2G1.1(b)(1) also is amended to clarify that the offense must have involved prostitution in order for the enhancement for coercion, threats, or drugs to apply. The amendment also clarifies that, in §§ 2A3.2(c)(1) and 2G1.1(c)(2), the cross reference to § 2A3.1 shall apply if the offense involved criminal sexual abuse of a minor under the age of 12 years, regardless of the ''consent'' of the victim. Review of Commission data indicated that the cross reference to § 2A3.1 currently is not being applied in many cases in which the offense conduct suggests it should. In both §§ 2A3.2 and 2G1.1, the amendment also precludes application of the new enhancement for misrepresentation of identity and/or undue influence if the victim is in the custody, care, or supervisory control of the defendant.

Third, the amendment addresses the directive in the Act to clarify that the term ''distribution of pornography'' applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest. In response to the directive, the amendment modifies the enhancement in § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor), relating to the distribution of child pornographic material, as well as a similar enhancement in § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), relating to the distribution of obscene material. For each of these enhancements, the amendment (1) modifies the definition of ''distribution'' to mean any act, including production, transportation, and possession with intent to distribute, related to the transfer of the material, regardless of whether it was for pecuniary gain; and (2) provides for varying levels of enhancement depending upon the purpose and audience of the distribution. These varying levels are intended to respond to increased congressional concerns, as indicated in the legislative history of the Act, that pedophiles, including those who use the Internet, are using child pornographic and obscene material to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity.

Fourth, the amendment clarifies the meaning of the term ''item'' in subsection (b)(2) of § 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). That subsection provides a two-level enhancement if the offense involved possession of ten or more items of child pornography. The amendment adopts the holding of all circuits that have addressed the matter that a computer file qualifies as an item for purposes of the enhancement. The amendment also provides for an invited upward departure if the offense involves a large number of visual depictions of child pornography, regardless of the number of ''items'' involved. This provision invites courts to depart upward in cases in which a particular item, such as a book or a computer file, contains an unusually large number of pornographic images involving children.

Fifth, the amendment addresses the new offense of transferring obscene matter to a minor, codified at 18 U.S.C. 1470, by referencing the offense in the Statutory Index (Appendix A) to § 2G3.1.

Sixth, the amendment addresses the new offense of prohibiting the knowing transmittal of identifying information about minors for criminal sexual purposes, codified at 18 U.S.C. 2425, by

referencing the new offense in the Statutory Index to § 2G1.1.

Because of the limited time available in this amendment cycle, the Commission was not able fully to respond to all of the directives of the Act. In the next amendment cycle, the Commission intends to continue consideration of the directive requiring that the Commission ''provide for an appropriate enhancement in any case in which the defendant engaged in a pattern of activity of sexual abuse and exploitation of a minor.'' In addition, the Commission intends to consider further the general directive in the Act requiring the Commission to ensure ''that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines.'' Implementation of this directive may include, for example, an examination of the appropriate offense level for defendants convicted of sexual abuse offenses that are not committed in violation of chapter 117 of title 18, United States Code (*e.g.,* offenses committed on Native American lands).

3. *Amendment:* Section 2B5.3, effective May 1, 2000 (*see* USSC *Guidelines Manual* Supplement to 1998 Supplement to Appendix C, Amendment 590), is repromulgated, with minor editorial changes, as follows:

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

(a) Base Offense Level: 8.

(b) Specific Offense Characteristics:

(1) If the infringement amount exceeded $2,000, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to that amount.

(2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(3) If the offense was not committed for commercial advantage or private financial gain, decrease by 2 levels, but the resulting offense level shall be not less than level 8.

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

Commentary

Statutory Provisions: 17 U.S.C. 506(a); 18 U.S.C. 2318–2320, 2511. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial advantage or private financial gain' means the receipt, or expectation of receipt, of anything of value, including other protected works.

'Infringed item' means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

'Infringing item' means the item that violates the copyright or trademark laws.

'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.

(ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

(iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.

(iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. 2511. (In a case involving such an offense, the 'retail value of the infringed item' is the price the user of the transmission would have paid to lawfully receive that transmission, and the 'infringed item' is the satellite transmission rather than the intercepting device.)

(v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. 2319A.

(C) Retail Value Defined.—For purposes of this Application Note, the 'retail value' of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.

(D) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (*i.e.,* the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (*i.e.,* the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

3. Uploading.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.

4. Application of § 3B1.3.—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall apply.

5. Upward Departure Considerations.—If the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of,

the criminal activities of a national, or international, organized criminal enterprise.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.''.

Reason for Amendment: This amendment is in response to section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147 (''the Act''). The Act directs the Commission to ensure that the applicable guideline range for intellectual property offenses (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is ''sufficiently stringent to deter such a crime.'' It also more specifically requires that the guidelines ''provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.''

The amendment responds to the directives by making changes to the monetary calculation found in § 2B5.3 (Criminal Infringement of Copyright or Trademark). In addition, the amendment makes a number of other modifications to the infringement guideline, including the addition of several mitigating and aggravating factors, as further means of providing just and proportionate punishment while also seeking to achieve sufficient deterrence.

The monetary calculation in § 2B5.3(b)(1), similar to the loss enhancement in the theft and fraud guidelines, serves as an approximation of the pecuniary harm caused by the offense and is a principal factor in determining the offense level for intellectual property offenses. Prior to this amendment, the monetary calculation for all intellectual property crimes was based on the retail value of the infringing item multiplied by the quantity of infringing items. In response to the directive, the Commission refashioned this enhancement so as to use the retail value of the infringed item, multiplied by the number of infringing items, as a means of approximating the pecuniary harm for cases in which that calculation is believed most likely to provide a reasonable estimate of the resulting harm. Use of that calculation is believed to provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item. The amendment also requires that the retail value of the infringed item, multiplied by the number of infringing items, be used in certain other cases for reasons of practicality.

However, based upon a review of cases sentenced under the former § 2B5.3 over two years, the Commission further determined that using the above formula likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline. For those cases, a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item. The Commission therefore determined that, for these latter classes of cases (referred to in Application Note 2(B)), the retail value of the infringing item, multiplied by the number of those items, provides a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, of the pecuniary harm resulting from the offense.

This amendment also increases the base offense level from level 6 to level 8. The two-level increase in the base offense level brings the infringement guideline more in line with offense levels that would pertain under § 2F1.1 (Fraud and Deceit), assuming applicability under that guideline of the two-level enhancement for more than minimal planning. Based on a review of cases sentenced under the infringement guideline, if a more than minimal planning enhancement did exist in that guideline, it would apply in the vast majority of such cases because they involve this kind of aggravating conduct. Rather than provide a separate enhancement within the revised guideline for ''more than minimal planning'' conduct, the Commission determined that the infringement guideline should incorporate this type of conduct into the base offense level.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. The Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark. A review of cases sentenced under the guideline indicated applicability of this enhancement to approximately two-thirds of the cases.

