For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1672 Filed 1–26–09; 8:45 am]

BILLING CODE 8011–01–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of period during which individuals may apply to be appointed to the voting membership of the Practitioners Advisory Group; request for applications.

SUMMARY: The Practitioners Advisory Group of the United States Sentencing Commission is a standing advisory group of the United States Sentencing Commission pursuant to 28 U.S.C. 995 and Rule 5.4 of the Commission's Rules of Practice and Procedure. Having decided to adopt a formal charter for the Practitioners Advisory Group, the United States Sentencing Commission is reconstituting the voting membership of the advisory group under that charter. The purpose of the advisory group is (1) To assist the Commission in carrying out its statutory responsibilities under 28 U.S.C. 994(o); (2) to provide to the Commission its views on the Commission's activities and work, including proposed priorities and amendments; (3) to disseminate to defense attorneys, and to other professionals in the defense community, information regarding federal sentencing issues; and (4) to perform other related functions as the Commission requests. Under the charter, the advisory group will consist of not more than 17 voting members, each of whom may serve not more than two consecutive three-year terms. Of those 17 voting members, one shall be Chair, one shall be Vice Chair, 12 shall be circuit members (one for each federal judicial circuit other than the Federal Circuit), and three shall be at-large members. To be eligible to serve as a voting member, an individual must be an attorney who (1) Devotes a substantial portion of his or her professional work to advocating the interests of privately represented individuals, or of individuals represented by private practitioners through appointment under the Criminal Justice Act of 1964, within the federal criminal justice system; (2) has significant experience with federal sentencing or post-conviction issues related to criminal sentences; and (3) is in good standing of the highest court of the jurisdiction or jurisdictions in which he or she is admitted to practice. Additionally, to be eligible to serve as a circuit member, the individual's primary place of business or a substantial portion of his or her practice must be in the circuit concerned. Each voting member is appointed by the Commission. The Commission hereby invites any individual who is eligible to be appointed to the initial voting membership of the Practitioners Advisory Group to apply. Applications should be received by the Commission not later than March 30, 2009. Applications may be sent to Michael Courlander at the address listed below.

DATES: Applications for the initial voting membership of the Practitioners Advisory Group should be received not later than March 30, 2009.

ADDRESSES: *Send applications to:* United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC 20002–8002, *Attention:* Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, *Telephone:* (202) 502–4597.

SUPPLEMENTARY INFORMATION: Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. Having adopted a formal charter for the Practitioners Advisory Group, the United States Sentencing Commission is reconstituting the voting membership of the Practitioners Advisory Group under that charter. The Commission invites any individual who is eligible to be appointed to the initial voting membership of the Practitioners Advisory Group to apply.

Authority: 28 U.S.C. 994(a), (o), (p), 995; USSC Rules of Practice and Procedure 5.2, 5.4.

Ricardo H. Hinojosa,

Acting Chair.

[FR Doc. E9–1636 Filed 1–26–09; 8:45 am]

BILLING CODE 2210–40–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment in response to the Identity Theft Restitution and Enforcement Act of 2008, title II of Public Law 110–326, including proposed changes to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and issues for comment regarding the guidelines' treatment of offenses involving fraud, identity theft, computers, and communications; (2) a proposed amendment in response to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465, including proposed changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and § 2D3.1

[14] 17 CFR 200.30–3(a)(12).

(Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy), and issues for comment regarding the guidelines' treatment of Schedule III, IV, and V controlled substance offenses; (3) a proposed amendment in response to the Drug Trafficking Vessel Interdiction Act of 2008, Public Law 110–407, including a proposed change to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and a proposed new guideline for offenses involving operating a submersible vessel or semi-submersible vessel without nationality, and issues for comment regarding the guidelines' treatment of such offenses; (4) an issue for comment in response to the Court Security Improvement Act of 2007, Public Law 110–177, regarding the guidelines' treatment of homicide, assault, and threat offenses; (5) an issue for comment in response to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457, regarding the guidelines' treatment of alien harboring and human trafficking offenses; (6) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues, including proposed changes to the guidelines' treatment of offenses involving contempt, consumer product safety, interest rate limitations, domestic violence, child soldiers, veterans' grave markers, child pornography, firearms, threats, and copyright infringement and the guidelines' treatment of probation and supervised release, and related issues for comment; (7) a proposed amendment to § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) in response to a circuit conflict regarding application of the undue influence enhancement in those guidelines, and a related issue for comment; (8) a proposed amendment to § 3C1.3 (Commission of Offense While on Release) in response to an application issue regarding that guideline; (9) a proposed amendment in response to a circuit conflict regarding the guidelines' treatment of counterfeiting offenses involving ''bleached notes'', including a proposed change to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States); and (10) a proposed amendment in response to certain technical issues that have arisen in the guidelines.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 30, 2009.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its Web site at *http://www.ussc.gov.*

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, *Attention:* Public Affairs.

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

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

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments 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).

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *http://www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Ricardo H. Hinojosa,
Acting Chair.

1. Identity Theft

Synopsis of Proposed Amendment: This proposed amendment addresses the Identity Theft Restitution and Enforcement Act of 2008 (the ''Act''), Title II of Public Law 110–326, and other related issues arising from case law. The Act contains a directive to the Commission at section 209. Section 209(a) of the Act directs the Commission to—review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.

The offenses that are the subject of the directive in section 209 of the Act, and the guidelines to which they are referenced, are as follows:

(1) 18 U.S.C. 1028 (fraud and related activity in connection with identification documents, authentication features, and information) makes it unlawful to engage in fraud and related activity in connection with ''identification documents'' (*e.g.*, government-issued

documents such as drivers' licenses) or ''authentication features'' (*i.e.*, features used on such documents to determine whether such documents are authentic, such as watermarks or holograms). A violator is subject to a fine under title 18, United States Code, and imprisonment. The statutory maximum term of imprisonment varies from 1 year to 30 years, depending on the circumstances of the offense. For example, the statute provides imprisonment up to 30 years (if terrorism is involved); 20 years (if a drug trafficking crime or a crime of violence is involved, or if the violator is a repeat offender); and 15 years, 5 years, and 1 year, in other specified circumstances.

Offenses under 18 U.S.C. 1028 are referenced in Appendix A of the *Guidelines Manual* (Statutory Index) to §§ 2B1.1 (Theft, Property Destruction, and Fraud), 2L2.1 (Trafficking in a Document Relating to Naturalization), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization).

(2) 18 U.S.C. 1028A (aggravated identity theft) makes it unlawful to transfer, possess, or use a ''means of identification'' (*i.e.*, a name or number used to identify a specific individual, such as a social security number) of another person during and in relation to another felony (such as a fraud or an immigration violation). A violator is subject to a mandatory consecutive term of imprisonment of 2 years or, if the other felony was a terrorism offense, 5 years.

Offenses under 18 U.S.C. 1028A are referenced in Appendix A (Statutory Index) to § 2B1.6 (Aggravated Identity Theft).

(3) 18 U.S.C. 1030 (fraud and related activity in connection with computers) provides for several offenses as follows:

(A) 18 U.S.C. 1030(a)(1) makes it unlawful to retain national security information after having obtained it by computer without authority, or to disclose such information to a person not entitled to receive it. A violator is subject to a fine under title 18, United States Code, and imprisonment up to 10 years (for a first offense) or 20 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(1) are referenced in the Statutory Index to § 2M3.2 (Gathering National Defense Information).

(B) 18 U.S.C. 1030(a)(2) makes it unlawful to obtain by computer, without authority, information of a financial institution or of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense), 5 years (for an offense involving valuable information, an offense for purposes of commercial advantage or financial gain, or an offense in furtherance of another crime or tort), or 10 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(2) are referenced in the Statutory Index to § 2B1.1 (Theft, Property Destruction, and Fraud).

(C) 18 U.S.C. 1030(a)(3) makes it unlawful to access, without authority, a nonpublic computer of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(3) are referenced in the Statutory Index to § 2B2.3 (Trespass).

(D) 18 U.S.C. 1030(a)(4) makes it unlawful to access a ''protected computer'' (*i.e.*, a computer of a financial institution or a federal agency) without authority and, by means of doing so, further an intended fraud and obtain a thing of value. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(4) are referenced in the Statutory Index to § 2B1.1 (Theft, Property Destruction, and Fraud).

(E) 18 U.S.C. 1030(a)(5) makes it unlawful to use a computer to cause damage to a ''protected computer'' (*i.e.*, a computer of a financial institution or a federal agency). A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year, 5 years, 10 years, 20 years, or life, depending on the circumstances.

Offenses under 18 U.S.C. 1030(a)(5) are referenced in the Statutory Index to § 2B1.1 (Theft, Property Destruction, and Fraud).

(F) 18 U.S.C. 1030(a)(6) makes it unlawful to traffic in any password or similar information through which a computer may be accessed without authorization, if the trafficking affects interstate or foreign commerce or if the computer is used by or for a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(6) are referenced in the Statutory Index to § 2B1.1 (Theft, Property Destruction, and Fraud).

(G) 18 U.S.C. 1030(a)(7) makes it unlawful to threaten to cause damage to, or obtain information from, a ''protected computer'' (*i.e.*, a computer of a financial institution or a federal agency), without authority and with intent to extort. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. 1030(a)(7) are referenced in the Statutory Index to § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

(H) 18 U.S.C. 1030(b) makes it unlawful to conspire to commit, or attempt to commit, a section 1030(a) offense. A violator is subject to the same penalty as for the section 1030(a) offense.

Offenses under 18 U.S.C. 1030(b) are referenced in the Statutory Index to § 2X1.1 (Attempt, Solicitation, or Conspiracy).

(4) 18 U.S.C. 2511 (interception and disclosure of wire, oral, or electronic communications prohibited) makes it unlawful to intercept or disclose any wire, oral, or electronic communication. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years.

Offenses under 18 U.S.C. 2511 are referenced in the Statutory Index to §§ 2B5.3 (Criminal Infringement of Copyright or Trademark) and 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

(5) 18 U.S.C. 2701 (unlawful access to stored communications) makes it unlawful to access, without authority, a facility through which an electronic communication service is provided and obtain, alter, or prevent authorized access to a wire or electronic communication stored in that facility. A violator is subject to a fine under title 18, United States Code, and imprisonment. If the offense is committed for commercial advantage, malicious damage, or commercial gain, or in furtherance of a crime or tort, the maximum term of imprisonment is 5 years (for a first offender) or 10 years (for a repeat offender); otherwise, the maximum term of imprisonment is 1 year (for a first offender) or 5 years (for a repeat offender).

Offenses under 18 U.S.C. 2701 are referenced in the Statutory Index to § 2B1.1 (Theft, Property Destruction, and Fraud).

Section 209(b) of the Act requires that, in determining the appropriate sentence for the above referenced crimes, the Commission ''shall consider the extent to which the current guidelines and policy statements may or may not adequately account for the following factors in order to create an effective deterrent to computer crime

and the theft or misuse of personally identifiable data'':

(1) The level of sophistication and planning involved in such offense.

(2) Whether such offense was committed for purpose of commercial advantage or private financial benefit.

(3) The potential and actual loss resulting from the offense including—

(A) The value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and

(B) Where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information.

(4) Whether the defendant acted with intent to cause either physical or property harm in committing the offense.

(5) The extent to which the offense violated the privacy rights of individuals.

(6) The effect of the offense upon the operations of an agency of the United States Government, or of a State or local government.

(7) Whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice.

(8) Whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure.

(9) Whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death.

(10) Whether the defendant purposefully involved a juvenile in the commission of the offense.

