UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines, effective November 1, 2002.

SUMMARY: Pursuant to its authority under 28 U.S.C. § 994(a) and (p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index.

This notice sets forth the amendments and the reason for each amendment.

DATES: The Commission has specified an effective date of November 1, 2002, for the amendments set forth in this notice.

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

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

Notice of proposed amendments was published in the **Federal Register** on November 27, 2001 (*see* 66 FR 59330–59340), and January 17, 2002 (*see* 67 FR 2456–2475). The Commission held three public hearings on the proposed amendments in Washington, DC, on February 25, 2002, February 26, 2002, and March 19, 2002. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth in this notice. On May 1, 2002, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2002.

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

Diana E. Murphy,

Chair.

1. Amendment: The Commentary to § 2A1.1 captioned ''Statutory Provisions'' is amended by inserting '', 2332b(a)(1), 2340A'' after ''2118(c)(2)''.

The Commentary to § 2A1.2 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' before ''1111''; and by inserting '', 2332b(a)(1), 2340A'' after ''1111''.

The Commentary to § 2A1.3 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' before ''1112''; and by inserting '', 2332b(a)(1)'' after ''1112''.

The Commentary to § 2A1.4 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' before ''1112''; and by inserting '', 2332b(a)(1)'' after ''1112''.

The Commentary to § 2A2.1 captioned ''Statutory Provisions'' is amended by inserting '', 1993(a)(6)'' after ''1751(c)''.

The Commentary to § 2A2.2 captioned ''Statutory Provisions'' is amended by inserting '', 1993(a)(6), 2332b(a)(1), 2340A'' after ''1751(e)''.

The Commentary to § 2A4.1 captioned ''Statutory Provisions'' is amended by inserting '', 2340A'' after ''1751(b)''.

Chapter Two, Part A is amended in the heading of subpart 5 by adding at the end ''AND OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS''.

Section 2A5.2 is amended in the heading by adding at the end ''; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry''.

Section 2A5.2(a)(1) is amended by striking ''the aircraft and passengers; or'' and inserting '': (A) an airport or an aircraft; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry;''.

Section 2A5.2(a)(2) is amended by striking ''the aircraft and passengers; or'' and inserting '': (A) an airport or an aircraft; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry;''.

Section 2A5.2 is amended by inserting after subsection (a) the following:

''(b) Specific Offense Characteristic.

(1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by 5 levels; (ii) a dangerous weapon was otherwise used, increase by 4 levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by 3 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Cross References.

(1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

(2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.''.

The Commentary to § 2A5.2 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 1993(a)(4), (5), (6), (b);'' before ''49 U.S.C.''; and by inserting ''46503,'' after ''46308,''.

Section 2A5.2 is amended by striking the Commentary captioned ''Background'' and inserting the following:

''Application Note:

1. Definitions.—For purposes of this guideline:

'Biological agent', 'chemical weapon', 'nuclear byproduct material', 'nuclear material', 'toxin', and 'weapon of mass destruction' have the meaning given those terms in Application Note 1 of the Commentary to § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

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

'Mass transportation' has the meaning given that term in 18 U.S.C. 1993(c)(5).''.

Section 2A6.1 is amended by redesignating subsection (b)(4) as subsection (b)(5); by striking ''and (3)'' in subsection (b)(5), as redesignated by this amendment, and inserting ''(3), and (4)''; and by inserting after subsection (b)(3) the following:

''(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.''.

The Commentary to § 2A6.1 captioned ''Statutory Provisions'' is amended by inserting ''32(c), 35(b),'' before ''871''; by inserting '', 1993(a)(7), (8), 2332b(a)(2)'' after ''879''; and by inserting ''; 49 U.S.C. 46507'' after ''(C)–(E)''.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended by striking Note 1; and by redesignating Note 2 as Note 1.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended in Note 1, as redesignated by this amendment, by inserting ''Scope of Conduct to Be Considered.—'' before ''In determining''; and by striking the last two paragraphs.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended by adding at the end the following:

''2. Grouping.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under § 3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under § 3D1.2.

3. Departure Provisions.—

(A) In General.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).

(B) Multiple Threats or Victims.—If the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims, an upward departure may be warranted.''.

Section 2B1.1 is amended by striking subsection (d).

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1992, 1993(a)(1), (a)(4),'' after ''1832,''; by inserting '', 2332b(a)(1)'' after ''2317''; and by inserting '', 60123(b)'' after ''46317(a)''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by striking the last paragraph.

Section 2B2.3(b)(1) is amended by inserting ''(A)'' after ''occurred''; by striking the comma after ''government facility'' and inserting ''; (B) at''; and by striking '', or'' after ''energy facility'' and inserting ''; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; or (E) at''.

Section 2B2.3 is amended by inserting after subsection (b) the following:

''(c) Cross Reference.

(1) If the offense was committed with the intent to commit a felony offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.''.

The Commentary to § 2B2.3 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''1030''; and by inserting '', 1036'' after ''(a)(3)''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

''Airport'' has the meaning given that term in section 47102 of title 49, United States Code.

''Felony offense'' means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.''.

Section 2K1.4(a)(1)(B) is amended by inserting '', an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry'' after ''dwelling''.

Section 2K1.4(a)(2) is amended by striking ''a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling'' and inserting ''(i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an aircraft, a mass transportation vehicle, or a ferry''.

The Commentary to § 2K1.4 captioned ''Statutory Provisions'' is amended by inserting ''1992, 1993(a)(1), (a)(2), (a)(3), (b),'' after ''1855,''; and by inserting '', 2332a; 49 U.S.C. 60123(b)'' after ''2275''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

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

''Explosives'' includes any explosive, explosive material, or destructive device.