This amendment also provides a two-level downward adjustment (but to a resulting offense level that is not less than offense level 8) if the offense was not committed for commercial advantage or private financial gain. This adjustment reflects the fact that the Act establishes lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 13, if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. Testimony received by the Commission indicated that the conscious or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products. The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore,

this enhancement is consistent with an identical provision in the fraud guideline.

The amendment also contains an application note expressly providing that the adjustment in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. As stated in the background commentary to § 3B1.3, persons who use such a special skill to facilitate or commit a crime generally are viewed as more culpable.

Finally, this amendment contains two encouraged upward departure provisions. The Commission received public comment that indicated that infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation. Public comment also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises. The amendment invites the court to consider an appropriate upward departure if either of these aggravating circumstances are present.

Pursuant to the emergency amendment authority of the Act, this amendment previously was promulgated as a temporary measure effective May 1, 2000. (*See* USSC *Guidelines Manual* Supplement to the 1998 Supplement to Appendix C, Amendment 590).

4. *Amendment:* Section 2D1.1(c)(1) is amended by striking ''3 KG or more'' before ''of Methamphetamine (actual)'' and inserting ''1.5 KG or more''; and by striking ''3 KG or more'' before ''of 'Ice' '' and inserting ''1.5 KG or more''.

Section 2D1.1(c)(2) is amended by striking ''at least 1 KG but less than 3 KG'' before ''of Methamphetamine (actual)'' and inserting ''at least 500 G but less than 1.5 KG''; and by striking ''at least 1 KG but less than 3 KG'' before ''of 'Ice' '' and inserting ''at least 500 G but less than 1.5 KG''.

Section 2D1.1(c)(3) is amended by striking ''at least 300 G but less than 1 KG'' before ''of Methamphetamine (actual)'' and inserting ''at least 150 G but less than 500 G''; and by striking ''at least 300 G but less than 1 KG'' before ''of 'Ice' '' and inserting ''at least 150 G but less than 500 G''.

Section 2D1.1(c)(4) is amended by striking ''at least 100 G but less than 300 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 50 G but less than 150 G''; and by striking ''at least 100 G but less than 300 G'' before ''of 'Ice' '' and inserting ''at least 50 G but less than 150 G''.

Section 2D1.1(c)(5) is amended by striking ''at least 70 G but less than 100 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 35 G but less than 50 G''; and by striking ''at least 70 G but less than 100 G'' before ''of ''Ice' '' and inserting ''at least 35 G but less than 50 G''.

Section 2D1.1(c)(6) is amended by striking ''at least 40 G but less than 70 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 20 G but less than 35 G''; and by striking ''at least 40 G but less than 70 G'' before ''of 'Ice' '' and inserting ''at least 20 G but less than 35 G''.

Section 2D1.1(c)(7) is amended by striking ''at least 10 G but less than 40 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 5 G but less than 20 G''; and by striking ''at least 10 G but less than 40 G'' before ''of 'Ice' '' and inserting ''at least 5 G but less than 20 G''.

Section 2D1.1(c)(8) is amended by striking ''at least 8 G but less than 10 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 4 G but less than 5 G''; and by striking ''at least 8 G but less than 10 G'' before ''of 'Ice' '' and inserting ''at least 4 G but less than 5 G''.

Section 2D1.1(c)(9) is amended by striking ''at least 6 G but less than 8 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 3 G but less than 4 G''; and by striking ''at least 6 G but less than 8 G'' before ''of 'Ice' '' and inserting ''at least 3 G but less than 4 G''.

Section 2D1.1(c)(10) is amended by striking ''at least 4 G but less than 6 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 2 G but less than 3 G''; and by striking ''at least 4 G but less than 6 G'' before ''of 'Ice' '' and inserting ''at least 2 G but less than 3 G''.

Section 2D1.1(c)(11) is amended by striking ''at least 2 G but less than 4 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 1 G but less than 2 G''; and by striking ''at least 2 G but less than 4 G'' before ''of 'Ice' '' and inserting ''at least 1 G but less than 2 G''.

Section 2D1.1(c)(12) is amended by striking ''at least 1 G but less than 2 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 500 MG but less than 1 G''; and by striking ''at least 1 G but less than 2 G'' before ''of 'Ice' '' and inserting ''at least 500 MG but less than 1 G''.

Section 2D1.1(c)(13) is amended by striking ''at least 500 MG but less than 1 G'' before ''of Methamphetamine (actual)'' and inserting ''at least 250 MG but less than 500 MG''; and by striking ''at least 500 MG but less than 1 G'' before ''of 'Ice' '' and inserting ''at least 250 MG but less than 500 MG''.

Section 2D1.1(c)(14) is amended by striking ''less than 500 MG'' before ''of Methamphetamine (actual)'' and inserting ''less than 250 MG''; and by striking ''less than 500 MG'' before ''of 'Ice' '' and inserting ''less than 250 MG''.

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

Reason for Amendment: This amendment responds to statutory changes to the quantity of methamphetamine substance triggering mandatory minimum penalties, as prescribed in the Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105–277 (the ''Act''). This amendment conforms methamphetamine (actual) penalties, as specified in the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), to the more stringent mandatory minimums established by the Act. In taking this action, the Commission follows the approach set forth in the original guidelines for the other principal controlled substances for which mandatory minimum penalties have been established by Congress. No change was made in the guideline penalties for methamphetamine mixture offenses because those penalties already corresponded to the mandatory minimum penalties as amended by the Act. *See* USSC *Guidelines Manual* Appendix C, Amendment 555, effective November 1, 1997.

At the same time that it proposed this amendment, the Commission also had invited comment on whether it should increase penalties for offenses relating to Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine, or amend the Chemical Quantity Table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical), relating to any chemical referenced in that table that is used to manufacture methamphetamine. However, in light of the Methamphetamine Anti-Proliferation Act of 1999, passed by the Senate Judiciary Committee on August 5, 1999, and similar pending House legislation,

the Commission has decided to defer action on these issues.

5. *Amendment:* Sections 2B5.1, 2F1.1, and 3A1.1, effective November 1, 1998 (*see* USSC *Guidelines Manual* Appendix C Supplement, Amendment 587), are repromulgated without change.

Reason for Amendment: This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 (''the Act'').

The Act directs the Commission to provide for ''substantially increased penalties'' for telemarketing frauds. It also more specifically requires that the guidelines provide ''an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States,'' and ''an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to (telemarketing fraud victims over age 55), are affected by a fraudulent scheme or schemes.''