(11) Whether the defendant's intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in USSG 2B1.1(b)(14) [currently § 2B1.1(b)(15)].

(12) Whether the term ''victim'' as used in USSG 2B1.1, should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a result of the offense.

(13) Whether the defendant disclosed personal information obtained during the commission of the offense.

Section 209(c) of the Act requires that in responding to the directive, the Commission:

(1) Assure reasonable consistency with other relevant directives and with other sentencing guidelines;

(2) Account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(3) Make any conforming changes to the sentencing guidelines; and

(4) Assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The proposed amendment and issues for comment address the factors set forth in section 209(b) of the Act, and other related issues arising under the Act and under case law, in the following manner:

(A) Level of Sophistication and Planning Involved in the Offense

Synopsis of Proposed Amendment: The proposed amendment responds to subsection (b)(1) of the directive, which concerns the level of sophistication involved in the offense, by amending the commentary in § 2B1.1 relating to fraud offenses that involve sophisticated means. Specifically, the proposed amendment responds to a concern about whether, in a case involving computers, the defendant's use of any technology or software to conceal the identity or geographic location of the perpetrator qualifies as ''especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense'' within the meaning of the sophisticated means enhancement in § 2B1.1(b)(9) and Application Note 8(B) of that guideline. The proposed amendment adds this conduct to the list in Application Note 8(B) of examples of conduct that ordinarily indicates sophisticated means.

Two issues for comment are also included.

Proposed Amendment:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 8(B) by adding at the end the following:

''In a scheme involving computers, using any technology or software to conceal the identity or geographic location of the perpetrator ordinarily indicates sophisticated means.''.

Issues for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(1) of the Act (the level of sophistication and planning involved in the offense). The guidelines currently address this factor as follows:

(1) Section 2B1.1(b)(9) contains a 2-level enhancement, and a minimum offense level of 12, if the offense involved sophisticated means.

(2) Section 2B1.1(b)(4) contains a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property, which Application Note 5 provides is to be determined in part on the regularity and sophistication of the defendant's activities.

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements, or of the minimum offense level, or any combination of those? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements, minimum offense levels, or both?

2. The Commission requests comment regarding whether § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should apply to a person who has self-trained computer skills. Does the guideline adequately address such a person? Should the guideline include language that unequivocally includes such a person, or should it include language that unequivocally excludes such a person?

(B) Whether the Offense Was Committed for Purpose of Commercial Advantage or Private Financial Benefit

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(2) of the Act (whether the offense was committed for purpose of commercial advantage or private financial benefit). The guidelines currently address this factor as follows:

(1) Section 2H3.1 provides a 3-level enhancement at subsection (b)(1)(B) if the purpose of an offense under 18 U.S.C. 2511 was to obtain direct or indirect commercial advantage or economic gain, and a cross reference at subsection (c)(1) that applies if the purpose of the offense was to facilitate another offense.

(2) Section 2B1.5(b)(4) provides a 2-level enhancement if the offense was committed for pecuniary gain or otherwise involved a commercial purpose.

(3) Sections 2B1.1(b)(1), 2B2.3(b)(3), and 2B5.3(b)(1) provide enhancements based on the monetary amounts involved in the offense.

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements, or the scope of the cross reference? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements or cross references?

(C) The Potential and Actual Loss Resulting From the Offense Including (A) the Value of Information Obtained From a Protected Computer, Regardless of Whether the Owner Was Deprived of Use of the Information; and (B) Where the Information Obtained Constitutes a Trade Secret or Other Proprietary Information, the Cost the Victim Incurred Developing or Compiling the Information

Synopsis of Proposed Amendment: The proposed amendment responds to subsection (b)(3) of the directive by revising § 2B1.1 (Theft, Property Destruction, and Fraud). Specifically, it addresses two types of information: information that the victim retains but that is copied by the defendant, and information that constitutes a trade secret or other proprietary information of the victim. Two options are presented. Option 1 adds to the rule of construction for cases under 18 U.S.C.1030 (Fraud and related activity in connection with computers) regarding pecuniary harm in Application Note 3(A)(v)(III), specifying that any reduction in the value of proprietary information that resulted from the offense should be included in the loss calculation. Option 2 adds a provision in Application Note 3(C), specifying that, if the fair market value of copied information is unavailable or insufficient, the court may consider the cost the victim incurred in originally developing the information or the reduction in the value of the information that resulted from the offense.

Four issues for comment are also included.

Proposed Amendment:

[Option 1:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3(A)(v)(III) by striking '', and'' after ''prior to the offense'' and inserting a semicolon; and by inserting after ''service'' the following:

''; and any reduction in the value of proprietary information (*e.g.*, trade secrets) that resulted from the offense''.]

[Option 2:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3(C)(i) by inserting ''copied,'' after ''taken,''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3(C) by redesignating clauses (ii) through (v) as (iii) through (vi); and by inserting after clause (i) the following new clause:

''(ii) In the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction that resulted from the offense in the value of that information.''.]

Issues for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(3) of the Act (the potential and actual loss resulting from the offense including (A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and (B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information). The guidelines currently address this factor as follows:

(1) Sections 2B1.1(b)(1), 2B2.3(b)(3), and 2B5.3(b)(1) provide enhancements based on the monetary amounts involved in the offense.

(2) Section 2B1.1, Application Note 19(A)(iv), provides an upward departure if the offense created a risk of substantial loss beyond the loss determined for purposes of § 2B1.1(b)(1).

(3) Section 2B1.1, Application Note 19(A)(v), provides an upward departure if, in a case involving stolen information from a ''protected computer,'' the defendant sought the stolen information to further a broader criminal purpose.

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

2. Should the definition of ''loss'' in § 2B1.1 be amended to provide greater guidance to the court on how to estimate loss in cases involving information obtained from a protected computer without depriving the owner of the use of the information, or information obtained that constitutes a trade secret or other proprietary information? For such cases, should § 2B1.1 include a special rule for including and quantifying (or providing a stipulated amount for) the loss, such as the special rule in Application Note 3(F)(i) relating to credit cards?

3. The Commission requests comment regarding whether § 2B1.1 adequately accounts for a case in which an individual suffers pecuniary harm, but the pecuniary harm is immediately reimbursed by a third party. In such a case, the pecuniary harm may not be treated as ''loss,'' and the individual may not be treated as a ''victim,'' for purposes of § 2B1.1.

Five circuit courts have addressed the issue of whether an individual who is fully reimbursed for his or her temporary financial loss by a third party is a ''victim'' for purposes of § 2B1.1(b)(2). The Fifth Circuit in *United States* v. *Conner*, 537 F.3d 480, 489 (5th Cir. 2008), and the Sixth Circuit in *United States* v. *Yagar*, 404 F.3d 967, 971 (6th Cir. 2005), have held that individuals who have been fully reimbursed for temporary financial losses by a third party are not ''victims'' within the meaning of § 2B1.1(b)(2). Although the Second Circuit in *United States* v. *Abiodun*, 536 F.3d 162, 168 (2d Cir.), *cert. denied, __S. Ct. __*, 2008 WL 4619522 (2008), and the Ninth Circuit in *United States* v. *Pham*, 545 F.3d 712, 721 (9th Cir. 2008), have agreed with the reasoning of these courts, they have further held that individuals who were fully reimbursed for their financial losses by third parties may be deemed victims for purposes of § 2B1.1(b)(2) so long as they suffered an adverse effect, measurable in monetary terms, as a result of the defendant's conduct (*e.g.*, the costs associated with obtaining reimbursements from banks or credit card companies). The Eleventh Circuit in *United States* v. *Lee*, 427 F.3d 881, 895 (11th Cir. 2005), did not agree. While acknowledging that the facts of its case were significantly different in that the monetary losses were neither short-lived nor immediately reimbursed by third parties, the Lee court held that the operative time for determining whether someone is a victim is the time of the offense, irrespective of any subsequent remedial action.

Should the Commission amend the guidelines to address this circumstance and, if so, how?

4. The Commission requests comment regarding whether § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should apply to a person who is an officer, employee, or insider of a business who participates in an offense involving proprietary information (*e.g.*, trade secrets) of that business. Does the guideline adequately address such a person? Should the guideline include language that unequivocally includes such a person, or should it include language that unequivocally excludes such a person?

(D) Whether the Defendant Acted With Intent To Cause Either Physical or Property Harm in Committing the Offense

Issue for Comment

1. The Commission requests comment regarding the factor described in section 209(b)(4) of the Act (whether the defendant acted with intent to cause either physical or property harm in committing the offense). The guidelines currently address this factor as follows:

(1) Section 2B1.1(b)(13) provides a 2-level enhancement if the offense involved the conscious or reckless risk of death or serious bodily injury, or possession of a dangerous weapon in connection with the offense.

(2) Section 2B1.1(c) provides a cross reference under which the court applies a firearms or explosives guideline if firearms or explosives are involved.

(3) Section 2H3.1(c) provides a cross reference under which the court applies another offense guideline if the purpose was to facilitate another offense.

(4) Section 2B1.1, Application Note 19, provides an upward departure if the offense caused or risked substantial non-monetary harm, such as physical harm or property harm.

(5) Section 2H3.1, Application Note 5, provides an upward departure if the offense caused or risked substantial non-monetary harm, such as physical harm or property harm.

(6) Section 5K2.5 (Property Damage or Loss) provides an upward departure if the offense caused property damage or loss not taken into account by the guidelines.

Is the factor adequately addressed by these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements, or the scope of the cross reference or departure provisions? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements or cross references? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(E) The Extent to Which the Offense Violated the Privacy Rights of Individuals

Synopsis of Proposed Amendment: The proposed amendment responds to subsection (b)(5) of the directive (the extent to which the offense violated the privacy rights of individuals) by revising § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Two options are presented. Option 1 creates a new specific offense characteristic in § 2H3.1 with three alternative enhancements if the offense involved the personal information or means of identification of specified numbers of individuals. Specifically, it provides an enhancement of [2] levels for offenses involving the personal information or means of identification of [10]–[50] or more individuals; an enhancement of [4] levels for [50]–[250] or more individuals; and an enhancement of [6] levels for [250]–[1,000] or more individuals. The graduated levels ensure incremental punishment for increasingly serious conduct. Option 2 amends Application Note 5 to § 2H3.1, suggesting that an upward departure may be warranted not only in a case in which the offense involved confidential phone records information or tax return information of a substantial number of individuals (as the application note currently provides), but also in a case in which the offense involved personal information or means of identification of a substantial number of individuals.

The proposed amendment defines the term ''personal information'', for purposes of § 2H3.1, in the same manner as the term ''personal information'' is defined for purposes of § 2B1.1(b)(15). The proposed amendment clarifies, for purposes of both guidelines, that information is ''personal information'' only if it involves an identifiable individual.

An issue for comment is also included.

Proposed Amendment:

[Option 1:

Section 2H3.1(b) is amended by adding at the end the following:

''(3) (Apply the greatest) If the defendant is convicted under 18 U.S.C. § 2511 and the offense involved personal information or means of identification of—

(A) [10]–[50] or more individuals, increase by [2] levels;

(B) [50]–[250] or more individuals, increase by [4] levels; or

(C) [250]–[1,000] or more individuals, increase by [6] levels.''.]

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended in Note 4 by striking ''subsection (b)(2)(B)'' and inserting ''this guideline''; and by adding after the paragraph that begins '' 'Interactive computer service' '' the following:

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

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

[Option 2:

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended in Note 5(i) by inserting ''personal information, means of identification,'' after ''involved''; and by inserting a comma before ''or tax''.]

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 13(A) in the paragraph that begins '' 'Personal information' '' by inserting ''involving an identifiable individual'' after ''private information''.