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

''Mass transportation'' has the meaning given that term in 18 U.S.C. 1993(c)(5).''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended in Note 2 by inserting ''Risk of Death or Serious Bodily Injury.—'' before ''Creating''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended by striking Notes 3 and 4 and inserting the following:

''3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended by inserting at the end of subdivision (B) of Note 1 the following:

''(vi) 'Terrorism offense' means any offense involving, or intending to promote, a 'federal crime of terrorism', as that term is defined in 18 U.S.C. 2332b(g)(5).''.

The Commentary to § 2M2.1 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. 60123(b)'' after ''2284''.

The Commentary to § 2M2.3 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. 60123(b)'' after ''2284''.

Chapter Two, Part M is amended in the heading of subpart 5 by adding at the end '', AND PROVIDING MATERIAL SUPPORT TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS''.

Section 2M5.1 is amended in the heading by adding at the end ''; Financial Transactions with Countries Supporting International Terrorism''.

Section 2M5.1(a)(1) is amended by inserting ''(A)'' after ''26, if''; and by inserting ''; or (B) the offense involved a financial transaction with a country supporting international terrorism'' after ''evaded''.

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 2332d;'' before ''50 U.S.C.''.

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

''4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).''.

Chapter Two, Part M, subpart 5 is amended by adding at the end the following:

''§ 2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

(1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; or (D) funds

with knowledge or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C), increase by 2 levels.

(c) Cross References

(1) If the offense resulted in death, apply § 2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. 2339B.

Application Notes:

1. Definitions—For purposes of this guideline:

''Biological agent'', ''chemical weapon'', ''nuclear byproduct material'', ''nuclear material'', ''toxin'', and ''weapon of mass destruction'' have the meaning given those terms in Application Note 1 of the Commentary to § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

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

''Explosives'' has the meaning given that term in Application Note 1 of the Commentary to § 2K1.4 (Arson; Property Damage by Use of Explosives).

''Foreign terrorist organization'' has the meaning given the term ''terrorist organization'' in 18 U.S.C. 2339B(g)(6).

''Material support or resources'' has the meaning given that term in 18 U.S.C. 2339B(g)(4).

2. Departure Provisions.—

(A) In General.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).

(B) War or Armed Conflict.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.''.

Section 2M6.1(a)(2) is amended by striking ''and'' and inserting a comma; by inserting '', (a)(4), and (a)(5)'' after ''(a)(3)''; and by striking ''or''.

Section 2M6.1(a) is amended by redesignating subdivision (3) as subdivision (5); by inserting after subdivision (2) the following:

''(3) 22, if the defendant is convicted under 18 U.S.C. 175b;

(4) 20, if the defendant is convicted under 18 U.S.C. 175(b); or''; and by striking ''by-product'' in subdivision (5), as redesignated by this amendment, and inserting ''byproduct''.

Section 2M6.1(b)(1) is amended by striking ''or (a)(3)'' and inserting '', (a)(4), or (a)(5)''.

Section 2M6.1(b)(2) is amended by inserting '', (a)(3), or (a)(4)'' after ''(a)(2)''.

Section 2M6.1(b)(3) is amended by striking ''or'' after ''(a)(2)'' and inserting a comma; and by inserting '', (a)(4), or (a)(5)'' after ''(a)(3)''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''175b,'' after ''175,''; and by inserting ''1993(a)(2), (3), (b),'' after ''842(p)(2),''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''18 U.S.C. 831(f)(1).'' the following paragraph:

'''Restricted person' has the meaning given that term in 18 U.S.C. 175b(b)(2).''.

Section 2S1.3 is amended in the heading by adding at the end ''; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts''.

Section 2S1.3(a) is amended to read as follows:

''(a) Base Offense Level:

(1) 8, if the defendant was convicted under 31 U.S.C. 5318 or 5318A; or

(2) 6 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.''.

Section 2S1.3(b)(1) is amended by inserting ''(A)'' after ''If''; and by inserting ''; or (B) the offense involved bulk cash smuggling'' after ''promote unlawful activity''.

Section 2S1.3(b) is amended by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

''(2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period, increase by 2 levels.''.

Section 2S1.3(b)(3), as redesignated by this amendment, is amended by striking ''subsection (b)(1) does not apply'' and inserting ''subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting ''5318, 5318A(b), 5322,'' after ''5316,''; and by inserting '', 5331, 5332'' after ''5326''.

The Commentary to § 2S1.3 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; by inserting ''Definition of ''Value of the Funds'.—'' before ''For purposes of this guideline''; and by adding after Note 1 the following:

''2. Bulk Cash Smuggling.—For purposes of subsection (b)(1)(B), 'bulk cash smuggling' means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. 5316, more than $10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. 'United States' has the meaning given that term in Application Note 1 of the Commentary to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

3. Enhancement for Pattern of Unlawful Activity.—For purposes of subsection (b)(2), 'pattern of unlawful activity' means at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.''.

The Commentary to § 2S1.3 captioned ''Background'' is amended by striking ''The'' and inserting ''Some of the''; and by adding at the end the following:

'' This guideline also covers offenses under 31 U.S.C. 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.''.

Section 2X1.1 is amended by adding after subsection (c) the following:

''(d) Special Instruction

(1) Subsection (b) shall not apply to any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5):

18 U.S.C. 81;
18 U.S.C. 930(c);
18 U.S.C. 1362;
18 U.S.C. 1363;
18 U.S.C. 1992;
18 U.S.C. 2339A;
18 U.S.C. 2340A;
49 U.S.C. 46504;
49 U.S.C. 46505; and 49 U.S.C. 60123(b).''.