This amendment responds to the directives by building upon the amendments to the fraud guideline, § 2F1.1 (Fraud and Deceit), that were submitted to Congress on May 1, 1998. (*See* USSC Guidelines Manual Appendix C Supplement, Amendment 577.) Those amendments added a specific offense characteristic for ''mass-marketing,'' which is defined to include telemarketing, and a specific offense characteristic for sophisticated concealment.

This amendment broadens the ''sophisticated concealment'' enhancement to cover ''sophisticated means'' of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under § 3A1.1 (Hate Crime Motivation or Vulnerable Victim), for offenses that impact a large number of vulnerable victims.

This amendment also makes a conforming amendment to § 2B5.1 in the definition of ''United States''.

In designing enhancements that may apply more broadly than the Act's above-stated directives minimally require, the Commission acts consistently with other directives in the Act (*e.g.*, section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (*e.g.*, 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)).

Pursuant to the emergency amendment authority of the Act, this amendment previously was promulgated as a temporary measure effective November 1, 1998. (*See* USSC *Guidelines Manual* Appendix C Supplement, Amendment 587.)

6. *Amendment:* The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 4 in its entirety; by redesignating Notes 5 through 16 as Notes 4 through 15, respectively; and in Note 2 by striking the second paragraph in its entirety and inserting the following:

''If the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan, a counterfeit access device, or an unauthorized access device, the loss is to be determined in accordance with the Commentary to § 2F1.1 (Fraud and Deceit). For example, in accordance with Application Note 17 of the Commentary to § 2F1.1, in a case involving an unauthorized access device (such as a stolen credit card), loss includes any unauthorized charge(s) made with the access device. In such a case, the loss shall be not less than $500 per unauthorized access device. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in 18 U.S.C. 1029(e)(2) and (e)(3), respectively.''.

Section 2F1.1, as amended by Amendment 5 of this document, is further amended by redesignating subsections (b)(5) through (b)(7) as subsections (b)(6) through (b)(8), respectively; and by inserting after subsection (b)(4) the following:

''(5) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended in Note 12 in the first sentence by striking ''fraudulent identification documents and'' by striking the second sentence in its entirety; in the third sentence, by striking ''the case of an offense involving false identification documents or access devices,'' and inserting ''such a case,'' and by adding at the end the following paragraph:

''Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than § 2F1.1.''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended by redesignating Notes 15 through 20 as Notes 18 through 23, respectively; and by inserting after Note 14 the following:

''15. For purposes of subsection (b)(5)—

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

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

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

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

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

16. Subsection (b)(5)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

Examples of conduct to which this subsection should apply are as follows:

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

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

Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:

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

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

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

In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

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

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

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

17. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in Application Note 15.''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended in redesignated Note 18 (formerly Note 15) by striking ''(b)(5)'' each place it appears and inserting ''(b)(6)''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended in redesignated Note 21 (formerly Note 18), by striking ''(b)(7)'' and inserting ''(b)(8)''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended by striking redesignated Note 23 (formerly Note 20), in its entirety and inserting the following:

''23. If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).''.

The Commentary to § 2F1.1 captioned ''Background'', as amended by Amendment 5 of this document, is further amended by striking the sixth paragraph and all that follows through the end of the ''Background'' and inserting the following:

''Subsections (b)(5)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(5)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

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

Subsection (b)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101–647.

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

Reason for Amendment: This is a five-part amendment. First, this amendment provides a two-level increase and a minimum offense level of level 12 for offenses involving (1) the possession or use of equipment that is used to manufacture access devices; (2) the production of, or trafficking in, unauthorized and counterfeit access devices, such as stolen credit cards and cloned wireless telephones; or (3) affirmative identity theft (*i.e.,* unlawfully producing from any means of identification any other means of identification). Affirmative identity theft, referred to in the research and analysis conducted by the Commission as the ''breeding'' of identification means, will result in an enhanced penalty in any case in which there is a transfer or use of another person's means of identification unlawfully to produce or ''breed'' additional means of identification, or in which there is the possession of five or more means of identification that were unlawfully produced.

Second, this amendment provides a rebuttable presumption that the offense involved more than minimal planning, and it contains a rule to avoid ''double counting'' between the existing enhancement for ''sophisticated means'' based on the same conduct.

Third, the amendment provides a revised minimum loss rule for offenses involving counterfeit or unauthorized access devices. Specifically, this rule requires that a minimum loss amount of $500 per access device be used when calculating the loss involved in the offense. However, for offenses that involve only the possession, and not the use, of a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (*e.g.,* an ESN/MIN pair used to obtain telecommunications service in a wireless telephone), the rule provides a minimum loss amount of $100 per unused means.

Fourth, this amendment provides an encouraged upward departure if the offense level does not adequately reflect the seriousness of the offense conduct. Examples of cases in which a departure may be warranted include those in which (1) an identity theft caused substantial harm to the victim's reputation or credit record; (2) an individual is arrested, or is denied a job, because of a misidentification that results from an identity theft; or (3) a defendant essentially assumed the victim's identity.

Fifth, this amendment incorporates the statutory definitions of 18 U.S.C. 1028 and 1029, although it also broadens the definitions of ''counterfeit access device'' and ''device-making equipment'' for guideline purposes.

This amendment responds to the directives to the Commission contained in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105–318(b)(1) (''ITADA'') and section 2 of the Wireless Telephone Protection Act, Pub. L. 105–172 (''WTPA''). For the reasons discussed below and because of the overlap in some of the statutory definitions in the ITADA and the WTPA (particularly ''access device,'' ''telecommunication identifying information,'' and ''means of identification''), enhancements have been consolidated into a single guideline amendment.

The ITADA and the WTPA directed the Commission to ''review and amend the Federal sentencing guidelines and the policy statements of the Commission'' to provide appropriate punishment for identity theft offenses under 18 U.S.C. 1028 and for offenses under 18 U.S.C. 1029 related to the cloning of wireless telephones.

The WTPA directed the Commission to review, among other factors, ''the range of conduct covered by'' cloning offenses. Although cloned telephones may be possessed and used in connection with a variety of offenses, the Commission determined that the possession or use of a cloned phone does not necessarily increase the seriousness of the underlying offense. However, the Commission decided that offenders who manufacture or distribute cloned telephones are more culpable than offenders who only possess them. Accordingly, the new enhancements at § 2F1.1(b)(5)(A) and (B) recognize that such offenders warrant greater punishment. However, to ensure that the guidelines apply consistently to similarly serious conduct regardless of the technology employed, this amendment provides for a broader enhancement that applies to the manufacture or distribution of any access device, including a cloned telephone.

The ITADA directed the Commission to assess certain specific factors in its consideration of appropriate penalties for identity theft, including: the number of victims; the harm to a victim's reputation and inconvenience caused by the offense; the number of means of identification, identification documents, or false identification documents involved in the offense; the range of offense conduct; and, the adequacy of the value of loss to an individual victim as a measure for establishing penalties.