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(5) of the Act (the extent to which the offense violated the privacy rights of individuals). In many cases, non-monetary harm (such as a violation of privacy rights) may be difficult or impossible to quantify. *See, e.g.,* § 2B1.1, comment. (backg'd.). For that reason, non-monetary harm is typically accounted for by the guidelines through a minimum offense level or an upward departure. The guidelines currently address this factor as follows:

(1) Section 2B1.1, Application Note 19, provides an upward departure if the offense resulted in a substantial invasion of a privacy interest. It also provides an upward departure if, in a case involving access devices or unlawfully produced or unlawfully obtained means of identification, (i) the offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record; (ii) an individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name; or (iii) the defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(2) Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information or resulted in a substantial invasion of a privacy interest.

(3) Section 2B1.1(b)(15)(A) provides a 2-level enhancement if an offense under 18 U.S.C. 1030 involved an intent to obtain personal information, and § 2H3.1(b)(2)(B) provides a 10-level enhancement if an offense under 18 U.S.C. 119 involved the use of a computer to make restricted personal information about a covered person publicly available.

Is the factor adequately addressed through these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(F) The Effect of the Offense Upon the Operations of an Agency of the United States Government, or of a State or Local Government

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(6) of the Act (the effect of the offense upon the operations of an agency of the United States Government, or of a State or local government). The guidelines currently address this factor as follows:

(1) Section 5K2.7 (Disruption of Government Function) provides an upward departure if the defendant's conduct resulted in a significant disruption of a governmental function.

(2) Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.

Is the factor adequately addressed through these upward departure provisions? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(G) Whether the Offense Involved a Computer Used by the United States Government, a State, or a Local Government in Furtherance of National Defense, National Security, or the Administration of Justice

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(7) of the Act (whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice). The guidelines currently address this factor as follows:

(1) Section 2B1.1 provides a 2-level enhancement at subsection (b)(15)(A)(i) if an offense under 18 U.S.C. 1030 involved a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.

(2) Section 2B2.3(b)(1) provides a 2-level enhancement if a trespass occurred on a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.

(3) Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of damage to a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.

(4) Section 2B1.1, Application Note 19, provides an upward departure in a case in which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.

(5) Section 5K2.7 (Disruption of Government Function) provides an upward departure if the defendant's conduct resulted in a significant disruption of a governmental function.

(6) Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(H) Whether the Offense Was Intended to, or Had the Effect of, Significantly Interfering With or Disrupting a Critical Infrastructure

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(8) of the Act (whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure). The guidelines currently address this factor as follows:

(1) Section 2B1.1 provides a 2-level enhancement at subsection (b)(15)(A)(i) if an offense under 18 U.S.C. 1030 involved a computer system used to maintain or operate a critical infrastructure, and a 6-level enhancement (and a minimum offense level of 24) at subsection (b)(15)(A)(iii) if an offense under section 1030 caused a substantial disruption of a critical infrastructure.

(2) Section 2B2.3(b)(1) provides a 2-level enhancement if a trespass occurred on a computer system used to maintain or operate a critical infrastructure.

(3) Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of damage to such a computer system.

(4) Section 2B1.1, Application Note 19, provides an upward departure in a case in which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.

(5) Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements (or of the minimum offense level)? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements (or minimum offense levels)? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(I) Whether the Offense Was Intended to, or Had the Effect of, Creating a Threat to Public Health or Safety, Causing Injury to any Person, or Causing Death

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(9) of the Act (whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death). The guidelines currently address this factor as follows:

(1) Section 2B1.1(b)(13) provides a 2-level enhancement, and a minimum offense level of 14, if the offense involved the conscious or reckless risk of death or serious bodily injury.

(2) Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of serious bodily injury, and § 2B3.2(b)(4) provides an enhancement if the victim sustained bodily injury, with the amount of the enhancement

ranging from 2 to 6 levels according to the seriousness of the injury.

(3) Section 2B5.3(b)(5) provides a 2-level enhancement, and a minimum offense level of 13, if the offense involved the conscious or reckless risk of serious bodily injury.

(4) Section 2B1.1, Application Note 19, provides an upward departure if the offense caused or risked substantial non-monetary harm, or in a case in which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.

(5) Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.

Is the factor adequately addressed through these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements (or minimum offense levels)? Should the Commission amend other guidelines to address this factor, such as by adding comparable enhancements (or minimum offense levels)? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(J) Whether the Defendant Purposefully Involved a Juvenile in the Commission of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(10) of the Act (whether the defendant purposefully involved a juvenile in the commission of the offense). The guidelines currently address this factor in § 3B1.4 (Using a Minor to Commit a Crime), which provides a 2-level adjustment if the defendant used or attempted to use a minor to commit the offense or assist in avoiding detection of, or apprehension for, the offense.

Is the factor adequately addressed by this adjustment? Should the Commission increase the amount, or the scope, of this adjustment? Should the Commission amend other guidelines to address this factor, such as by adding enhancements comparable to this adjustment?

(K) Whether the Defendant's Intent To Cause Damage or Intent To Obtain Personal Information Should Be Disaggregated and Considered Separately From the Other Factors Set Forth in § 2B1.1(b)(15)

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(11) of the Act (whether the defendant's intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in § 2B1.1(b)(15)).

For example, subsection (b)(15) currently applies only to offenses under 18 U.S.C. 1030. Should the intent to cause damage or intent to obtain personal information be disaggregated only within the context of 18 U.S.C. 1030 cases? Should the defendant's intent to cause damage or intent to obtain personal information be a factor that applies to other offenses as well?

(L) Whether the Term ''Victim'' as Used in § 2B1.1 Should Include Individuals Whose Privacy Was Violated as a Result of the Offense in Addition to Individuals Who Suffered Monetary Harm as a Result of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(12) of the Act (whether the term ''victim'' as used in § 2B1.1 should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a result of the offense). In many cases, non-monetary harm (such as a violation of privacy rights) may be difficult or impossible to quantify. *See, e.g.*, § 2B1.1, comment. (backg'd.). For that reason, non-monetary harm is typically accounted for by the guidelines through a minimum offense level or an upward departure.

The guidelines currently address this factor as follows:

(1) Section 2B1.1, Application Note 19, provides an upward departure if the offense resulted in a substantial invasion of a privacy interest. It also provides an upward departure if, in a case involving access devices or unlawfully produced or unlawfully obtained means of identification, (i) the offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record; (ii) an individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name; or (iii) the defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(2) Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information, or resulted in a substantial invasion of privacy interest.

Is the factor adequately addressed through these upward departure provisions? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

The definition of ''victim'' in § 2B1.1, Application Note 1, currently applies only to a person who sustained any part of the ''actual loss'' or to an individual who sustained bodily injury. Should the Commission modify that definition to also apply to an individual whose privacy was violated? If so, what standard should be used to determine whether an individual's privacy was violated? Should the guidelines seek to quantify the loss of such an individual, for purposes of the loss table in subsection (b)(1)? If so, what standard would be used to quantify the loss? For example, in a case in which a computer-related invasion of privacy occurs, should the guidelines include a special rule for including and quantifying (or providing a stipulated amount for) the loss, such as the special rule in Application Note 3(F)(i) relating to credit cards? If the Commission were to revise the applicability of § 2B1.1 to individuals whose privacy was violated, should the Commission do so for all offenses under § 2B1.1, or only for certain categories of cases, such as cases involving identity theft, cases involving computers, or cases involving violations of certain specified statutes?

Should the definition of ''reasonably foreseeable pecuniary harm'' in § 2B1.1 be amended to expressly include such harm as the reasonably foreseeable costs to the victim of correcting business, financial, and government records that erroneously indicate the victim's responsibility for particular transactions or applications; the reasonably foreseeable costs of repairing any computer data, program, system, or information that was altered or impaired in connection with the offense; and the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense? Should the Commission make such a change only for identity theft cases, such as by amending § 2B1.1, Application Note 3(A)(v), to provide a special rule for identity theft cases? Alternatively, should the Commission make such a change for all cases under § 2B1.1, such as by amending Application Note 3(A)(iv), or for some other category of cases?

(M) Whether the Defendant Disclosed Personal Information Obtained During the Commission of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(13) of the Act (whether the defendant disclosed personal information obtained during the commission of the offense). The guidelines currently address this factor as follows:

(1) Section 2B1.1, Application Note 19, provides an upward departure if the offense resulted in a substantial invasion of a privacy interest.

(2) Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information or resulted in a substantial invasion of a privacy interest.

(3) Section 2B1.1(b)(15)(A) provides a 2-level enhancement if an offense under 18 U.S.C.1030 involved an intent to obtain personal information.

(4) Section 2H3.1(b)(2)(B) provides a 10-level enhancement if an offense under 18 U.S.C.119 (protection of individuals performing certain official duties) involved the use of a computer to make restricted personal information about a covered person publicly available.

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

If the Commission were to amend the guidelines to more adequately address this factor, what should constitute a ''disclosure'', and what should constitute ''personal information''?

(N) Other Issues Relating to the Directive Not Otherwise Addressed Above

Issues for Comment:

1. The Commission requests comment regarding section 209(a) of the Act, which directs the Commission to review its guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. 1028 (fraud and related activity in connection with identification documents, authentication features, and information), 1028A (aggravated identity theft), 1030 (fraud and related activity in connection with computers), 2511 (interception and disclosure of wire, oral, or electronic communications prohibited), and 2701 (unlawful access to stored communications), and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements. Section 209(b) of the Act directed the Commission, in determining the appropriate sentence for those offenses, to ''consider the extent to which the current guidelines and policy statements may or may not adequately account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data'', and provided a list of factors. Other than the specific factors set forth in section 209(b), which are addressed more specifically in the issues for comment set forth above, are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines?

2. Should the Commission create a new guideline specifically for identity theft cases? If so, what should the new guideline provide?

(O) Technical Amendments

Synopsis of Proposed Amendment: The proposed amendment makes two technical changes. First, it corrects several places in the *Guidelines Manual* that erroneously refer to subsection ''(b)(15)(iii)'' of § 2B1.1; the reference should be to subsection (b)(15)(A)(iii).

Second, it clarifies Application Note 2(B) of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). There is a concern that Application Note 2(B) is internally inconsistent in a case in which the defendant, as discussed in the example in Application Note 2(B)(i), is an employee of a state motor vehicle department who knowingly issues without proper authority a driver's license based on false, incomplete, or misleading information. Arguably, to ''obtain'' or ''use'' a means of identification (the terms used in the first sentence of Application Note 2(B)) does not necessarily include to ''issue'' a means of identification (the term used in the example in Application Note 2(B)(i)). The proposed amendment clarifies the first sentence of Application Note 2(B) so that it expressly covers not only obtaining or using, but also issuing or transferring, a means of identification.

Proposed Amendment:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 13(B) by inserting ''(A)'' after ''(15)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 19(B) by inserting ''(A)'' after (15)''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in Note 2(B) by inserting '', transfer, or issue'' after ''obtain''.

2. Online Pharmacy

Synopsis of Proposed Amendment: This proposed amendment addresses changes made by the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465 (the ''Act''). The Act amends the Controlled Substances Act (21 U.S.C. 801 *et seq.*) to create two new offenses involving controlled substances. The first is 21 U.S.C. 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet), which prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment is determined based upon the controlled substance being distributed. The second new offense is 21 U.S.C. 843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale a Controlled Substance), which prohibits the use of the Internet to advertise for sale a controlled substance. This offense has a statutory maximum term of imprisonment of four years.