The Commentary to § 2X2.1 captioned ''Statutory Provision'' is amended to read as follows:

''Statutory Provisions: 18 U.S.C. 2, 2339, 2339A.''.

The Commentary to § 2X2.1 captioned ''Application Note'' is amended in Note 1 by striking '''Underlying'' and inserting ''Definition.—For purposes of this guideline, 'underlying''; and by inserting '', or in the case of a violation of 18 U.S.C. 2339A, ''underlying offense'' means the offense the defendant is convicted of having materially supported prior to or during its commission'' after ''abetting''.

Section 2X3.1(a) is amended by striking ''Provided, that where'' and inserting ''However, in a case in which''; and by striking ''offense level shall'' and inserting ''base offense level under this subsection shall''.

The Commentary to § 2X3.1 captioned ''Statutory Provisions'' is amended by inserting '', 2339, 2339A'' after ''1072''.

The Commentary to § 2X3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''Underlying'' and inserting ''Definition.''—For purposes of this guideline, ''underlying''; and by inserting'', or in the case of a violation of 18 U.S.C. 2339A, 'underlying offense' means the offense the defendant is convicted of having materially supported after its commission (*i.e.,* in connection with the concealment of or an escape from that offense)'' after ''accessory''.

The Commentary to § 2X3.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Application of Mitigating Role Adjustment.—''before ''The adjustment''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. 'Federal Crime of Terrorism' Defined.—For purposes of this guideline, ''federal crime of terrorism'' has the meaning given that term in 18 U.S.C. 2332b(g)(5).''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended by redesignating Note 2 as Note 3; and by inserting after Note 1 the following:

''2. Harboring, Concealing, and Obstruction Offenses.—For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. 2339 or 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by inserting ''Computation of Criminal History Category.—'' before ''Under subsection (b)''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended by adding at the end the following:

''4. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 by striking the period at the end of subdivision (i) and inserting a semicolon; and by inserting after subdivision (i) the following:

''(j) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. 853(p).''.

Section 5D1.2(a) is amended by adding at the end the following:

''Notwithstanding subdivisions (1) through (3), the length of the term of supervised release for any offense listed in 18 U.S.C. 2332b(g)(5)(B) the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person (A) shall be not less than the minimum term of years specified for that class of offense under subdivisions (1) through (3); and (B) may be up to life.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 175 the following new line:

''18 U.S.C. 175b 2M6.1'';

by inserting after the line referenced to 18 U.S.C. 1992 the following new lines:

''18 U.S.C. 1993(a)(1) 2B1.1, 2K1.4
18 U.S.C. 1993(a)(2) 2K1.4, 2M6.1
18 U.S.C. 1993(a)(3) 2K1.4, 2M6.1
18 U.S.C. 1993(a)(4) 2A5.2, 2B1.1
18 U.S.C. 1993(a)(5) 2A5.2
18 U.S.C. 1993(a)(6) 2A2.1, 2A2.2, 2A5.2
18 U.S.C. 1993(a)(7) 2A6.1
18 U.S.C. 1993(a)(8) 2A6.1
18 U.S.C. 1993(b) 2A5.2, 2K1.4, 2M6.1'';

by inserting after the line referenced to 18 U.S.C. 2332a the following new lines:

''18 U.S.C. 2332b(a)(1) 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A4.1, 2B1.1
18 U.S.C. 2332b(a)(2) 2A6.1
18 U.S.C. 2332d 2M5.1
18 U.S.C. 2339 2X2.1, 2X3.1
18 U.S.C. 2339A 2X2.1, 2X3.1
18 U.S.C. 2339B 2M5.3
18 U.S.C. 2340A 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1'';

by inserting after the line referenced to 30 U.S.C. 1463 the following new line:

''31 U.S.C. 5311 note (section 329 of the USA PATRIOT Act of 2001) 2C1.1'';

by inserting after the line referenced to 31 U.S.C. 5316 the following new lines:

''31 U.S.C. 5318 2S1.3
31 U.S.C. 5318 2S1.3'';

by inserting after the line referenced to 31 U.S.C. 5326 the following new lines:

''31 U.S.C. 5331 2S1.3
31 U.S.C. 5332 2S1.3'';

by inserting after the line referenced to 49 U.S.C. 46502(a),(b) the following new line:

''49 U.S.C. 46503 2A5.2''; and

by inserting after the line referenced to 49 U.S.C. 46506 the following new lines:

''49 U.S.C. 46507 2A6.1
49 U.S.C. 60123(b) 2B1.1, 2K1.4, 2M2.1, 2M2.3''.

Reason for Amendment: This amendment is a six-part amendment

that responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Public Law 107–56 (the ''Act'').

Among its many provisions are appropriately severe penalties for offenses against mass transportation systems and interstate gas or hazardous liquid pipelines. The amendment also increases sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures. It expands the guideline coverage of offenses involving bioterrorism, and it creates a new guideline for providing material support to foreign terrorist organizations. It punishes attempts and conspiracies to commit terrorism as if the offense had been carried out and adds an invited upward departure to the guidelines' terrorism enhancement for appropriate cases. Finally, it authorizes a term of supervised release up to life for a defendant convicted of a federal crime of terrorism that resulted in substantial risk of death or serious bodily injury to another person.

First, this amendment makes a number of changes to Appendix A (Statutory Index) and several guidelines in Chapter Two (Offense Conduct) in order to incorporate several new predicate offenses to federal crimes of terrorism. This amendment addresses section 801 of the Act, which added 18 U.S.C. 1993, generally pertaining to offenses against mass transportation systems and facilities. The amendment also addresses 49 U.S.C. 46507 pertaining to false information and threats, that heretofore was not listed in the Statutory Index, as well as the new offense at 49 U.S.C. 46503, pertaining to interference with security screening personnel.