In conducting research pursuant to the ITADA, the Commission learned that identity theft, as defined broadly under the new statutory provisions at 18 U.S.C. 1028(a)(7) and 1028(d)(3), occurs along a continuum of offense conduct. The most basic type of identity theft occurs when a thief steals a wallet and uses a stolen credit card to make a purchase or forges a signature to cash a stolen check. However, after analyzing the legislative history of the ITADA and Commission data, the Commission determined that the more aggravated and sophisticated forms of identity theft, about which Congress seemed particularly concerned, should be the focus of enhanced punishment under the guidelines. Such offense conduct, which generally occurs within the context of financial and credit account take-overs, involves affirmative activity to generate or ''breed'' another level of identification means without the knowledge of the individual victim whose identification means are misused, purloined, or ''taken over''. This activity is considered more sophisticated because of the additional steps the perpetrator takes to ''breed'' additional means of identification in order to conceal and continue the fraudulent conduct. Such sophisticated conduct makes detection by both the individual and institutional victims much more difficult. It also has the potential to increase harm, both monetary and non-monetary, to the individual victims (about whom Congress was particularly concerned in enacting the ITADA), and can result in substantial disruption of record-keeping by governmental agencies and private financial institutions upon which the stream of commerce depends. Thus, the Commission determined that this aggravated offense conduct, in contrast to the most basic forms of identity theft, merits enhanced punishment.

Accordingly, amended section § 2F1.1(b)(5)(C) recognizes that the conduct of generating or ''breeding'' identification means warrants substantial additional penalties. The minimum offense level of level 12 accounts for the fact that the defendant in an identity theft case typically has exclusive control over the ''bred'' means of identification, making it difficult for the individual victim to detect that the victim's identity has been stolen until substantial harms (*e.g.,* a damaged credit rating) have occurred. The minimum offense level also accounts for the non-monetary harms associated with identity theft (*e.g.,* harm to reputation or credit rating), which typically are

difficult to quantify. However, for cases in which the nature and scope of the harm to an individual victim is so egregious that the two-level enhancement and minimum offense level provide insufficient punishment, the amendment invites an upward departure.

The WTPA directed the Commission to review ''the extent to which the value of the loss caused by the offenses * * * is an adequate measure for establishing penalties. * * *'' The amendment provides a minimum loss rule in § 2F1.1 that extends to all access devices, not just to cloned wireless telephones. In so doing, similar fraud cases will be treated similarly regardless of the technology or type of access device used in the offense. Additionally, the Commission's research and data supported increasing the minimum loss amount, previously provided only in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), from $100 to $500 per access device. However, the data were insufficient to support using this increased amount in cases that involve only the possession, and not the use, of means of telecommunications access that identify a specific telecommunications instrument or account (*e.g.,* ESN/MIN pairs of wireless telephones). (An example of such a case is a defendant who possesses a list of ESN/MIN pairs but has not used any of those pairs to clone wireless telephones.) For such cases, the Commission decided that the minimum loss amount should be $100 per unused means.

7. *Amendment:* Section 2F1.1(b), as amended by Amendment 5 of this document, is further amended in subdivision (4) by striking ''; or'' after ''agency'' and inserting a semicolon; by inserting ''a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a'' after ''(B)''; and by inserting ''prior, specific'' before ''judicial''.

The Commentary to § 2F1.1 captioned ''Application Notes'', as amended by Amendment 5 of this document, is further amended by striking Note 6 in its entirety and inserting the following:

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

If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.''.

The Commentary to § 2F1.1 captioned ''Background'', as amended by Amendment 5 of this document, is further amended by striking the fourth sentence of the fourth paragraph and inserting the following:

''The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.''.

Reason for Amendment: The amendment was prompted by the circuit conflict regarding whether the enhancement in § 2F1.1 (Fraud and Deceit) for ''violation of any judicial or administrative order, injunction, decree, or process'' applies to false statements made during bankruptcy proceedings. *Compare United States* v. *Saacks,* 131 F.3d 540 (5th Cir. 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of the enhancement; *United States* v. *Michalek,* 54 F.3d 325 (7th Cir. 1995) (bankruptcy fraud is a ''special procedure''; it is a violation of a specific adjudicatory process); *United States* v. *Lloyd,* 947 F.2d 339 (8th Cir. 1991) (knowing concealment of assets in bankruptcy fraud violates ''judicial process''); *United States* v. *Welch,* 103 F.3d 906 (9th Cir. 1996) (same); *United States* v. *Messner,* 107 F.3d 1448 (10th Cir. 1997) (same); *United States* v. *Bellew,* 35 F.3d 518 (11th Cir. 1994) (knowing concealment of assets during bankruptcy proceedings qualifies as a violation of a ''judicial order''), with *United States* v. *Shadduck,* 112 F.3d 523 (1st Cir. 1997) (falsely filling out bankruptcy forms does not violate judicial process since the debtor is not accorded a position of trust). *See also United States* v. *Carrozella,* 105 F. 3d 796 (2d Cir. 1997) (district court erred in enhancing the sentence for violation of judicial process in the case of a defendant who filed false accounts in probate court).

The majority of circuits have held that the current enhancement applies to a defendant who conceals assets in a bankruptcy case because the conduct violates a judicial order or violates judicial process. Commission data indicate that, in fiscal year 1998, 41 defendants received an increase for either ''violation of a judicial order * * * or misrepresentation of a charitable organization.'' The data did not distinguish between the two parts of the enhancement.

This amendment creates a separate and distinct basis for a two-level enhancement under the fraud guideline for a misrepresentation or false statement made in the course of a bankruptcy proceeding. Additionally, the existing enhancement and its accompanying commentary are modified to make clear that, in order for the enhancement to apply in a fraud case not involving a bankruptcy proceeding, there must be a false statement in violation of a specific, prior order. Therefore, any case involving a bankruptcy fraud will result in a two-level enhancement, but in the case of a non-bankruptcy fraud, the enhancement will apply only if a defendant was given prior notice of a particular action. The Commission has decided to treat bankruptcy fraud more severely because of its adverse impact on the bankruptcy judicial process and because of the additional harm and seriousness involved in such conduct. *See United States* v. *Saacks,* 131 F.3d 540, 543 (5th Cir. 1997) (noting that bankruptcy fraud is more serious than ''the most pedestrian federal fraud offense'').

8. *Amendment:* Section 2K2.4 is amended by striking subsection (a) in its entirety and inserting the following:

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

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

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

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.,* not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. 924(c) or 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. 844(h), 924(c), and 929(a) requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

A sentence above the minimum term required by 18 U.S.C. 924(c) or 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. 924(c) or 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of § 4B1.1 (Career Offender) if that guideline applied to these offenses. *See* Application Note 3.''.