In addition to the new offenses, the Act increased the statutory maximum terms of imprisonment for all Schedule III controlled substance offenses (from 5 years to 10 years), for all Schedule IV controlled substance offenses (from 3 years to 5 years), and for Schedule V controlled substance offenses if the offense is committed after a prior drug conviction (from 2 years to 5 years). The Act added a sentencing enhancement for Schedule III controlled substance offenses where ''death or serious bodily injury results from the use of such substance.'' The Act also includes a directive to the Commission that states:

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

First, the proposed amendment provides three options for incorporating the new sentencing enhancement for cases involving Schedule III controlled substances where ''death or serious

bodily injury results from the use of such substance.'' The enhancement carries a statutory maximum term of imprisonment of 15 years. Option 1 proposes a new alternative base offense level at § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) of [12]–[34]. Option 2 proposes a new specific offense characteristic at § 2D1.1 that provides an enhancement of [4]–[11] levels; Option 2 also includes, as a sub-option, a minimum offense level of [12]–[34]. Option 3 proposes a new invited upward departure provision for § 2D1.1.

Second, the proposed amendment revises the title of § 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) to reflect the new offense at 21 U.S.C.843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale a Controlled Substance). The new offense is already referenced in Appendix A (Statutory Index) to § 2D3.1.

Third, the proposed amendment amends Appendix A (Statutory Index) to refer the new offense at 21 U.S.C. 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet) to § 2D1.1.

Several issues for comment are also included.

Proposed Amendment:

[Option 1:

Section 2D1.1(a) is amended by redesignating subdivision (3) as subdivision (4); and by inserting after subdivision (2) the following new subdivision:

''(3)[12]–[34], if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or''.]

[Option 2:

Section 2D1.1(b) is amended by redesignating subdivision (11) as subdivision (12); and by inserting after subdivision (10) the following new subdivision:

''(11) If the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, increase by [4]–[11] levels. [If the resulting offense level is less than level [12]–[34], increase to level [12]–[34].]''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 by striking ''(11)'' and inserting ''(12)'' each place it appears.]

[Option 3:

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

''27. Upward Departure Provision.—If the defendant is convicted under 21 U.S.C.841(b)(1)(E) or 21 U.S.C.960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, an upward departure may be warranted.''.]

Section 2D3.1 is amended in the heading by striking ''Schedule I'' and inserting ''Scheduled''.

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

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

Issues for Comment:

1. The Commission requests comment regarding whether offenses involving Schedule III substances are adequately addressed by the guidelines. The Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465 (the ''Act''), increased the statutory maximum term of imprisonment for those offenses from 5 years to 10 years. Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule III substances, what justifies doing so?

For example, under the Drug Quantity Table in § 2D1.1, the maximum base offense level for an offense involving Schedule III substances (except Ketamine) is 20, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in § 2D1.1, 1 unit of a Schedule III substance is equivalent to 1 gm of marihuana. Should a different equivalency apply? If so, what should that different equivalency be?

2. The Commission requests comment regarding whether offenses involving Schedule IV substances are adequately addressed by the guidelines. The Act increased the statutory maximum term of imprisonment for those offenses from 3 years to 5 years. Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule IV substances, what justifies doing so?

For example, under the Drug Quantity Table in § 2D1.1, the maximum base offense level for an offense involving Schedule IV substances (except Flunitrazepam) is 12, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in § 2D1.1, 1 unit of a Schedule IV substance (except Flunitrazepam) is equivalent to 0.0625 gm of marihuana. Should a different equivalency apply? If so, what should that different equivalency be? For example, should the Commission amend the Drug Equivalency Tables to provide that 1 unit of a Schedule IV substance (except Flunitrazepam) is equivalent to 0.125 gm of marihuana?

3. The Commission requests comment regarding whether offenses involving Schedule V substances are adequately addressed by the guidelines. For those offenses, the Act did not increase the statutory maximum term of imprisonment for a first offense (which is 1 year), but did increase the statutory maximum term of imprisonment if the offense is committed after a prior drug conviction (from 2 years to 5 years). Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule V substances, what justifies doing so?

For example, under the Drug Quantity Table in § 2D1.1, the maximum base offense level for an offense involving Schedule V substances is 8, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in § 2D1.1, 1 unit of a Schedule V substance is equivalent to 0.00625 gm of marihuana. Should a different equivalency apply? If so, what should that different equivalency be?

4. The Commission requests comment regarding whether offenses involving hydrocodone substances are adequately addressed by the guidelines. Currently, the guidelines do not distinguish between hydrocodone substances and other Schedule III substances (except Ketamine). The Act increased the statutory maximum term of imprisonment for all Schedule III offenses, including hydrocodone offenses, from 5 years to 10 years. Should hydrocodone be treated differently than other Schedule III substances and, if so, how? If the Commission should revise the guidelines as they relate to hydrocodone, what justifies doing so?

For example, under the Drug Quantity Table in § 2D1.1, the maximum base offense level for an offense involving Schedule III substances (except Ketamine) is 20, which corresponds to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in § 2D1.1, 1 unit of a Schedule III substance, including hydrocodone, is equivalent to 1 gm of marihuana. Should a different equivalency apply to hydrocodone? If so, what should that different equivalency be? Should the guidelines take into account (as is done for oxycodone) the weight of the hydrocodone itself (*i.e.* , the ''hydrocodone *actual*''), rather than the number of units of hydrocodone? If so, what base offense levels should apply, and to what weights of hydrocodone *actual* should those base offense levels correspond? For example, should the Commission amend the Drug Equivalency Tables to provide that 1 gm of hydrocodone actual is equivalent to 1,675 gm of marihuana?

3. Submersible Vessels

Synopsis of Proposed Amendment: This proposed amendment implements the Drug Trafficking Vessel Interdiction Act of 2008, Public Law 110–407 (the ''Act''). The Act creates a new offense at 18 U.S.C. 2285 (Operation of Submersible Vessel or Semi-Submersible Vessel Without Nationality), which provides: ''Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.''

Section 103 of the Act also directs the Commission to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. 2285. In carrying out this directive, the Commission shall—

(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of the offense described in section 2285 of title 18, United States Code, and the need for deterrence to prevent such offenses;

(2) Account for any aggravating or mitigating circumstances that might justify exceptions, including—

(A) The use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies;

(B) The repeated use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies, including whether such use is part of an ongoing criminal organization or enterprise;

(C) Whether the use of such a vessel involves a pattern of continued and flagrant violations of section 2285 of title 18, United States Code;

(D) Whether the persons operating or embarking in a submersible vessel or semi-submersible vessel willfully caused, attempted to cause, or permitted the destruction or damage of such vessel or failed to heave to when directed by law enforcement officers; and

(E) Circumstances for which the sentencing guidelines (and policy statements) provide sentencing enhancements;

(3) Ensure reasonable consistency with other relevant directives, other sentencing guidelines and policy statements, and statutory provisions;

(4) Make any necessary and conforming changes to the sentencing guidelines and policy statements; and

(5) Ensure that the sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

The proposed amendment amends § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if the defendant used a submersible vessel or semi-submersible vessel as described in 18 U.S.C. 2285.

The proposed amendment also provides a new guideline at § 2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. 2285, with a base offense level of [12]–[34]. The proposed amendment also provides upward departure provisions to account for certain aggravating factors listed in the directive.

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) to index the new offense to the new guideline.

Three issues for comment are also included.

Proposed Amendment:

Section 2D1.1(b)(2) is amended by striking ''or'' after ''substance,'' and inserting ''a submersible vessel or semi-submersible vessel as described in 18 U.S.C. 2285 was used, or (C)'' after ''(B)''.

Chapter Two, Part X, Subpart 7 is amended in the heading by adding at the end ''AND SUBMERSIBLE AND SEMI-SUBMERSIBLE VESSELS''.

Chapter Two, Part X, Subpart 7 is amended by adding at the end the following new guideline and accompanying commentary:

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

(a) Base Offense Level: [12]–[34]

Commentary

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

Application Note:

1. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

(A) The offense involved a failure to heave to when directed by a law enforcement officer.

(B) The offense involved an attempt to sink the vessel or the sinking of the vessel.

(C) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. 2285 to facilitate other felonies.

(D) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2284 the following:

''18 U.S.C. 2285 2X7.2''.

Issues for Comment:

1. The Commission requests comment regarding whether it should reference the new offense at 18 U.S.C. 2285 (Operation of Submersible Vessel or Semi-submersible Vessel Without Nationality) to § 2X5.1 (Other Felony Offenses), instead of promulgating a new guideline at § 2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense, as provided for by the proposed amendment. Section 2X5.1 instructs the court to ''apply the most analogous offense guideline'' when an ''offense is a felony for which no guideline expressly has been promulgated.'' In a case where ''there is not a sufficiently analogous guideline'', § 2X5.1 provides that:

The provisions of 18 U.S.C. 3553 shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the Commission references section 2285 to § 2X5.1, is there further action the Commission should take to clarify how the guidelines apply in such cases? If so, what action?

2. Section 103 of the Drug Trafficking Vessel Interdiction Act of 2008, Public Law 110–407, directs the Commission to consider aggravating circumstances such as the use of such vessels as part of an ongoing criminal organization or enterprise. Accordingly, the Commission requests comment regarding how the proposed amendment's new guideline at § 2X7.2 (Submersible and Semi-Submersible Vessels), or any other guideline to which offenses under 18 U.S.C. 2285 (Operation of Submersible Vessel or Semi-submersible Vessel Without Nationality) would be referenced, should account for cases in which the vessel is used as part of an ongoing criminal organization or enterprise. The Commission was informed at its public briefing in November 2008 that the construction of such a vessel costs one million dollars or more and takes one year or more to complete, and that such a vessel is intended to be used for a single trip before being purposely sunk. If so, this may indicate that the use of the submersible or semi-submersible vessel typically is part of an ongoing criminal organization or enterprise. Should the Commission account for this factor in setting the base offense level? If so, should the Commission provide a specific offense characteristic or a downward departure to account for a case in which an ongoing criminal organization or enterprise is not involved? Alternatively, should the Commission provide a specific offense characteristic or an upward departure to account for this factor? Are there any other amendments to the guidelines that should be made to account for cases in which the vessel is used as part of an ongoing criminal organization or enterprise?

3. The Commission requests comment regarding whether, in a case sentenced under the proposed guideline, § 2X7.2 (Submersible and Semi-Submersible Vessels), and in which § 3B1.2 (Mitigating Role) applies, it should provide an alternative base offense level, downward adjustment, or downward departure to reflect the lesser culpability of the defendant?

4. Court Security

Issues for Comment:

1. The Court Security Improvement Act of 2007, Public Law 110–177 (the ''Act''), creates two new federal offenses, increases the statutory maximum penalty for a number of existing federal offenses, and contains a directive to the Commission relating to threats made in violation of 18 U.S.C. 115 that occur over the Internet. The Commission responded to the two new offenses created by the Act during the amendment cycle ending May 1, 2008 (*see* Amendment 718). The Commission requests comment regarding what additional amendments may be appropriate in light of the Act. The increases in the statutory maximum penalties provided by the Act raise issues concerning a number of guidelines in Chapter Two, Part A, generally, and it may be necessary to continue work on any or all of the remaining issues raised by the Act beyond the amendment cycle ending May 1, 2009.