Specifically, the amendment makes a number of changes to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant) and the guidelines in Chapter Two, part A, subpart 2 (Assault). First, this amendment references violations of 18 U.S.C. 1993(a)(4), (a)(5), (a)(6), and (b) and 49 U.S.C. 46503 to 2A5.2 because that guideline presently covers other similar offenses and because the guideline's alternative base offense levels cover offenses that involve reckless or intentional endangerment, conduct which is an element of some of these new offenses.

In order to take into account aggravating conduct which may occur in such offenses, the amendment adds a specific offense characteristic for use of a weapon, borrowing language from § 2A2.2 (Aggravated Assault). The specific offense characteristic provides a graduated enhancement with a minimum offense level of level 24 at § 2A5.2(b)(1) for the involvement of a dangerous weapon in the offense. This enhancement addresses concerns that the current base offense level of level 18 (in § 2A5.2(a)(2)) for reckless endangerment may be inadequate in situations involving a dangerous weapon and reckless disregard for the safety of human life. The minimum offense level of level 24 mirrors the offense level that applies for conduct amounting to reckless endangerment under subsection (b)(1) of § 2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft). A cross reference to the appropriate homicide guideline also is provided for offenses in which death results; death as an aggravating circumstance is included in 18 U.S.C. 1993(b).

The amendment also amends § 2A6.1 (Threatening or Harassing Communications) to incorporate offenses against mass transportation systems under 18 U.S.C. 1993(a)(7) and (a)(8) and 49 U.S.C. 46507 and provides corresponding references in the Statutory Index. These three provisions require the same type of threatening conduct or conveyance of false information as two other offenses referenced to § 2A6.1, specifically 18 U.S.C. 32(c) and 35(b), which cover aircraft, railroads, and shipping, rather than mass transportation systems. Additionally, a specific offense characteristic is added if the offense resulted in a substantial disruption of public, governmental, or business functions or services, or a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense. This enhancement recognizes that a terrorist threat usually will be directed at a large number of individuals, governmental buildings or operations, or infrastructure. Unless such a terrorist threat is immediately dismissed as not credible, the conduct may result in significant disruption and response costs. This specific offense characteristic is the same as that contained in subsection (b)(3) of § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). An invited upward departure provision is added for situations in which the offense involved multiple victims, a circumstance which might occur in the context of these new offenses.

This amendment also amends § 2K1.4 (Arson; Property Damage by Use of Explosives) and § 2B1.1 (Theft, Property Destruction, and Fraud) to cover violations of 18 U.S.C. 1993(a)(1) and (b). Offenses under 18 U.S.C. 1993(a)(1) are similar to another offense referenced to these guidelines, 18 U.S.C. 32(a)(1), with respect to the intent standard required to commit the offense, offense conduct, and resulting harm. The amendment references violations of 18 U.S.C. 1993(a)(2), (a)(3), and (b) to §§ 2K1.4 and 2M6.1. These offenses encompass a wide range of conduct. For example, a violation of 18 U.S.C. 1993(a)(3) may occur if the defendant sets fire to a garage or places a biological agent or toxin for use as a destructive substance near an aircraft and this likely endangered the safety of that aircraft.

The amendment expands § 2M6.1 to cover 18 U.S.C. 175(b) and 175b, two new offenses created by section 817 of the Act, involving possession of biological agents, toxins, and delivery systems. Section 2M6.1 is the most appropriate guideline for these offenses because they involve the knowing possession of certain biological substances. A base offense level of level 20 is provided for 18 U.S.C. 175(b) offenses, the same base offense level as is currently provided for threat cases under that guideline. The current two level increase for particularly dangerous biological agents would be available for the most serious substances.

A base offense level of level 22 is provided for offenses under 18 U.S.C. 175b, which forbids certain restricted persons (defined in the statute) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or to receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent (e.g., ebola, anthrax). Because this offense already takes into account the serious nature of a select agent, the amendment treats these offenses separately from offenses under 18 U.S.C. 175(b), with a higher base offense level and an instruction that the enhancement for select biological agents does not apply.

The amendment also amends the Statutory Index to reference 18 U.S.C. 2339 to 2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). This offense prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit, one of several enumerated offenses.

Second, this amendment provides Statutory Index references, as well as modifications to various Chapter Two guidelines, for a number of offenses

that, prior to enactment of the Act, were enumerated in 18 U.S.C. 2332b(g)(5) as predicate offenses for federal crimes of terrorism but were not explicitly incorporated in the guidelines.

Specifically, the amendment references 18 U.S.C. 2332b(a)(1) offenses to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint), inasmuch as 18 U.S.C. 2332b offenses are analogous to offenses currently referenced to those guidelines.

The amendment also provides a Statutory Index reference to § 2A6.1 (Threatening or Harassing Communications) for cases under 18 U.S.C. 2332b(a)(2), which prohibits threats, attempts and conspiracies to commit an offense under 18 U.S.C. 2332b(a)(1).

This amendment also creates a new guideline, at § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations), for offenses under 18 U.S.C. 2339B, which prohibits the provision of material support or resources to a foreign terrorist organization. The amendment references offenses under 18 U.S.C. 2339A to §§ 2X2.1 and 2X3.1. Section 2339A offenses concern providing material support to terrorists that the defendant knows or intends will be used in preparation for, or in carrying out, certain specified predicate offenses. Thus, the essence of 18 U.S.C. 2339A offenses is akin to aiding and abetting or accessory after the fact offenses, which warrants reference to §§ 2X2.1 and 2X3.1. In contrast, 18 U.S.C. 2339B offenses are referenced to a new guideline, § 2M5.3, primarily because they are not statutorily linked to the commission of any specified predicate offenses. To account for the variety of ways in which such offenses may be committed, the proposed new guideline provides two specific offense characteristics that enhance the sentence for cases in which the material support involved dangerous weapons and in which the material support involved nuclear, biological, or chemical weapons.