The Commentary to § 2K2.4 captioned ''Background'' is amended by striking the first sentence in its entirety and inserting the following:

''Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment.''.

The Commentary to § 3D1.1 captioned ''Application Note'' is amended in Note 1 in the second sentence by striking ''mandatory term of five years'' and inserting ''mandatory minimum terms of imprisonment, based on the conduct involved,''; and in the seventh sentence by inserting ''minimum'' after ''mandatory''.

The Commentary to § 5G1.2 is amended in the second sentence of the last paragraph by striking ''mandatory term of five years'' and inserting ''mandatory minimum terms of imprisonment, based on the conduct involved,''.

Reason for Amendment: This amendment revises § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to (1) clarify how the minimum, consecutive terms of imprisonment mandated by the statutes indexed to this guideline should be treated for purposes of guideline application; and (2) specify guideline sentences, for all statutes indexed to § 2K2.4, that comply with the Commission's mandate in 28 U.S.C. 994(b)(2) (requiring guideline sentencing ranges in which the maximum shall not exceed the minimum by more than the greater of 25 percent or six months). The Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, changed the penalty provisions in 18 U.S.C. 924(c) from fixed terms of years to ranges of ''not less than'' various terms of years. This effectively establishes mandatory minimum terms of imprisonment with implicit maximum terms of life. Section 929(a) of title 18, United States Code, contains similar provisions. Section 2K2.4 continues to provide that, in both cases, the term of imprisonment imposed under the statute should be determined independently of the usual guideline application rules and the sentence imposed should run consecutively to any other term of imprisonment. *See* § 5G1.2(a). However, § 2K2.4 previously stated that the term of imprisonment was that ''required by statute.'' Because two of the statutes indexed to the guideline now provide for terms of a range of years, questions arose as to whether any sentence within the statutorily authorized range complied with the guidelines.

The amendment clarifies that the guideline sentence is the minimum term required by the statute of conviction, that a term greater than this minimum is an upward departure and should be imposed using the normal standards and procedures that apply to departures from the guideline range, and that such upward departures are invited under certain circumstances. *See* 18 U.S.C. 3553(b). For example, career offenders who are convicted both of an offense under 18 U.S.C. 924(c) and of an underlying crime of violence or drug trafficking typically will receive lengthy guideline sentences. This amendment modifies Application Note 1 of § 2K2.4 to encourage an upward departure in the unusual circumstance in which an offender is convicted only of 18 U.S.C. 924(c) and would have qualified as a career offender if that guideline applied to such convictions, or in other unusual circumstances in which the sentence in a particular case does not adequately reflect the seriousness of the defendant's criminal history. Because 18 U.S.C. 844(h) still provides for fixed terms of imprisonment, the amendment differentiates it from the two statutes that provide for terms of a range of years.

The amendment also contains technical and conforming changes: §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction) are revised to reflect a change to the penalty provision of 18 U.S.C. 924(c).

9. *Amendment:* The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 2 by striking the first paragraph in its entirety and inserting the following:

''If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(5) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct

covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), 924(c) or 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(5) would not apply.''.

The Commentary to § 2K2.4 captioned ''Application Notes'', as amended by Amendment 10 of this document, is further amended in Note 5 (formerly Note 4) in the third sentence by inserting ''brandishing,'' after ''possession,''.

The Commentary to § 2K2.4 captioned ''Background'' is amended in the second sentence by inserting ''brandishing,'' after ''use,''.

Reason for Amendment: This amendment expands the commentary in Application Note 2 of § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to clarify under what circumstances defendants sentenced for violations of 18 U.S.C. 924(c) in conjunction with convictions for other offenses may receive weapon enhancements contained in the guidelines for those other offenses. The amendment directs that no guideline weapon enhancement should be applied when determining the sentence for the crime of violence or drug trafficking offense underlying the 18 U.S.C. 924(c) conviction, nor for any conduct with respect to that offense for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Guideline weapon enhancements may be applied, however, when determining the sentence for counts of conviction outside the scope of relevant conduct for the underlying offense (*e.g.,* a conviction for a second armed bank robbery for which no 18 U.S.C. 924(c) conviction was obtained).

For similar reasons, this amendment also expands the application note to clarify that offenders who receive a sentence under § 2K2.4 should not receive enhancements under § 2K1.3(b)(3) (pertaining to explosive material connected with another offense), or § 2K2.1(b)(5) (pertaining to firearms or ammunition possessed, used, or transferred in connection with another offense) with respect to any weapon, ammunition, or explosive connected to the offense underlying the count of conviction sentenced under § 2K2.4.

The purposes of this amendment are to (1) avoid unwarranted disparity and duplicative punishment; and (2) conform application of guideline weapon enhancements with general guideline principles. The relevant application note to § 2K2.4 previously stated that if a sentence was imposed under § 2K2.4 in conjunction with a sentence for ''an underlying offense,'' no weapon enhancement should be applied with respect to the guideline for the underlying offense. Some courts interpreted ''underlying offense'' narrowly to mean only the ''crime of violence'' or ''drug trafficking offense'' that forms the basis for the 18 U.S.C. § 924(c) conviction. *See, e.g., United States* v. *Flennory,* 145 F.3d 1264, 1268–69 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 1130 (1999). *But see United States* v. *Smith,* 196 F.3d 676, 679–82 (6th Cir. 1999) (a conviction under 18 U.S.C. 922(g) qualifies as an ''underlying offense,'' and thus, application of the enhancement in § 2K2.1(b)(5) was impermissible double-counting). In other cases, offenders have received both the mandated statutory penalty and a guideline weapon enhancement in circumstances in which the guidelines generally would require a single weapon enhancement. *See United States* v. *Gonzalez,* 183 F.3d 1315, 1325–26 (11th Cir.), *cert. denied,* 120 S.Ct. 996 (2000) (both statutory and guideline increases may be imposed if defendant and accomplice used different weapons as part of a joint undertaking); *United States* v. *Willett,* 90 F.3d 404, 407–08 (9th Cir. 1996) (not double counting to apply both increases for separate weapons possessed by defendant). *But see United States* v. *Knobloch,* 131 F.3d 366, 372 (3d Cir. 1996) (error to apply guideline enhancement in addition to statutory penalty ''even if the section 924(c)(1) sentence is for a different weapon than the weapon upon which the enhancement is predicated.'').

The amendment clarifies application of the commentary, consistent with the definition of ''offense'' found in § 1B1.1 (Application Note 1(l)) and with general guideline principles. It addresses disparate application arising from conflicting interpretations of the current guideline in different courts, and is intended to avoid the duplicative punishment that results when sentences are increased under both the statutes and the guidelines for substantially the same harm.

Finally, Application Notes 2 and 4 and the Background Commentary of § 2K2.4 are revised to reflect changes to 18 U.S.C. 924(c), made by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, with respect to ''brandishing'' a firearm.