A. Increases in Statutory Maximum Penalties

The existing federal offenses with statutory maximum penalties increased by the Act and the guidelines to which those offenses are referenced are as follows:

(1) 18 U.S.C. 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member) makes it unlawful to, among other things, assault an individual who is a current or former federal official, or a family member of such an individual, with intent to impede the individual in, or retaliate against the individual for, the performance of the individual's official duties. Such an assault is punished under 18 U.S.C. 115(b)(1). The Act modified the penalty structure of these offenses. In doing so, the Act eliminated the reference to 18 U.S.C. 111 (Assaulting, resisting, or impeding certain officers or employees), and increased the statutory maximum terms of imprisonment for assaults involving physical contact or intent to commit another felony (from 8 years to 10 years), and for assaults resulting in serious bodily injury or assaults involving the use of a dangerous weapon (from 20 years to 30 years). Other statutory maximum terms of imprisonment include 20 years (for assaults resulting in bodily injury) and 1 year (for simple assaults).

Offenses involving assaults punished under 18 U.S.C.115(b)(1) are referenced in Appendix A (Statutory Index) to §§ 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault), and 2A2.3 (Minor Assault).

(2) 18 U.S.C. 1112 (manslaughter) makes it unlawful to kill a human being without malice, either upon a sudden quarrel or heat of passion (''voluntary manslaughter'') or in the commission of an unlawful act not amounting to a felony or in the commission, in an unlawful manner or without due caution and circumspection, of a lawful act which might produce death (''involuntary manslaughter''). The Act increased the statutory maximum terms of imprisonment for voluntary manslaughter (from 10 years to 15 years) and for involuntary manslaughter (from 6 years to 8 years).

Offenses under 18 U.S.C. 1112 are referenced in Appendix A (Statutory Index) to §§ 2A1.3 (Voluntary Manslaughter) and 2A1.4 (Involuntary Manslaughter).

(3) Subsection (a) of 18 U.S.C. 1512 (Tampering with a witness, victim, or an informant), makes it unlawful to kill or attempt to kill another person with intent to interfere in an official proceeding. It also makes it unlawful to use or threaten physical force, or attempt to do so, with intent to interfere with an official proceeding. The Act increased the statutory maximum terms of imprisonment for the killing of another under circumstances constituting manslaughter (by reference to 18 U.S.C.1112, from 10 years to 15 years); for attempted murder or attempted use of physical force (from 20 years to 30 years); and for threat of use of physical force to prevent the attendance or testimony in an official proceeding (from 10 years to 20 years). Offenses under section 1512(a) are referenced in Appendix A (Statutory Index) to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault),

2A2.3 (Minor Assault), and 2J1.2 (Obstruction of Justice).

(4) Section 1512(b) makes it unlawful to intimidate, threaten, or corruptly persuade another person, or to engage in misleading conduct toward another person, with intent to interfere with an official proceeding. The Act increased the statutory maximum term of imprisonment for these offenses from 10 years to 20 years.

Offenses under section 1512(b) are referenced in Appendix A (Statutory Index) to § 2J1.2 (Obstruction of Justice).

(5) Section 1512(d) makes it unlawful to harass another person and thereby hinder, delay, prevent, or dissuade an arrest or prosecution, or the participation of a person in an official proceeding. The Act increased the statutory maximum term of imprisonment for these offenses from 1 year to 3 years.

Offenses under section 1512(d) are referenced in Appendix A (Statutory Index) to § 2J1.2 (Obstruction of Justice).

(6) Subsection (a) of 18 U.S.C. 1513 (Retaliating against a witness, victim, or an informant) makes it unlawful to kill or attempt to kill another person with intent to retaliate against a person for attending or testifying at an official proceeding or for providing information to a law enforcement officer. The Act increased the statutory maximum terms of imprisonment for the killing of another under circumstances constituting manslaughter (by reference to 18 18 U.S.C. 1112, from 10 years to 15 years) and for an attempt (from 20 years to 30 years). Other statutory penalties include death, or imprisonment for life, if the offense involved the killing of another under circumstances constituting murder.

Offenses under section 1513(a) are referenced in Appendix A (Statutory Index) to § 2J1.2 (Obstruction of Justice).

(7) Section 1513(b) makes it unlawful to cause bodily injury to another person or damage the tangible property of another person (or threaten to do so) with intent to retaliate against a person for attending or testifying at an official proceeding or for providing information to a law enforcement officer. The Act increased the statutory maximum terms of imprisonment for such offenses from 10 years to 20 years.

Offenses under section 1513(b) are referenced in Appendix A (Statutory Index) to § 2J1.2 (Obstruction of Justice).

(8) Other offenses under section 1513 include subsection (e) (which makes it unlawful to knowingly, with intent to retaliate, take any action harmful to any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense) and subsection (f) (which makes it unlawful to conspire to commit any offense under section 1513).

These other offenses under section 1513 are also referenced in Appendix A (Statutory Index) to § 2J1.2 (Obstruction of Justice).

Are the guidelines adequate as they apply to such offenses? If not, what amendments to the guidelines should be made to address the increases in statutory maximum penalties?

As described in paragraph (7), above, Appendix A (Statutory Index) currently refers all offenses under section 1513 to § 2J1.2 (Obstruction of Justice) only. An offense under section 1513 can involve conduct such as killing, causing bodily injury, or threatening. Should the Commission amend Appendix A (Statutory Index) to refer offenses under section 1513 to other guidelines, either in addition to or in lieu of referencing them to § 2J1.2? If so, to which other guidelines? Alternatively, should the Commission provide cross references in § 2J1.2 that allow for an offense under section 1513 to be sentenced under a guideline other than § 2J1.2?

B. Official Victims

The Commission requests comment regarding cases in which an official is the victim of an offense described above. The circumstance of an official victim is addressed in the guidelines as follows:

(1) Section 3A1.2 contains an adjustment if the victim was an individual who is a current or former government officer or employee (or a member of the immediate family of such an individual), and the offense was motivated by such status. If the applicable guideline is from Chapter Two, Part A (as is the case with §§ 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3), the adjustment is 6 levels; otherwise (as with § 2J1.2), the adjustment is 3 levels.

(2) Section 3A1.2, Application Note 5, invites an upward departure if the official victim is an exceptionally high-level official.

Do these provisions adequately address the circumstance of an official victim? If not, what amendments to the guidelines should be made? Should the Commission increase the amount, or the scope, of these provisions? Should the upward departure provision be incorporated as an enhancement in one or more of the applicable guidelines (*e.g.*, §§ 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2J1.2)?

The Commission also requests comment on cases in which a non-official is the victim of an offense described above. Are the guidelines adequate as they apply to such offenses? If not, what amendments to the guidelines should be made?

C. Directive to the Commission

Section 209 of the Act directs the Commission to review the guidelines as they apply to threats made in violation of 18 U.S.C. 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member). Section 115 makes it unlawful to assault, kidnap, or murder an individual who is a current or former federal official, or a family member of such an individual, with intent to impede the individual in, or retaliate against the individual for, the performance of the individual's official duties; section 115 also makes it unlawful to threaten such an assault, kidnapping, or murder. Such a threat is punished under 18 U.S.C. 115(b)(4), which provides that a violator is subject to a fine under title 18, United States Code, and imprisonment of up to 6 years (if an assault was threatened) or up to 10 years (if a kidnapping or murder was threatened). Offenses involving threats made in violation of 18 U.S.C. 115 are referenced in Appendix A of the *Guidelines Manual* (Statutory Index) to § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens).

Section 209 specified that the Commission should review those threats made in violation of section 115 ''that occur over the Internet,'' and ''determine whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code.'' Section 209 further directed the Commission to ''take into consideration the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.''

With regard to threats made in violation of section 115 that occur over the Internet, the guidelines do not currently provide for the use of the Internet to be an aggravating circumstance. Should that circumstance aggravate the punishment and, if so, by how much?

Other factors specified in the directive (*i.e.*, (i) the number of threats made in violation of section 115, (ii) the intended number of recipients of such threats, and (iii) whether the initial senders of such threats were acting in an individual capacity or as part of a larger group), are currently addressed in the guidelines as follows:

(1) Section 2A6.1(b)(2)(A) contains a 2-level enhancement if the offense

involved more than two threats. Section 2A6.1, Application Note 1, provides that, in determining whether this enhancement applies, conduct that occurred prior to the offense must be ''substantially and directly connected to the offense, under the facts of the case taken as a whole''.

(2) Section 2A6.1, Application Note 4, invites an upward departure if the offense involved substantially more than two threatening communications to the same victim, or if the offense involved multiple victims.

Are the factors in the directive relating to number of threats made and intended number of recipients adequately addressed through these upward departures? If not, what amendments to the guidelines should be made? Should these upward departure provisions be incorporated as enhancements in § 2A6.1?

In considering whether to amend the guidelines as they apply to offenses involving threats made in violation of section 115, should the Commission focus on whether to amend the guidelines with regard to offenses that occur over the Internet (*i.e.*, the category of offenses covered by the directive), or should the Commission also consider whether to amend the guidelines with regard to offenses that do not occur over the Internet? If the latter, what amendments to the guidelines should be made?

5. Trafficking

Issues for Comment:

1. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457 (the ''Act''), was signed into law on December 23, 2008. The Act creates two new federal offenses, amends a number of federal statutes, and contains a directive to the Commission relating to certain alien harboring offenses. The Commission requests comment regarding what amendments to the guidelines may be appropriate in light of the Act. Given the recency of enactment of the Act, it may be necessary to continue work on any or all of the issues raised by the Act beyond the amendment cycle ending May 1, 2009.

A. Directive to the Commission

Section 222(g) of the Act directs the Commission to—review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if—

(1) The harboring was committed in furtherance of prostitution; and

(2) The defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.

Alien harboring is an offense under 8 U.S.C.1324(a) (bringing in and harboring certain aliens), which makes it unlawful to (among other things) harbor an illegal alien. Offenses under section 1324(a) are referenced to § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). In some circumstances, a person who harbors an alien could also commit an offense under 8 U.S.C. 1328 (importation of alien for immoral purpose), which makes it unlawful to (among other things) harbor an illegal alien for purposes of prostitution or any other immoral purpose. Offenses under section 1328, however, are referenced not to § 2L1.1 but to the guidelines applicable to promoting a commercial sex act, § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). It is to those guidelines, §§ 2G1.1 and 2G1.3, that sex trafficking offenses, such as 18 U.S.C. 1591 and the offenses under chapter 117 of title 18, United States Code (18 U.S.C. 2421 *et seq.*) are referenced.

The Commission requests comment regarding whether (and, if so, how) the guidelines should be amended to ensure conformity between the guidelines applicable to persons convicted of alien harboring (*i.e.*, § 2L1.1) and the guidelines applicable to persons convicted of promoting a commercial sex act (*i.e.*, §§ 2G1.1 and 2G1.3) if the alien harboring offense involves the circumstances specified in the directive (*i.e.*, the harboring was committed in furtherance of prostitution and the defendant is an organizer, leader, manager, or supervisor of the criminal activity).

In a case in which no aggravating or mitigating factors otherwise apply, a person convicted of alien harboring under 8 U.S.C. 1324(a)(1)(A)(iii) under the circumstances specified in the directive receives a base offense level of 12 under § 2L1.1(a)(3) and an upward adjustment of two, three, or four levels under § 3B1.1 (Aggravating Role) for being an organizer, leader, manager, or supervisor of the criminal activity, for a resulting offense level of 14 to 16. (Section 2L1.1 does not provide an enhancement for committing the harboring in furtherance of prostitution.) In comparison, a person convicted of promoting a commercial sex act receives a base offense level of 14 under § 2G1.1(a)(2) (if the offense did not involve a minor) or a base offense level of 24 under § 2G1.3(a)(4) (if the offense did involve a minor). In cases in which aggravating or mitigating circumstances are present, the guideline applicable to alien harboring, § 2L1.1, may conform with the guidelines applicable to promoting a commercial sex act, §§ 2G1.1 and 2G1.3, to a greater or lesser degree.