The amendment references torture offenses under 18 U.S.C. 2340A to §§ 2A1.1, 2A1.2, 2A2.1, 2A2.2, and 2A4.1. The amendment also references 49 U.S.C. 60123(b), pertaining to damaging or destroying an interstate gas or hazardous liquid pipeline facility, to §§ 2B1.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities).

Third, the amendment responds to section 811 of the Act, which amended a number of offenses to ensure that attempts and conspiracies to commit any of those offenses subject the offender to the same penalties prescribed for the object offense. This amendment provides a special instruction in § 2X1.1 (Attempt, Solicitation, or Conspiracy) that the three level reduction in § 2X1.1(b) does not apply to these offenses when committed for a terrorist objective.

Fourth, the amendment adds an encouraged, structured upward departure in § 3A1.4 (Terrorism) for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote ''federal crimes of terrorism'' for purposes of the terrorism adjustment in § 3A1.4. The amendment provides an upward departure, rather than a specified guideline adjustment, because of the expected infrequency of these terrorism offenses and to provide the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis. In addition, the structured upward departure provision makes it possible to impose punishment equal in severity to that which would be imposed if the § 3A1.4 adjustment actually applied.

The amendment adds an application note to § 3A1.4 regarding harboring and concealing offenses to clarify that § 3A1.4 may apply in the case of offenses that occurred after the commission of the federal crime of terrorism (*e.g.,* a case in which the defendant, in violation of 18 U.S.C. 2339A, concealed an individual who had committed a federal crime of terrorism).

Fifth, the amendment amends § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports) to incorporate new money laundering provisions created by the Act.

Specifically, the amendment provides an alternative base offense level of level 8 in § 2S1.3(a) in order to incorporate offenses under 31 U.S.C. 5318 and 5318A. The base offense level of level 8 recognizes the heightened due diligence requirements placed on financial institutions with respect to payable-through accounts, correspondent accounts, and shell banks.

The amendment also amends § 2S1.3(b)(1), relating to the promotion of unlawful activity, to provide an alternative prong if the offense involved bulk cash smuggling. This amendment addresses 31 U.S.C. 5332, added by section 371 of the Act, which prohibits concealing, with intent to evade a currency reporting requirement under 31 U.S.C. 5316, more than $10,000 in currency or other monetary instruments and transporting or transferring such currency or monetary instruments into or outside of the United States. Findings set forth in that section of the Act indicate that bulk cash smuggling typically involves the promotion of unlawful activity.

The amendment also provides an enhancement in § 2S1.3(b) to give effect to the enhanced penalty provisions under 31 U.S.C. 5322(b) for offenses under subchapter II of chapter 53 of title 31, United Stated Code, if such offenses were committed as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period.

Sixth, the amendment addresses a number of miscellaneous issues related to terrorism. Specifically, it provides a definition of terrorism for purposes of the prior conviction enhancement in § 2L1.2 (Unlawfully Entering or Remaining in the United States). For consistency, the definition is the same as that found in the current Chapter Three terrorism adjustment.

It also amends § 3C1.1 (Obstructing or Impeding the Administration of Justice), in response to section 319(d) of the Act, which amends the Controlled Substances Act at 21 U.S.C. 853(e) to require a defendant to repatriate any property that may be seized and forfeited and to deposit that property in the registry of the court or with the United States Marshals Service or the Secretary of the Treasury. Section 319(d) of the Act also states that the failure to comply with a protective order and an order to repatriate property ''may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.'' Accordingly, the amendment adds Application Note 4(j) to § 3C1.1 to provide that failure to comply with an order issued pursuant to 21 U.S.C. 835(e) is an example of the types of conduct to which the adjustment applies.

It also amends § 5D1.2 (Term of Supervised Release), in response to section 812 of the Act, which authorizes a term of supervised release of any term of years or life for a defendant convicted

of a federal crime of terrorism the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

It also amends § 2B1.1 to delete the special instruction pertaining to the imposition of not less than six months' imprisonment for a defendant convicted under 18 U.S.C. 1030(a)(4) or (5). This amendment is in response to section 814(f) of the Act, which directed the Commission to amend the guidelines ''to ensure that any individual convicted of a violation of section 1030 of title 18, United States Code, can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment.''

It also adds a reference in the Statutory Index to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), for the new offense created by section 329 of the Act, which prohibits a federal official or employee, in connection with administration of the money laundering provisions of the Act, to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of an official act, being influenced to commit or aid in committing any fraud on the United States, or being induced to do or omit to do any act in violation of official duties.

It also amends § 2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. 2332d, which prohibits a United States person, knowing or having reasonable cause to know that a country is designated under the Export Administration Act as a country supporting international terrorism, to engage in a financial transaction with the government of that country. The amendment provides a base offense level of level 26 for these offenses.

Finally, it amends § 2B2.3 (Trespass) to incorporate the offense under 18 U.S.C. 1036. That offense, added by section 2 of the Enhanced Federal Security Act of 2000, Public Law 106–547, prohibits, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport. The amendment amends the existing two level enhancement in § 2B2.3(b)(1) to provide an additional ground for application of the enhancement if the trespass involved a vessel, aircraft of the United States, or secure area of an airport. It also adds a cross reference to § 2X1.1 if the offense involved the intent to commit another felony.

2. Amendment: Section 2B1.1(c) is amended by adding at the end the following:

''(4) If the offense involved a cultural heritage resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''For purposes of this guideline:'' the following paragraph:

'' 'Cultural heritage resource' has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).''.