10. *Amendment:* The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively; and by inserting after Note 2 the following:

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

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''Possessing a firearm during and in relation to a crime of violence'' and all that follows through the end of the first sentence and inserting the following:

''A prior conviction for violating 18 U.S.C. 924(c) or 929(a) is a 'prior felony conviction'' for purposes of applying § 4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a ''crime of violence'' or ''controlled substance offense.'''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively; and by inserting after Note 1 the following:

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

Reason for Amendment: This amendment revises §§ 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify guideline application for offenders convicted under 18 U.S.C. 924(c) and 929(a) who might also qualify as career offenders under the rules and definitions provided in §§ 4B1.1 (Career Offender) and 4B1.2. Pending further study, the Commission

has deferred a decision on whether any or all convictions for violations of 18 U.S.C. 924(c) should be considered ''instant offenses'' for purposes of the career offender guideline. This amendment preserves the *status quo* as it existed prior to the statutory changes to 18 U.S.C. 924(c), made by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, that established a statutory maximum of life for all violations of the statute.

This amendment adds a new Application Note 3 to § 2K2.4 directing courts not to apply Chapter Three (Adjustments) or Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under § 2K2.4. This effectively prohibits the use of 18 U.S.C. § 924(c) convictions either to trigger application of the career offender guideline, § 4B1.1, or to determine the appropriate offense level under that guideline. Application Note 1 of § 4B1.2 also is amended to clarify, however, that prior convictions for violating 18 U.S.C. 924(c) will continue to qualify as ''prior felony convictions'' under the career offender guideline in most circumstances.

11. *Amendment:* The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(c) by striking ''that the weapon was pointed or waved about, or displayed in a threatening manner.'' and inserting the following:

''that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.''.

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

''(d) 'Dangerous weapon' means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).''.

Section 2A3.1(b)(1) is amended by striking ''(including, but not limited to, the use or display of any dangerous weapon)''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''where any dangerous weapon was used,'' and inserting ''if any dangerous weapon was used or''; and by striking '', or displayed to intimidate the victim''.

Section 2B3.1(b)(2) is amended by striking ''displayed,'' each place it appears.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended by striking Note 2 in its entirety and inserting the following:

''2. Consistent with Application Note 1(d)(ii) of § 1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (*e.g.,* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).''.

Section 2B3.2(b)(3) is amended by striking ''displayed,'' each place it appears.

Section 2E2.1(b)(1)(C) is amended by striking '', displayed''.

Reason for Amendment: This amendment conforms the guideline definition of ''brandish'' found at Application Note 1(c) of § 1B1.1 (Application Instructions) to a statutory definition, which was added by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, and is codified at 18 U.S.C. 924(c)(4). The purposes of this amendment are to (1) avoid confusion that can be caused by different guideline and statutory definitions of identical terms; and (2) increase punishment in some circumstances for persons who ''make the presence of the weapon known to another person, in order to intimidate that person,'' regardless of whether the weapon is visible. As was the case prior to this amendment, the guideline definition of ''brandish'' applies to all dangerous weapons and not only to firearms.

The definition of ''dangerous weapon'' in Application Note 1(d) of § 1B1.1 also is amended to clarify under what circumstances an object that is not an actual, dangerous weapon should be treated as one for purposes of guideline application. The amendment is in accord with the decisions in *United States* v. *Shores,* 966 F.2d 1383 (11th Cir. 1992) (toy gun carried but never used by a defendant qualifies as a dangerous weapon because of its potential, if it were used, to arouse fear in victims and dangerous reactions by police or security personnel) and *United States* v. *Dixon,* 982 F.2d 116 (3rd Cir. 1992) (hand wrapped in a towel qualifies as a dangerous weapon if the defendant's actions created the impression that the defendant possessed a dangerous weapon).

The amendment also deletes the term ''displayed'' wherever it appears in the *Guidelines Manual* in an enhancement with ''brandished.'' Because ''brandished'' applies in any case in which ''all or part of the weapon was displayed,'' the Commission determined the inclusion of ''displayed'' in these enhancements is redundant. This part of the amendment is not intended to make a substantive change in the guidelines.

12. *Amendment:* Chapter One, Part A, Subpart 4(b) is amended in the fifth sentence of the first paragraph by striking ''and'' before ''the last''; and by inserting '',and § 5K2.19 (Post-Sentencing Rehabilitative Efforts)'' after ''(Coercion and Duress)''.

Chapter Five, Part K, Subpart 2, is amended by inserting at the end the following:

''§ 5K2.19. *Post-Sentencing Rehabilitative Efforts* (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo.*''.

Reason for Amendment: This amendment was prompted by the circuit conflict regarding whether sentencing courts may consider an offender's post-offense rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. *Compare United States* v. *Rhodes,* 145 F.3d 1375, 1379 (D.C. Cir. 1998) (post-conviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may

consider it as a possible ground for downward departure at resentencing); *United States* v. *Bradstreet,* 207 F.3d 76 (1st Cir. 2000); *United States* v. *Core,* 125 F.3d 74, 75 (2d Cir. 1997) (''We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.'') *cert. denied,* 118 S. Ct. 735 (1998); *United States* v. *Sally,* 116 F.3d 76, 80 (3d Cir. 1997) (holding that ''post-offense rehabilitations efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure''); *United States* v. *Rudolph,* 190 F.3d 720, 723 (6th Cir. 1999); *United States* v. *Green,* 152 F.3d 1202, 1207 (9th Cir. 1998) (*same*), *with United States* v. *Sims,* 174 F.3d 911 (8th Cir. 1999) (district court lacks authority at resentencing following an appeal to depart on ground of post-conviction rehabilitation which occurred after the original sentencing; refuses to extend holding regarding departures for post-offense rehabilitation to conduct that occurs in prison; departure based on post-conviction conduct infringes on statutory authority of the Bureau of Prisons to grant good-time credits). In *Sims,* the Eighth Circuit concluded that a rule allowing a departure at resentencing based on post-sentencing rehabilitation would result in unwarranted disparity because resentencing would be a fortuitous event benefitting only some defendants; would reinstate a parole-like system; and would interfere with the authority of the Bureau of Prisons to award good-time credits. *See Sims,* 174 F.3d at 912–13; *Rhodes,* 145 F.3d at 1384 (Silberman, J., dissenting).

The Commission determined that post-sentencing rehabilitative efforts should not provide a basis for a downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with policies established by Congress under the Sentencing Reform Act, including the provisions of 18 U.S.C. 3624(b) for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those few who gain the opportunity to be resentenced *de novo,* while others, whose rehabilitative efforts may have been more substantial, could not benefit simply because they chose not to appeal or appealed unsuccessfully. Additionally, prohibition on downward departure for post-sentencing rehabilitative efforts is consistent with Commission policies expressed in § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). This amendment does not restrict departures based on extraordinary post-offense rehabilitative efforts prior to sentencing. Such departures have been allowed by every circuit that has ruled on the matter post-*Koon. See e.g., United States* v. *Brock,* 108 F.3d 31 (4th Cir. 1997).