Are amendments needed to § 2L1.1, as it applies to a person convicted of alien harboring under the circumstances specified in the directive, to ensure conformity with §§ 2G1.1 and 2G1.3? For example, should the Commission provide a cross reference in § 2L1.1 to §§ 2G1.1 and 2G1.3 when the offense involves the circumstances specified in the directive? Alternatively, should the Commission provide one or more specific offense characteristics in § 2L1.1 to account for the circumstances specified in the directive, such as a specific offense characteristic for harboring committed in furtherance of prostitution? Should the Commission provide a specific offense characteristic in § 2L1.1 to account for harboring in furtherance of prostitution when the offense involves a minor? Should the Commission provide a specific offense characteristic in § 2L1.1 that incorporates the adjustment in § 3B1.1 (Aggravating Role)? If the Commission were to provide one or more such specific offense characteristics, what should the offense levels be? Are there any other amendments that should be made to the guidelines as they apply to a person convicted of alien harboring under the circumstances specified in the directive?

B. New Offenses

The Act created two new offenses. The first new offense, 18 U.S.C. 1593A (benefiting financially from peonage, slavery, and trafficking in persons), makes it unlawful to knowingly benefit, financially or by receiving anything of value, from participation in a venture that has engaged in any act in violation of section 1581(a), 1592, or 1595(a) of title 18, United States Code, knowing or in reckless disregard of the fact that the venture has engaged in such violation. A violator is subject to a fine under title 18, United States Code, and imprisonment in the same manner as a completed violation of such section.

The second new offense, 18 U.S.C. 1351 (fraud in foreign labor contracting), makes it unlawful to knowingly and with intent to defraud recruit, solicit or hire a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years.

Should the Commission amend Appendix A (Statutory Index) to refer these new offenses to one or more guidelines and, if so, which ones? Should offenses under section 1593A be referred to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade)? Should offenses under section 1351 be referred to § 2B1.1 (Theft, Property Destruction, and Fraud), or to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade)? Are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines? If so, what amendments to the guidelines should be made to address those circumstances?

C. Other Modifications to Chapter 77

Subtitle C of title II of the Act amended various provisions in Chapter 77 (Peonage, Slavery, and Trafficking in Persons) of title 18, United States Code, in particular the following offenses:

(A) 18 U.S.C. 1583 (enticement into slavery), which is referenced in Appendix A (Statutory Index) to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).

(B) 18 U.S.C. 1584 (sale into involuntary servitude), which is referenced in Appendix A (Statutory Index) to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).

(C) 18 U.S.C. 1589 (forced labor), which is referenced in Appendix A (Statutory Index) to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).

(D) 18 U.S.C. 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), which is referenced in Appendix A (Statutory Index) to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).

(E) 18 U.S.C. 1591 (sex trafficking of children or by force, fraud, or coercion), which is referenced in Appendix A (Statutory Index) to §§ 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).

(F) 18 U.S.C. 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), which is referenced in Appendix A (Statutory Index) to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).

Are the guidelines adequate as they apply to such offenses? Are there aggravating or mitigating circumstances existing in cases involving such offenses that might justify additional amendments to the guidelines? If so, what amendments to the guidelines should be made to address those circumstances?

Among other things, the Act amended these offenses by extending to these offenses the obstruction provision of 18 U.S.C. 1581 (peonage; obstructing enforcement), under which a person who obstructs, interferes with, or prevents the enforcement of the section is subject to the same punishment as a person who commits the substantive offense. Are the guidelines adequate as they apply to these offenses in a case involving obstruction?

The Act also amended 18 U.S.C. 1589 and 1591 to provide that a person who benefits financially from participating in a venture involving trafficked labor is subject to the same punishment as a person who commits the substantive offense. Are the guidelines adequate as they apply to these offenses in a case involving these circumstances?

The Act also amended 18 U.S.C. 1594 (general provisions) to provide for conspiracy liability under these offenses. Are the guidelines adequate as they apply to these offenses in a case involving conspiracy?

Are there any other amendments to the guidelines that should be made to address the amendments made by the Act?

6. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289). The new offense at 12 U.S.C. 4636b is referenced to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States); as a conforming change, the similar existing offense at 12 U.S.C. 1818(j) is also referenced to § 2B1.1. The new offense at 12 U.S.C. 4641 is referenced to § 2J1.1 (Contempt) and § 2J1.5 (Failure to Appear by Material Witness); as conforming changes, similar existing offenses (*see* 2 U.S.C. 192, 390; 7 U.S.C. 87f(e); 12 U.S.C. 1818(j), 1844(f), 2273, 3108(b)(6); 15 U.S.C. 78u(c), 80a–41(c), 80b–9(c), 717m(d); 16 U.S.C. 825f(c); 26 U.S.C. 7210; 33 U.S.C. 506, 1227(b); 42 U.S.C. 3611; 47 U.S.C. 409(m); 49 U.S.C. 14909, 16104) are also referenced to § 2J1.1 and § 2J1.5.

Part B of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Consumer Product Safety Improvement Act of 2008 (Pub. L. 110–314). These offenses (*see* 15 U.S.C. 1192, 1197(b), 1202(c), 1263, 2068) are referenced to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Technical and conforming changes are also made.

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

Part D of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162). The new offense at 18 U.S.C. 117 is referenced to § 2A6.2 (Stalking or Domestic Violence).

Part E of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008 (Pub. L. 110–340). The new offense at 18 U.S.C. 2442 is referenced to

§ 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). Technical and conforming changes are also made. An issue for comment is also provided.

Part F of the proposed amendment makes changes throughout the *Guidelines Manual* so that it accurately reflects the amendments made by the Judicial Administration and Technical Amendments Act of 2008 (Pub. L. 110–406) to the probation and supervised release statutes (18 U.S.C. 3563, 3583). The changes include the addition of a new guideline for intermittent confinement that parallels the statutory language, as well as technical and conforming changes.

Part G of the proposed amendment amends the enhancement relating to property from a national cemetery or veterans' memorial in subsection (b)(6) of § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) so that it also covers trafficking in such property, and makes a conforming change to the commentary. This part responds to the directive to the Commission in the Let Our Veterans Rest in Peace Act of 2008 (Pub. L. 110–384).

Part H of the proposed amendment makes changes to the child pornography guidelines, § 2G2.1 and § 2G2.2, so that they accurately reflect the amendments made to the child pornography statutes (18 U.S.C. 2251 *et seq.*) by the Effective Child Pornography Prosecution Act of 2007 (Pub. L. 110–358) and the PROTECT Our Children Act of 2008 (Pub. L. 110–401). The changes relate primarily to cases where child pornography is transmitted over the Internet. Under the proposed amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. As a conforming change, this part also amends the child pornography guidelines so that the term ''distribution'' includes ''transmission'', and the term ''material'' includes any visual depiction, as now defined by 18 U.S.C. 2256 (*i.e.*, to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format).

Part I of the proposed amendment makes a technical change to the terms ''another felony offense'' and ''another offense'', as defined in Application Note 14(C) of the firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Those definitions were slightly revised when they were placed into Application Note 14(C) by Amendment 691 (effective November 1, 2006), and some confusion has arisen regarding whether the revisions were intended to have a substantive effect. The technical change amends the terms to clarify that Amendment 691 was not intended to have a substantive effect on those terms.

Part J of the proposed amendment revises Appendix A (Statutory Index) so that the threat guideline, § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. 2280 and 2332a are referenced. The proposed amendment ensures that in a case in which an offense under one of those statutes is committed by threat, the court has the option of determining that § 2A6.1 is the most analogous offense guideline.

Part K of the proposed amendment amends the enhancement relating to serious bodily injury in subsection (b)(5) of § 2B5.3 (Criminal Infringement of Copyright or Trademark) so that it parallels the corresponding enhancement for serious bodily injury in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). This part responds to statutory amendments made by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Pub. L. 110–403).

An issue for comment is also included regarding whether the guidelines are adequate as they apply to subsection (a)(7) of 18 U.S.C. 2252A, a new offense created by the PROTECT Our Children Act of 2008 (Pub. L. 110–401).

Proposed Amendment:

Part A (Housing and Economic Recovery Act of 2008):

Appendix A (Statutory Index) is amended by inserting before the line referenced to 2 U.S.C. 437g(d) the following:

''2 U.S.C. 192 2J1.1, 2J1.5
2 U.S.C. 390 2J1.1, 2J1.5'';

by inserting after the line referenced to 7 U.S.C. 87b the following:

''7 U.S.C. 87f(e) 2J1.1, 2J1.5'';

by inserting after the line referenced to 12 U.S.C. 631 the following:

''12 U.S.C. 1818(j) 2B1.1
12 U.S.C. 1844(f) 2J1.1, 2J1.5
12 U.S.C. 2273 2J1.1, 2J1.5
12 U.S.C. 3108(b)(6) 2J1.1, 2J1.5
12 U.S.C. 4636b 2B1.1
12 U.S.C. 4641 2J1.1, 2J1.5'';

by inserting after the line referenced to 15 U.S.C. 78ff the following:

''15 U.S.C. 78u(c) 2J1.1, 2J1.5
15 U.S.C. 80a–41(c) 2J1.1, 2J1.5'';

by inserting after the line referenced to 15 U.S.C. 80b–6 the following:

''15 U.S.C. 80b–9(c) 2J1.1, 2J1.5'';

by inserting after the line referenced to 15 U.S.C. 714m(c) the following:

''15 U.S.C. 717m(d) 2J1.1, 2J1.5'';

by inserting after the line referenced to 16 U.S.C. 773g the following:

''16 U.S.C. 825f(c) 2J1.1, 2J1.5'';

in the line referenced to 26 U.S.C. 7210 by inserting '', 2J1.5'' after ''2J1.1'';

in the line referenced to 33 U.S.C. 506 by inserting '', 2J1.5'' after ''2J1.1'';

in the line referenced to 33 U.S.C. 1227(b) by inserting '', 2J1.5'' after ''2J1.1'';

in the line referenced to 42 U.S.C. 3611(f) by inserting '', 2J1.5'' after ''2J1.1'';

by inserting after the line referenced to 47 U.S.C. 223(b)(1)(A) the following:

''47 U.S.C. 409(m) 2J1.1, 2J1.5'';

in the line referenced to 49 U.S.C. 14909 by inserting '', 2J1.5'' after ''2J1.1'';

and in the line referenced to 49 U.S.C. 16104 by inserting '', 2J1.5'' after ''2J1.1''.

Part B (Consumer Product Safety Improvement Act of 2008):

Chapter Two, Part N is amended in the heading by inserting ''CONSUMER PRODUCTS,'' after ''PRODUCTS,''.

Chapter Two, Part N, Subpart 2 is amended in the heading by striking ''AND''; and by inserting '', AND CONSUMER PRODUCTS'' after ''PRODUCTS''.

Section 2N2.1 is amended in the heading by striking ''or'' after ''Cosmetic,'' and by inserting '', or Consumer Product'' at the end.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''15 U.S.C. 1176'' the following:

''15 U.S.C. 1192 2N2.1
15 U.S.C. 1197(b) 2N2.1
15 U.S.C. 1202(c) 2N2.1
15 U.S.C. 1263 2N2.1'';

and by inserting after the line referenced to 15 U.S.C. § 1990(c) the following:

''15 U.S.C. 2068 2N2.1''

Part C (Veterans' Benefits Improvement Act of 2008):

Appendix A (Statutory Index) is amended by inserting after the line referenced to 8 U.S.C. 1375a(d)(3)(C),(d)(5)(B) the following:

''10 U.S.C. 987(f) 2X5.2'';

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

''50 U.S.C. App. § 527(e)2X5.2''.