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

''(vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the ''value of the cultural heritage resource' set forth in Application Note 2 of the Commentary to § 2B1.5.''.

Chapter Two, Part B, subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources.

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resource (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by 2 levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

(4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by 2 levels.

(5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by 2 levels.

(6) If a dangerous weapon was brandished or its use was threatened, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(c) Cross Reference

(1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. 470ee, 668(a), 707(b); 18 U.S.C. 541–546, 641, 661–662, 666, 668, 1152–1153, 1163, 1168, 1170, 1361, 2232, 2314–2315.

Application Notes:

1. 'Cultural Heritage Resource' Defined.—For purposes of this guideline, 'cultural heritage resource' means any of the following:

(A) A historic property, as defined in 16 U.S.C. 470w(5) (see also section 16(l) of 36 CFR part 800).

(B) A historic resource, as defined in 16 U.S.C. 470w(5).

(C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 CFR part 7; 36 CFR part 296; 32 CFR part 299; 18 CFR part 1312).

(D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001(3) (see also 43 CFR 10.2(d)).

(E) A commemorative work. ''Commemorative work'' (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. 1002(c)); and (B) includes any national monument or national memorial.

(F) An object of cultural heritage, as defined in 18 U.S.C. 668(a)(2).

(G) Designated ethnological material, as described in 19 U.S.C. 2601(2)(ii), 2601(7), and 2604.

2. Value of the Cultural Heritage Resource Under Subsection (b)(1).''This application note applies to the determination of the value of the

cultural heritage resource under subsection (b)(1).

(A) General Rule.''For purposes of subsection (b)(1), the value of the cultural heritage resource shall include, as applicable to the particular resource involved, the following:

(i) The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)

(ii) The commercial value.

(iii) The cost of restoration and repair.

(B) Estimation of Value.''For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the cultural heritage resource based on available information.

(C) Definitions.''For purposes of this application note:

(i) ''Archaeological value'' of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 CFR 7.14(a); 36 CFR 296.14(a); 32 CFR 229.14(a); 18 CFR 1312.14(a).)

(ii) ''Commercial value'' of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 CFR 7.14(b); 36 CFR 296.14(b); 32 CFR 229.14(b); 18 CFR 1312.14(b).)

(iii) ''Cost of restoration and repair'' includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 CFR 7.14(c); 36 CFR 296.14(c); 32 CFR 229.14(c); 18 CFR 1312.14(c).)

(D) Determination of Value in Cases Involving a Variety of Cultural Heritage Resources.—In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this application note.

3. Enhancement in Subsection (b)(2).__For purposes of subsection (b)(2):

(A) ''Museum'' has the meaning given that term in 18 U.S.C. 668(a)(1) except that the museum may be situated outside the United States.

(B) ''National cemetery'' has the meaning given that term in Application Note 1 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud).

(C) ''National Historic Landmark'' means a property designated as such pursuant to 16 U.S.C. 470a(a)(1)(B).

(D) ''National marine sanctuary'' means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. 1433.

(E) ''National monument or national memorial'' means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. 431).

(F) ''National park system'' has the meaning given that term in 16 U.S.C. 1c(a).

(G) ''World Heritage List'' means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).''For purposes of subsection (b)(3):

(A) ''Cultural patrimony'' has the meaning given that term in 25 U.S.C. 3001(3)(D) (see also 43 CFR 10.2(d)(4)).

(B) ''Cultural property'' has the meaning given that term in 19 U.S.C. 2601(6).

(C) ''Designated archaeological or ethnological material'' means archaeological or ethnological material described in 19 U.S.C. 2601(7) (see also 19 U.S.C. 2601(2) and 2604).

(D) ''Funerary object'' means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

(E) ''Human remains'' (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(F) ''Pre-Columbian monumental or architectural sculpture or mural'' has the meaning given that term in 19 U.S.C. 2095(3).

(G) ''Sacred object'' has the meaning given that term in 25 U.S.C. 3001(3)(C) (see also 43 CFR 10.2(d)(3)).

5. Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).____

(A) ''For Pecuniary Gain'.__For purposes of subsection (b)(4), ''for pecuniary gain'' means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) Commercial Purpose.__The acquisition of cultural heritage resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a ''commercial purpose'' for purposes of subsection (b)(4).

6. Pattern of Misconduct Enhancement Under Subsection (b)(5).—

(A) Definition.__For purposes of subsection (b)(5), ''pattern of misconduct involving cultural heritage resources'' means two or more separate instances of offense conduct involving a cultural heritage resource that did not occur during the course of the offense (i.e., that did not occur during the course of the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct)). Offense conduct involving a cultural heritage resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

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

7. Dangerous Weapons Enhancement Under Subsection (b)(6).__For purposes of subsection (b)(6), ''brandished'' and ''dangerous weapon'' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

8. Multiple Counts.__For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving cultural heritage offenses covered by this guideline are grouped together under subsection (d) of § 3D1.2 (Groups of Closely Related Counts). Multiple counts involving cultural heritage offenses covered by this guideline and

offenses covered by other guidelines are not to be grouped under § 3D1.2(d).

9. Upward Departure Provision.__There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).''.

Section 2Q2.1 is amended by adding after subsection (b) the following:

''(c) Cross Reference

(1) If the offense involved a cultural heritage resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.''.

The Commentary to § 2Q2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''6. For purposes of subsection (c)(1), ''cultural heritage resource'' has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).''.

Section 3D1.2(d) is amended by inserting ''2B1.5,'' after ''2B1.4,''.