13. *Amendment:* Chapter One, Part A, Subpart 4(d) is amended by adding an asterisk at the end of the last paragraph after the period; and by adding at the end the following footnote:

''***Note:** Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the *Guidelines Manual* originally was written, it subsequently addressed the issue in Amendment 603 [this amendment], effective November 1, 2000. (*See* Supplement to Appendix C, Amendment 603.)''.

Chapter Five, Part K, Subpart 2, as amended by Amendment 12 of this document, is further amended by adding at the end the following:

''§ 5K2.20. Aberrant Behavior (Policy Statement)

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

Commentary

Application Notes:

1. For purposes of this policy statement—

'Aberrant behavior' means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.

'Dangerous weapon,' 'firearm,' 'otherwise used,' and 'serious bodily injury' have the meaning given those terms in the Commentary to § 1B1.1(Application Instructions).

'Serious drug trafficking offense' means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under § 5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

2. In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.''.

Reason for Amendment: This amendment responds to a circuit conflict regarding whether, for purposes of downward departure from the guideline range, a ''single act of aberrant behavior'' (Chapter One, Part A, Subpart 4(d)) includes multiple acts occurring over a period of time. *Compare United States* v. *Grandmaison,* 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word ''single'' to refer to the crime committed; therefore, ''single acts of aberrant behavior'' include multiple acts leading up to the commission of the crime; the district court should review the totality of circumstances); *Zecevic* v. *United States Parole Commission,* 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances); *United States* v. *Takai,* 941 F.2d 738 (9th Cir. 1991) (''single act'' refers to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime); *United States* v. *Pena,* 930 F.2d 1486 (10th Cir. 1991) (aberrational nature of the defendant's conduct and other circumstances justified departure), *with United States* v. *Marcello,* 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); *United States* v. *Glick,* 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not ''single act of aberrant behavior''); *United States* v. *Williams,* 974 F.2d 25 (5th Cir. 1992) (a single act of aberrant behavior is generally spontaneous or thoughtless); *United States* v. *Carey,* 895 F.2d 318 (7th Cir. 1990) (single act of aberrant behavior contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning); *United States* v. *Garlich,* 951 F.2d 161 (8th Cir. 1991)

(fraud spanning one year and several transactions was not a ''single act of aberrant behavior''); *United States* v. *Withrow,* 85 F.3d 527 (11th Cir. 1996) (a single act of aberrant behavior is not established unless the defendant is a first-time offender and the crime was a thoughtless act rather than one that was the result of substantial planning); *United States* v. *Dyce,* 78 F.3d 610 (D.C. Cir.), *amd. on reh.* 91 F.3d 1462 (D.C. Cir. 1996) (*same*).

This amendment addresses the circuit conflict but does not adopt *in toto* either the majority or minority circuit view on this issue. As a threshold matter, this amendment provides that the departure is available only in an extraordinary case. However, the amendment defines and describes ''aberrant behavior'' more flexibly than the interpretation of existing guideline language followed by the majority of circuits that have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless. The Commission concluded that this application of the current language in Chapter One is overly restrictive and may preclude departures for aberrant behavior in circumstances in which such a departure might be warranted. For this reason, the Commission attempted to slightly relax the ''single act'' rule in some respects, and provide guidance and limitations regarding what can be considered aberrant behavior. At the same time, the Commission also chose not to adopt the ''totality of circumstances'' approach endorsed by the minority of circuits, concluding that the latter approach is overly broad and vague. The Commission anticipates that this compromise amendment will not broadly expand departures for aberrant behavior.

The amendment creates a new policy statement and accompanying commentary in Chapter Five, Part K (Departures) that sets forth the parameters of conduct and criminal history that the Commission believes appropriately may warrant departure as ''aberrant behavior.'' The policy statement provides, in pertinent part, that '' 'aberrant behavior' means a single criminal occurrence or single criminal transaction.'' The Commission intends that the phrases ''single criminal occurrence'' and ''single criminal transaction'' will be somewhat broader than ''single act'', but will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life. For offense conduct to be considered for departure as aberrant behavior, the offense conduct must, at a minimum, have these characteristics. The Commission chose these characteristics after reviewing case law and public comment that indicated some support for the appropriateness of these factors.

The policy statement places significant restrictions on the type of offense and the criminal history of the offender that can be considered for this departure. The restrictions on the type of offense that can qualify reflect a Commission concern that certain offense conduct is so serious that a departure premised on a finding of aberrant behavior should not be available to those offenders who engage in such conduct. Similarly, the restrictions on criminal history reflect a Commission view that defendants with significant prior criminal records should not qualify for a departure premised on the aberrant nature of their current conduct.

The Commission recognizes that a number of other factors may have some relevance in evaluating the appropriateness of a departure based on aberrant behavior. Some of the relevant factors identified in the case law and public comment are listed in an application note.

14. *Amendment:* The Commentary to § 1B1.4 captioned ''Background'' is amended by striking:

''. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.'',

and inserting:

''in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for sentencing above the guideline range.''.

Chapter Five, Part K, Subpart 2, as amended by Amendment 13 of this document, is further amended by adding at the end the following:

''§ 5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.''.

Section 6B1.2(a) is amended in the second paragraph by striking ''Provided, that'' and inserting ''However,''.

The Commentary to § 6B1.2 is amended in the fourth paragraph by adding at the end the following:

''Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.''.

Reason for Amendment: This amendment addresses the circuit conflict regarding whether a court can base an upward departure on conduct that was dismissed or not charged as part of a plea agreement in the case. According to the majority of circuits, the sentencing court, in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, may consider without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* § 1B1.4 (Information to be Used in Imposing Sentence) and 18 U.S.C. 3661. These courts hold that § 6B1.2 (Standards for Acceptance of Plea Agreements) does not prohibit a court from considering conduct underlying counts dismissed pursuant to a plea agreement. The minority circuit view holds that a departure based on conduct uncharged or dismissed in the context of a plea agreement is inappropriate. Courts holding the minority view emphasize the need to protect the expectations of the parties to the plea agreement. *Compare United States* v. *Figaro,* 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); *United States* v. *Kim,* 896 F.2d 678 (2d Cir. 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); *United States* v. *Baird,* 109 F.3d 856 (3d Cir.), *cert. denied,* 118 S. Ct. 243 (1997) (allowing upward

departure based on dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct) (citing *United States* v. *Watts,* 519 U.S. 148 (1997)); *United States* v. *Barber,* 119 F.2d 276, 283–84 (4th Cir. 1997) (*en banc*); *United States* v. *Cross,* 121 F.3d 234 (6th Cir. 1997) (allowing upward departure based on dismissed conduct) (citing *Watts*); *United States* v. *Ashburn,* 38 F.3d 803 (5th Cir. 1994) (allowing upward departure based on dismissed conduct); *United States* v. *Big Medicine,* 73 F.3d 994 (10th Cir. 1995) (allowing departure based on uncharged conduct), *with United States* v. *Ruffin,* 997 F.2d 343 (7th Cir. 1993) (error to depart based on counts dismissed as part of plea agreement); *United States* v. *Harris,* 70 F.3d 1001 (8th Cir. 1995) (*same*); *United States* v. *Lawton,* 193 F.3d 1087 (9th Cir. 1999) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing).