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 115(b)(3) the following:

''18 U.S.C. 117 2A6.2''.

Part E (Child Soldiers Accountability Act of 2008):

Chapter Two, Part H, Subpart 4 is amended in the heading by striking ''AND'' after ''SERVITUDE,'' and by inserting '', AND CHILD SOLDIERS'' at the end.

Section 2H4.1 is amended in the heading by striking ''and'' after ''Servitude,'' and by inserting '', and Child Soldiers'' at the end.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by inserting '', 2442'' after ''1592''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended in Note 1 by inserting as the last paragraph the following:

'' 'Involuntary servitude' includes forced labor, slavery, and service as a child soldier.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2425 the following:

''18 U.S.C. 2442 2H4.1''.

Issue for Comment:

1. The Commission requests comment regarding whether it should amend Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. 2242 to 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) or to one or more other guidelines. Does § 2H4.1, or one or more other guidelines, adequately address offenses under 18 U.S.C. 2242 and, if not, what aggravating or mitigating circumstances existing in those cases might justify additional amendments to the guidelines? Alternatively, should the Commission defer action in response to the new offense at 18 U.S.C. 2242 this amendment cycle, undertake a broader review of the guidelines pertaining to human rights offenses generally, and include responding to the new offense as part of that broader review?

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

Section 5B1.3 is amended in subsection (a)(2) by striking '', (B) give notice'' and all that follows through ''or area,'' and inserting ''or (B) work in community service, unless the court has imposed a fine, or''; and by striking the paragraph that begins ''Note: Section 3563(a)(2)''.

Section 5B1.3(e)(1) is amended by adding at the end ''See § 5F1.1 (Community Confinement).''.

Section 5B1.3(e)(6) is amended by adding at the end ''See § 5F1.8 (Intermittent Confinement).''.

Section 5C1.1 is amended by striking the asterisk each place it appears.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking the asterisk each place it appears; and by striking the paragraph that begins ''Note: Section 3583(d)'' and the paragraph that begins ''However,''.

Section 5D1.3(e)(1) is amended by striking the asterisk; and by striking the paragraph that begins ''Note: Section 3583(d)'' and the paragraph that begins ''However,''.

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

''(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release. See § 5F1.8 (Intermittent Confinement).''.

Section 5F1.1 is amended by striking the asterisk; and by striking the paragraph that begins ''Note: Section 3583(d)'' and the paragraph that begins ''However,''.

Chapter Five, Part F is amending by adding at the end the following new guideline and accompanying commentary:

''§ 5F1.8. Intermittent Confinement

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

Commentary

Application Notes:

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

2. Intermittent confinement shall be imposed as a condition of supervised release only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. See 18 U.S.C. 3583(d).''.

Chapter Seven, Part A is amended in Subpart 2(b) in the second paragraph by striking ''With the exception'' and all that follows through ''probation, the'' and inserting ''The''; and by striking the paragraph that begins ''Note: Section 3583(d)'' and the paragraph that begins ''However,''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended by striking Note 5 and inserting the following:

''5. Intermittent confinement is authorized as a condition of probation only during the first year of the term of probation, see 18 U.S.C. 3563(b)(10), and as a condition of supervised release only during the first year of supervised release, see 18 U.S.C. 3583(d). See § 5F1.8 (Intermittent Confinement).''.

Section 8D1.3 is amended by striking subsection (b) and inserting the following:

''(b) Pursuant to 18 U.S.C. 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) Restitution or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. 3563(b).''.

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

Section 2B1.1(b)(6) is amended by striking ''or'' after ''damage to,''; and by inserting ''or trafficking in,'' after ''destruction of,''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the paragraph that begins ''Subsection (b)(6)'' by inserting at the end before the period the following: ''and the directive to the Commission in section 3 of Public Law 110–384''.

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

Section 2G2.1(b)(6) is amended by inserting ''or for the purpose of transmitting such material live'' after ''explicit material''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins '' 'Distribution' '' by inserting ''transmission,'' after ''production,''; and by inserting after the paragraph that begins '' 'Interactive computer service' '' the following paragraph:

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

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 4 by inserting ''or for the purpose of transmitting such material live'' after ''explicit material'' each place it appears; and in Note 4(B) by striking ''purpose'' after ''for such'' and inserting ''purposes''.

Section 2G2.2(b)(6) is amended by inserting ''or for accessing with intent to view the material,'' after ''material,''.

Section 2G2.2(c)(1) is amended by inserting ''or for the purpose of transmitting a live visual depiction of such conduct'' after ''such conduct''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins '''Distribution''' by inserting ''transmission,'' after ''production,''; by inserting after the paragraph that begins '''Interactive computer service''' the following:

'''Material' includes a visual depiction, as defined in 18 U.S.C. 2256.'' and

in the paragraph that begins ''Sexual abuse or exploitation'' by inserting ''accessing with intent to view,'' after ''possession,''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 2 by inserting ''access with intent to view,'' after ''possess,''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 4(B)(ii) by striking ''recording'' and inserting ''visual depiction'' each place it appears.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 5(A) by inserting ''or for the purpose of transmitting live any visual depiction of such conduct'' after ''such conduct''.

Part I (Clarification of § 2K2.1, Application Note 14(C)):

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 14(C) by striking ''the'' before ''explosive'' and inserting ''an'' each place it appears.

Part J (Treatment of 18 U.S.C. 2280, 2332a in Statutory Index):

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 2280 by inserting ''2A6.1,'' after ''2A4.1,''; and

in the line referenced to 18 U.S.C. 2332a by inserting ''2A6.1,'' before ''2K1.4''.

Part K (Prioritizing Resources and Organization for Intellectual Property Act of 2008):

Section 2B5.3(b)(5) is amended by inserting ''death or'' after ''risk of''; and by striking ''13'' and inserting ''14'' each place it appears.

Issue for Comment:

1. The Commission requests comment regarding whether the guidelines are adequate as they apply to subsection (a)(7) of 18 U.S.C. 2252A, a new offense created by the PROTECT Our Children Act of 2008 (Pub. L. 110–401). The new offense at subsection (a)(7) makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, ''child pornography that is an adapted or modified depiction of an identifiable minor.'' A violator is subject to a fine under title 18, United States Code, and imprisonment up to 15 years.

Under Appendix A (Statutory Index), all offenses under 18 U.S.C. 2252A are referenced to the child pornography trafficking, receipt, and possession guideline, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

Is § 2G2.2 the guideline to which offenses under subsection (a)(7) should be referenced? Alternatively, should the Commission amend Appendix A (Statutory Index) to refer offenses under subsection (a)(7) to a guideline or guidelines other than § 2G2.2 and, if so, which ones? Should the Commission amend the guidelines (such as by amending Appendix A or by providing cross references) so that an offense under subsection (a)(7) that involves distribution is referred to one guideline (*e.g.*, § 2G2.2), and an offense under subsection (a)(7) that involves production is referred to another guideline (*e.g.*, the child pornography production guideline, § 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))? Whether offenses under subsection (a)(7) are referenced to § 2G2.2 or to one or more other guidelines, are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines? If so, how should the guidelines be amended to address those circumstances? For example, if an offense under subsection (a)(7) that involves production is referred to § 2G2.1, should the Commission provide a downward adjustment in § 2G2.1 to reflect the less serious nature of an offense involving the production of child pornography that is an adapted or modified depiction of an identifiable minor compared to other offenses involving the production of child pornography covered by that guideline? Alternatively, should the Commission create a new guideline for offenses under subsection (a)(7)?

7. Influencing a Minor

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict regarding the undue influence enhancement at § 2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Year (Statutory Rape) or Attempt to Commit Such Acts) and at § 2G1.3(b)(2)(B) (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). The undue influence enhancement provides for an increase in the defendant's offense level (four levels in § 2A3.2 and two levels in § 2G1.3) if ''a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct.'' In both guidelines, commentary states that in determining whether the undue influence enhancement applies, ''the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.'' The commentary also provides for a rebuttable presumption of undue influence ''[i]n a case in which a participant is at least 10 years older than the minor.''

In both guideline provisions, the term ''minor'' includes ''an individual, whether fictitious or not, who a law enforcement officer represented to a participant * * * could be provided for the purposes of engaging in sexually explicit conduct'' or ''an undercover law enforcement officer who represented to a participant that the officer had not attained'' the age of majority.

Three circuits have three different approaches regarding the application of the undue influence enhancement in cases in which the ''minor'' is actually an undercover law enforcement officer. The Eleventh Circuit, in *United States* v. *Root,* 296 F.3d 1222 (11th Cir. 2002), held that, according to the terms of § 2A3.2, the undue influence enhancement can apply even when the

victim is an undercover law enforcement officer. In such a case, the Eleventh Circuit held, the focus is on the defendant's conduct, not on the fact that the victim's will was not actually overborne. The Eleventh Circuit is also the only circuit that has addressed this issue in the context of § 2G1.3. *See United States* v. *Vance,* 494 F.3d 985 (11th Cir. 2007) (holding that § 2G1.3(b)(2)(B) applies where the minor is fictitious, and stating that ''the focus is on the defendant's intent, not whether the victim is real or fictitious'').

The Seventh Circuit reached a different result in *United States* v. *Mitchell,* 353 F.3d 552 (7th Cir. 2003), holding that ''the plain language of [§ 2A3.2] cannot apply in the case of an attempt where the victim is an undercover police officer.'' The Seventh Circuit also stated that its reading of the guideline concluded that ''the enhancement cannot apply [in any case] where the offender and victim have not engaged in illicit sexual conduct.'' *Id.* at 559.

The Sixth Circuit, in *United States* v. *Chriswell,* 401 F.3d 459 (6th Cir. 2005), took a third approach. The Sixth Circuit agreed in part with the Seventh Circuit, holding that ''§ 2A3.2(b)(2)(B) is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen.'' *Id.* at 469. Unlike the Seventh Circuit, however, the Sixth Circuit concluded that the enhancement can apply in other instances of attempted sexual conduct.

The three proposed options reflect the three different interpretations of the enhancement by the Eleventh, Sixth, and Seventh Circuits. Option One reflects the Eleventh Circuit's approach by amending the commentary regarding the undue influence enhancement in §§ 2A3.2 and 2G1.3 to provide that the enhancement can apply in a case of attempted sexual conduct. Option One further amends the commentary to provide that the undue influence enhancement can apply in a case involving only an undercover law enforcement officer.

Option Two reflects the Sixth Circuit's approach. It amends the commentary regarding the undue influence enhancement in §§ 2A3.2 and 2G1.3 to provide that the enhancement can apply in a case of attempted sexual conduct. Option Two further amends the commentary to provide that the undue influence enhancement does not apply in a case involving only an undercover law enforcement officer.

Option Three reflects the Seventh Circuit's approach. Contrary to Options One and Two, Option Three amends the commentary regarding the undue influence enhancement in §§ 2A3.2 and 2G1.3 to provide that the enhancement does not apply in a case of attempted sexual conduct. Like Option Two, Option Three amends the commentary regarding the undue influence enhancement in §§ 2A3.2 and 2G1.3 to provide that the enhancement does not apply in a case involving only an undercover law enforcement officer.

All three options include a technical amendment to the background of § 2A3.2.

One issue for comment is also included.

Proposed Amendment:

[Option 1:

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B)(ii) does not require that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B)(ii) applies'';

and by adding at the end as the last paragraph the following:

''Subsection (b)(2)(B)(ii) can apply in a case in which the only 'minor' (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.''.]