Appendix A (Statutory Index) is amended by striking the line referenced to 16 U.S.C. 433; by inserting before the line referenced to 16 U.S.C. 668(a) the following new line: ''16 U.S.C. 470ee 2B1.5'';

in the line referenced to 16 U.S.C. 668(a) by inserting ''2B1.5,'' before ''2Q2.1'';

in the line referenced to 16 U.S.C. 707(b) by inserting ''2B1.5,'' before ''2Q2.1'';

in the line referenced to 18 U.S.C. 541 by inserting ''2B1.5,'' before ''2T3.1'';

in the line referenced to 18 U.S.C. 542 by inserting ''2B1.5,'' before ''2T3.1'';

in the line referenced to 18 U.S.C. 543 by inserting ''2B1.5,'' before ''2T3.1'';

in the line referenced to 18 U.S.C. 544 by inserting ''2B1.5,'' before ''2T3.1'';

in the line referenced to 18 U.S.C. 545 by inserting ''2B1.5,'' before ''2Q2.1''; by inserting after the line referenced to 18 U.S.C. 545 the following new line: ''18 U.S.C. 546 2B1.5'';

in the line referenced to 18 U.S.C. 641 by inserting '', 2B1.5'' after ''2B1.1'';

in the line referenced to 18 U.S.C. 661 by inserting '', 2B1.5'' after ''2B1.1'';

in the line referenced to 18 U.S.C. 662 by inserting '', 2B1.5'' after ''2B1.1'';

in the line referenced to 18 U.S.C. 666(a)(1)(A) by inserting '', 2B1.5'' after ''2B1.1''; in the line referenced to 18 U.S.C. 668 by striking ''2B1.1'' and inserting ''2B1.5'';

by inserting after the line referenced to 18 U.S.C. 1121 the following new line: ''18 U.S.C. 1152 2B1.5'';

in the line referenced to 18 U.S.C. 1153 by inserting ''2B1.5,'' after ''2B1.1,'';

in the line referenced to 18 U.S.C. 1163 by inserting '', 2B1.5'' after ''2B1.1'';

by inserting after the line referenced to 18 U.S.C. 1168 the following new line: ''18 U.S.C. 1170 2B1.5'';

in the line referenced to 18 U.S.C. 1361 by inserting '', 2B1.5'' after ''2B1.1'';

in the line referenced to 18 U.S.C. 2232 by inserting ''2B1.5,'' before ''2J1.2'';

in the line referenced to 18 U.S.C. 2314 by inserting '', 2B1.5'' after ''2B1.1''; and

in the line referenced to 18 U.S.C. 2315 by inserting '', 2B1.5'' after ''2B1.1''.

Reason for Amendment: This amendment provides a new guideline at § 2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) for offenses involving cultural heritage resources. This amendment reflects the Commission's conclusion that the existing sentencing guidelines for economic and property destruction crimes are inadequate to punish in an appropriate and proportional way the variety of federal crimes involving the theft of, damage to, destruction of, or illicit trafficking in, cultural heritage resources. The Commission has determined that a separate guideline, which specifically recognizes both the federal government's long-standing obligation and role in preserving such resources, and the harm caused to both the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources, is needed.

Cultural heritage resources include national memorials, landmarks, parks, archaeological and other historic and cultural resources, specifically designated by Congress and the President for the preservation of the cultural heritage of this nation and its ancestors. The federal government acts either as a trustee for the public generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations, to protect these cultural heritage resources. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations. Accordingly, this new guideline takes into account the transcendent and irreplaceable value of cultural heritage resources and punishes in a proportionate way the aggravating conduct associated with cultural heritage resource crimes.

This guideline incorporates into the definition of ''cultural heritage resource'' a broad range of existing federal statutory definitions for various historical, cultural, and archaeological items. If a defendant is convicted of an offense that charges illegal conduct involving a cultural heritage resource, this guideline will apply, irrespective of whether the conviction is obtained under general property theft or damage statutes, such as laws concerning the theft and destruction of government property, 18 U.S.C. 641, interstate sale or receipt of stolen property, 18 U.S.C. 2314–15, and smuggling, 18 U.S.C. 541 *et seq.*, or under specific cultural heritage statutes, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470ee (ARPA), the criminal provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) at 18 U.S.C. 1170, and 18 U.S.C. 668, which concerns theft from museums. In addition, if a more general offense is charged that is referenced in Appendix A to § 2B1.1 (Theft, Property Destruction, and Fraud), this guideline will apply by cross reference if the offense conduct involves a cultural heritage resource and results in a higher offense level.

This new guideline has a base offense level of level 8, which is two levels higher than the base offense level for general economic and property destruction crimes. The higher base offense level represents the Commission's determination that offenses involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society.

The new guideline also provides that the monetary value of the cultural heritage resource is an important, although not the sole, factor in determining the appropriate

punishment. The Commission has elected not to use the concept of ''loss,'' which is an integral part of the theft, fraud, and property destruction guideline at § 2B1.1, because cultural heritage offenses do not involve the same fungible and compensatory values embodied in ''loss.'' Instead, under this new guideline, value is to be based on commercial value, archaeological value, and the cost of restoration and repair. These methods of valuation are derived from existing federal law. See 16 U.S.C. 470ee(d); 43 CFR 7.14.

The Commission has recognized that archaeological value shall be used in calculating the value of archaeological resources but has provided flexibility for the sentencing court to determine whether either commercial value or the cost of restoration and repair, or both, should be added to archaeological value in determining the appropriate value of archaeological resources. For all other types of cultural heritage resources covered by this guideline, the Commission has provided flexibility for the sentencing court regarding whether and when to use all or some of the methods of valuation, as appropriate, for calculating the total value associated with the harm to the particular resource caused by the defendant's offense conduct. The value of the cultural heritage resource is then referenced to the monetary table provided at § 2B1.1(b)(1) in order to determine appropriate and proportionate offense levels in a manner consistent with the overall guidelines structure.