This amendment allows courts to consider for upward departure purposes aggravating conduct that is dismissed or not charged in connection with a plea agreement. This approach is consistent with the principles that underlie § 1B1.4 and 18 U.S.C. 3661 and preserves flexibility for the sentencing judge to impose an appropriate sentence within the context of a charge-reduction plea agreement.

15. *Amendment:* Section 2B5.1(b)(2) is amended by inserting ''level'' after ''increase to''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by striking ''Under subsection (b)(5), the enhancement'' and inserting ''Subsection (b)(5)''; by striking ''under this subsection'' and inserting ''under subsection (b)(5)''; by striking ''§ 5B1.3'' and inserting ''§§ 5B1.3''; and by striking ''§ '' before ''5D1.3''.

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

''(3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.''.

Section 2D1.11(d) is amended in subdivision (9) by striking ''At least 1.44 G but less than 1.92 KG of Isosafrole;'' and inserting ''At least 1.44 KG but less than 1.92 KG of Isosafrole;''; and by striking ''At least 1.44 G but less than 1.92 KG of Safrole;'' and inserting ''At least 1.44 KG but less than 1.92 KG of Safrole;''.

Section 2D1.11(d) is amended in subdivision (10) by striking ''Less than 1.44 G'' before ''of Isosafrole;'' and inserting ''Less than 1.44 KG''; and by striking ''Less than 1.44 G'' before ''of Safrole;'' and inserting ''Less than 1.44 KG''.

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

''8. Subsection (b)(3) applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).''.

Section 2D1.12(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by adding at the end the following:

''(2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.''.

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

''3. Subsection (b)(2) applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 5124, 9603(b). In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).''.

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by striking ''(e), (f), (g), (h), (j)–(n)'' and inserting ''(e)–(i), (k)–(o)''.

Section 5B1.3(a) is amended by striking the asterisk after ''Conditions''; in subdivision (8) by striking the period after ''§ 3563(a))'' and inserting a semi-colon; and by adding at the end the following:

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

Section 5B1.3 is amended by striking the footnote at the end in its entirety as follows:

''***Note:** Effective one year after November 26, 1997, section 3563(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of probation:

(9) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.''.

Section 5D1.3(a) is amended by striking the asterisk after ''Conditions''; in subdivision (6) by striking the period after ''§ 3013'' and inserting a semi-colon; and by adding at the end the following:

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

Section 5D1.3 is amended by striking the footnote at the end in its entirety as follows:

''***Note:** Effective one year after November 26, 1997, section 3583(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of supervised release:

(7) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.''.

Reason for Amendment: This five-part amendment makes various technical and conforming changes.

First, the amendment corrects a typographical error in § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) by inserting a missing word in subsection (b)(2).

Second, the amendment corrects a typographical error in the Chemical Quantity Table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) regarding certain quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms.

Third, the amendment corrects an omission that was made during prior, final deliberations by the Commission on amendments to implement the Comprehensive Methamphetamine Control Act of 1996 (the ''Act''), Pub. L. 104–237. Specifically, the proposal amends §§ 2D1.11 and 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment) to add an enhancement for environmental damage associated with methamphetamine offenses. The Commission previously had intended to amend these guidelines in this manner, but due to a technical oversight, the final amendment did not implement that intent.

The Act directed the Commission to determine whether the guidelines adequately punish environmental violations occurring in connection with precursor chemical offenses under 21 U.S.C. 841(d) and (g) (sentenced under § 2D1.11), and manufacturing equipment offenses under 21 U.S.C. 843(a)(6) and (7) (sentenced under § 2D1.12). On February 25, 1997, the Commission published two options to provide an increase for environmental damage associated with the manufacture of methamphetamine, the first by a specific offense characteristic, the second by an invited upward departure. *See* 62 FR 8487 (proposed Feb. 25, 1997). Both options proposed to make amendments to §§ 2D1.11, 2D1.12, and 2D1.13. Additionally, although the directive did not address manufacturing offenses under 21 U.S.C. 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. 994(a) to ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly. Accordingly, the published options also included amendments to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking).

The published options were revised prior to final action by the Commission. However, in the revision that was presented to the Commission for promulgation in late April 1997, amendments to §§ 2D1.11 and 2D1.12 mistakenly were omitted from the option to provide a specific offense characteristic, although that revision did refer to §§ 2D1.11 and 2D1.12 in the synopsis and included amendments to these guidelines in the upward departure option. (The revision did not include any amendments to guideline § 2D1.13, covering record-keeping offenses, because, upon further examination, it seemed unlikely that offenses sentenced under this guideline would involve environmental damage.) Accordingly, when the Commission voted to adopt the option providing the specific offense characteristic for §§ 2D1.1, 2D1.11, and 2D1.12, the vote effectively was limited to what was before the Commission, *i.e.,* an environmental damage enhancement for § 2D1.1 only. This amendment corrects that error and makes minor, conforming changes to the relevant application note in § 2D1.1.

Fourth, the amendment updates the Statutory Provisions of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) to conform to statutory re-designations made to 18 U.S.C. 924 (and already conformed in Appendix A (Statutory Index)).

Finally, the amendment updates §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release). Effective November 26, 1998, 18 U.S.C. 3563(a) and 3583(a) were amended to add a new mandatory condition of probation and supervised release requiring a person convicted of a sexual offense described in 18 U.S.C. 4042(c)(4) (enumerating several sex offenses) to report to the probation officer the person's address and any subsequent change of address, and to register as a sex offender in the state in which the person resides. *See* section 115 of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Pub. L. 105–119). Because the effective date of this change was later than the effective date of the last issued *Guidelines Manual* (November 1, 1998), the Commission did not amend §§ 5B1.3 and 5D1.3 to reflect the new condition. However, the Commission did provide a footnote in each guideline setting forth the new condition and alerting the user as to the date on which the condition became effective. This amendment includes the sex offender condition as a specific mandatory condition of probation and supervised release in both guidelines rather than in a footnote.

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