[Option 2:

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B)(ii) does not require that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B)(ii) applies'';

and by adding at the end as the last paragraph the following:

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

[Option 3:

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B)(ii) requires that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B)(ii) applies'';

and by adding at the end as the last paragraph the following:

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

The Commentary to § 2A3.2 captioned ''Background'' is amended by striking ''two-level'' and inserting ''four-level'' each place it appears.

[Option 1:

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B) does not require that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B) applies'';

and by adding at the end as the last paragraph the following:

''Subsection (b)(2)(B) can apply in a case in which the only 'minor' (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.''.]

[Option 2:

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B) does not require that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B) applies'';

and by adding at the end as the last paragraph the following:

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

[Option 3:

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''Undue Influence'' by adding at the end the following:

''Subsection (b)(2)(B) requires that the participant engage in prohibited sexual conduct with the minor.'';

in the paragraph that begins ''In a case'' by striking '', for purposes of'' and

all that follows through ''sexual conduct'' and inserting ''that subsection (b)(2)(B) applies'';

and by adding at the end as the last paragraph the following:

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

Issue for Comment:

1. The Commission seeks comment regarding the current application of the undue influence enhancements in both § 2A3.2 and § 2G1.3. In 2004, the Commission created § 2G1.3 specifically to address offenses under chapter 117 of title 18, United States Code, that involve minors. *See* USSG App. C, Amendment 664 (Nov. 2004). Prior to the creation of § 2G1.3, chapter 117 offenses, primarily 18 U.S.C. 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were sentenced under § 2A3.2 either by direct reference from Appendix A, or through a cross reference from § 2G1.1. The creation of a new guideline for chapter 117 cases was ''intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from § 2A3.2 permit[ted] the Commission to more appropriately tailor [§ 2A3.2] to actual statutory rape cases.'' USSG App. C, Amendment 664 (Nov. 2004).

The Commission requests comment regarding the application of the undue influence enhancements in the two guidelines at issue. Should the Commission amend the enhancement in either guideline in any way? If so, what changes should the Commission make? Should, for example, the Commission more narrowly tailor the enhancement in § 2A3.2 to reflect the offense conduct typical in cases now being sentenced under § 2A3.2? If so, how?

8. Commission of Offense While on Release

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

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to § 2J1.7 (now Application Note 1 to § 3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level enhancement. *See United States* v. *Confredo,* 528 F.3d 143 (2d Cir. 2008); *United States* v. *Stevens,* 66 F.3d 431 (2d Cir. 1995); *United States* v. *Wilson,* 966 F.2d 243 (7th Cir. 1992). The Second Circuit has stated that the example the Commission provides in the Application Note does not abide by their interpretation of the rule: ''The commentary example begins with a total range of 30–37 months. In all criminal history categories, if the § 2J1.7 three-level enhancement is deleted from the guideline level at which a 30–37 month sentence is imposed, the permissible range provided for the reduced sentence would be 21–27 months.'' *Stevens,* at 435–36. The example states that a properly ''apportioned'' sentence for the underlying offense would be 30 months. This is outside the guideline range for that offense.

Under ordinary guideline application principles, however, only one guideline range applies to a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. 3147. *See* § 1B1.1 (instructing the sentencing court to, in this order: (1) Determine the offense guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level, specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) ''[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above'').

The proposed amendment clarifies that the court determines the applicable guideline range as in any other case. At that point, the court determines an appropriate ''total punishment'' from within that applicable guideline range, and then divides the total sentence between the underlying offense and the § 3147 enhancement as the court considers appropriate.

Proposed Amendment:

The Commentary to § 3C1.3 captioned ''Application Notes'' is amended in Note 1 by striking ''as adjusted'' and inserting ''including, as in any other case in which a Chapter Three adjustment applies (*see* § 1B1.1 (Application Instructions)), the adjustment provided''; and by adding at the end as the last sentence the following:

''Similarly, if the applicable adjusted guideline range is 30–37 months and the court determines a 'total punishment' of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. 3147 would satisfy this requirement.''.

9. Counterfeiting and ''Bleached Notes''

Synopsis of Proposed Amendment: The proposed amendment clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving ''bleached notes.'' Bleached notes are genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Treasury. Circuit courts have resolved differently the question of whether offenses involving bleached notes should be sentenced under § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). *Compare, United States* v. *Schreckengost,* 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under § 2B1.1); *United States* v. *Inclema,* 363 F.3d 1177 (11th Cir. 2004) (same); with *United States* v. *Dison,* 2008 WL 351935 (W.D. La. Feb 8, 2008) (applying § 2B5.1 in a case involving bleached notes); *United States* v. *Vice,* 2008 WL 113970 (W. D. La. Jan. 3, 2008) (same). The proposed amendment resolves this circuit conflict and responds to concerns expressed by federal judges and members of Congress concerning the guidelines pertaining to offenses involving bleached notes.

The definition of the term ''counterfeit'' in Application Note 3 of § 2B5.1 has been cited by courts as the basis for declining to apply § 2B5.1 to offenses involving bleached notes. ''Counterfeit'' is defined to mean ''an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety.'' Application Note 3 further provides that ''[o]ffenses involving genuine instruments that have been altered are covered under § 2B1.1 (Theft, Property Destruction, and Fraud).'' Under this definition, courts have had to consider whether a bleached note should be considered falsely made or

manufactured in its entirety (and therefore sentenced under § 2B5.1) or an altered note (and therefore sentenced under § 2B1.1).

The proposed amendment resolves this issue to provide that offenses involving bleached notes are to be sentenced under § 2B5.1. Specifically, the proposed amendment deletes Application Note 3 and revises the definition of ''counterfeit'' to more closely parallel relevant counterfeiting statutes, for example 18 U.S.C. 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). As a clerical change, the definition is moved from Application Note 3 to Application Note 1.

The proposed amendment also amends the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed.

In addition, the proposed amendment amends Appendix A (Statutory Index) by striking the alternative reference to § 2B1.1 for two offenses that do not involve elements of fraud.

Specifically, the amendment deletes alternative reference to § 2B1.1 for offenses under 18 U.S.C. 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities). As a result, these offenses would be referenced solely to § 2B5.1. A conforming change is made to delete these offenses from the list of statutory provisions in § 2B1.1.

Proposed Amendment:

Section 2B5.1(b)(2)(B) is amended by inserting ''(ii) genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed;'' after ''paper;'' and by striking ''or (ii)'' and inserting ''or (iii)''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins ''Definitions.—'' the following:

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

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by striking Note 3 in its entirety and by redesignating Note 4 as Note 3.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 474A by striking ''2B1.1,''; and in the line referenced to 18 U.S.C. § 476 by striking ''2B1.1,''.

10. Technical

Synopsis of Proposed Amendment: This proposed amendment is a multi-part amendment that makes various technical and conforming changes to the guidelines.

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

Part B of the proposed amendment resolves certain technical issues that have arisen in the *Guidelines Manual* with respect to child pornography offenses. First, the proposed amendment makes technical changes in § 2G2.1, Statutory Provisions, to address the fact that only some, not all, offenses under 18 U.S.C. 2251 are referenced to § 2G2.1. Second, it makes technical changes in § 2G2.2, Statutory Provisions, to address the fact that offenses under section 2252A(g) are now covered by § 2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by § 2G2.2. Third, it makes similar technical changes in § 2G2.2, Application Note 1, to address this fact. Fourth, it makes a technical change in § 2G2.3, Commentary, to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. 2251A is now 30 years imprisonment. Fifth, it makes technical changes in § 2G3.1, subsection (c)(1), to address the fact that § 2G2.4 no longer exists, having been consolidated into § 2G2.2 effective November 1, 2004. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. As a conforming change, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section. Seventh, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by § 2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by § 2G2.2.

Proposed Amendment:

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

The Commentary to § 1B1.8 captioned ''Application Notes'' is amended in Note 3 by striking ''(e)(6) (Inadmissibility of Pleas,'' and inserting ''(f) (Admissibility or Inadmissibility of a Plea,''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''(7)'' and inserting ''(8)''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins ''Unlawfully possessing a listed'' by striking ''(d)'' and inserting ''(c)''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Note 8 by striking ''(c)(1), (3)'' and inserting ''(f), (i)''.

The Commentary to § 5D1.2 captioned ''Background'' is amended by striking ''(b)'' and inserting ''(c)''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3611(f) by striking ''(f)'' and inserting ''(c)''.

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

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by inserting ''(a)–(c), 2251(d)(1)(B)'' after ''2251''.

The Commentary to § 2G2.2 captioned ''Statutory Provisions'' is amended by inserting ''(a)–(b)'' after ''2252A''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 1 in the last paragraph by inserting ''(a)–(c), § 2251(d)(1)(B)'' after ''2251''.

The Commentary to § 2G2.3 captioned ''Background'' is amended by striking ''twenty'' and inserting ''thirty''.

Section 2G3.1(c)(1) is amended by inserting ''Soliciting,'' after ''Shipping,''; by striking ''Traffic) or § 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.'' and inserting ''Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2251(a),(b) the following:

''18 U.S.C. 2251(c) 2G2.2'';

in the line referenced to 18 U.S.C. 2251(c)(1)(A) by striking ''(c)'' and inserting ''(d)'';

in the line referenced to 18 U.S.C. 2251(c)(1)(B) by striking ''(c)'' and inserting ''(d)'';

in the line referenced to 18 U.S.C. 2252A by inserting ''(a), (b)'' after ''2252A'';

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

''18 U.S.C. 2252A(g) 2G2.6''.

[FR Doc. E9–1642 Filed 1–26–09; 8:45 am]

BILLING CODE 2210–40–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11638]

Ohio Disaster # OH–00019 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of Ohio, dated 01/16/2009.

Incident: Category One Hurricane Force Winds.

Incident Period: 09/14/2008.

Effective Date: 01/16/2009.

EIDL Loan Application Deadline Date: 10/16/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Franklin, Greene, Hamilton, Montgomery.

Contiguous Counties:

Ohio: Butler, Clark, Clermont, Clinton, Darke, Delaware, Fairfield, Fayette, Licking, Madison, Miami, Pickaway, Preble, Union, Warren.

Indiana: Dearborn, Franklin.

Kentucky: Boone, Campbell, Kenton.

The Interest Rate is: 4.000.

The number assigned to this disaster for economic injury is 116380.

The States which received an EIDL Declaration # are Ohio, Indiana, Kentucky.

(Catalog of Federal Domestic Assistance Number 59002)

Dated: January 16, 2009.

Sandy K. Baruah,

Acting Administrator.

[FR Doc. E9–1710 Filed 1–26–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11634 and # 11635]

Vermont Disaster # VT–00012

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Vermont (FEMA—1816—DR), dated 01/14/2009.

Incident: Severe Winter Storm.

Incident Period: 12/11/2008 through 12/18/2008.

DATES: *Effective Date:* 01/14/2009.

Physical Loan Application Deadline Date: 03/16/2009

Economic Injury (EIDL) Loan Application Deadline Date: 10/14/2009

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 01/14/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Bennington, Windham.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11634B and for economic injury is 11635B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: January 16, 2009.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–1708 Filed 1–26–09; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2009–0001]

Occupational Information Development Advisory Panel Meeting

AGENCY: Social Security Administration.

ACTION: Notice of Inaugural Meeting; Correction notice.

SUMMARY: The Social Security Administration published in the **Federal Register** of January 21, 2009, a document announcing the dates and times of the Notice of Inaugural Meeting of the Occupational Information Development Advisory Panel Meeting. This notice serves to correct the beginning time for the meeting on February 23, 2009. The meeting will begin at 9 a.m.

DATES: Effective on January 27, 2009.

FOR FURTHER INFORMATION CONTACT: Debra Tidwell Peters, 410–965–9617.