The new guideline provides five additional specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with cultural heritage resource offenses. In providing enhancements for these non-pecuniary aggravating factors, the Commission seeks to ensure that the nonquantifiable harm caused by the offense to affected cultural groups, and society as a whole, is adequately reflected in the penalty structure.

The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. These are the national park system, national historic landmarks, national monuments, national memorials, national marine sanctuaries, national cemeteries, sites contained on the World Heritage List, and museums.

Consistent with the definition in 18 U.S.C. 668(a)(1), museums are defined broadly to include all organized and permanent institutions, with an essentially educational or aesthetic purpose, which exhibit tangible objects to the public on a regular schedule. Adoption of this definition reflects the Commission's recognition that cultural heritage resource crimes affecting institutions dedicated to the preservation of resources and associated knowledge, irrespective of the institution's size, ownership, or funding, deprive the public and future generations of the opportunity to learn and appreciate the richness of the nation's heritage. Similarly, this enhancement reflects the Commission's assessment that damage to the other listed places degrades not only the resource itself but also the historical and cultural aspects which the resource commemorates.

An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law. Funerary objects, items of cultural patrimony, and sacred objects are included because they are domestic cultural heritage resources protected under NAGPRA. See 25 U.S.C. 3001. Cultural property, designated archaeological and ethnological material, and pre-Columbian monumental and architectural sculpture and murals are included in the enhancement because these are cultural heritage resources of foreign provenance for which Congress has chosen, in the implementation of international treaties and bilateral agreements, to impose import restrictions. See 19 U.S.C. 2092, 2606, and 2607.

This guideline also provides a two level enhancement at subsection (b)(4) if the offense was committed for pecuniary gain or otherwise involved a commercial purpose. This increase is based on a determination that offenders who are motivated by financial gain or other commercial incentive are more culpable than offenders who are motivated solely by their personal interest in possessing cultural heritage resources. Those motivated by financial gain contribute to illicit trafficking and support dealers and brokers who earn a livelihood from illegal activities. Mindful of INTERPOL's findings, as reported by the Department of Justice, that the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking, the Commission seeks to ensure that the penalty structure adequately accounts for these increased harms.

This guideline also provides a two level enhancement at subsection (b)(5) if the offense involves a pattern of misconduct, and provides a definition of ''pattern of misconduct'' that is designed to interact with other requirements of the guidelines regarding relevant conduct and criminal history. ''Pattern of misconduct'' is defined as ''two or more separate instances of offense conduct involving cultural heritage resources that did not occur during the course of the instant offense (i.e., that did not occur during the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct))''. Accordingly, under this guideline, separate instances of offense conduct need not result in a criminal conviction or legal adjudication in order for this enhancement to apply. Separate instances of offense conduct involving cultural heritage resources that are included in the defendant's criminal history may also form the factual basis for the application of this enhancement. The Commission considers such increased punishment to be appropriate for offenders who repeatedly disregard cultural heritage resource laws and regulations and the social values underlying them. These repeat offenders cause serious harm, not only to the resources themselves, but to the nation and the individuals who treasure them.

This guideline also provides at subsection (b)(6) a two level enhancement and a minimum offense level of level 14 if a dangerous weapon, including a firearm, is brandished or its use threatened. This enhancement reflects the increased culpability of offenders who pose a threat to law enforcement officers and innocent passersby. Recognizing that there are legitimate uses in remote expanses of tribal and federal land for certain tools and firearms that may otherwise qualify as ''dangerous weapons'' under the guideline definitions, the Commission has limited the scope of this enhancement by requiring that the dangerous weapon or firearm be brandished or its use threatened, in order for increased punishment to attach under this provision.

In light of the increased potential for the symbols of our nation's heritage and culture to be targets of violent individuals, including terrorists, the Commission also has provided for increased punishment through a cross reference to § 2K1.4 (Arson; Property Damage by Use of Explosives), if the offense involved arson or property damage by the use of any explosive,

explosive material, or destructive devices, when the resulting offense level is greater under § 2K1.4 than the offense level under this guideline.

This guideline also includes a special rule in the Commentary to address multiple counts of cultural heritage resource offenses, as well as multiple counts of conviction involving offenses under this and other guidelines. Consistent with the principles underlying the rules for grouping multiple counts of conviction in § 3D1.2 (Groups of Closely Related Counts) and the unique concerns sought to be addressed by this amendment, the new guideline provides that multiple counts of cultural heritage resource offenses are to be grouped under § 3D1.2(d). However, because the monetary harm is measured differently, a count of conviction for an offense sentenced under § 2B1.5 may not be grouped under this provision with a conviction for an offense sentenced under a different guideline.

This guideline also invites an upward departure if the determined offense level substantially understates the seriousness of the cultural heritage resource offense. Two illustrations of such situations are given. Finally, this amendment provides a cross reference within § 2B1.1. Theft, fraud, and property destruction offenses which also involve cultural heritage resources are cross referenced to the new guideline at § 2B1.5 if the resulting offense level under it would be greater than under § 2B1.1. When a case involving a cultural heritage resource is sentenced under § 2B1.1, loss attributable to that cultural heritage resource is to be determined using the definition of ''value of the cultural heritage resource'' from § 2B1.5.

The Commission recognizes that the full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. 1163 (covering the theft of tribal property). Currently ARPA has either a one year or two year statutory maximum term of imprisonment for the first offense, depending on whether the value exceeds $500, and NAGPRA has a statutory maximum term of imprisonment of one year for the first offense irrespective of value. These statutes all have five year statutory maximum terms of imprisonment for second and subsequent offenses. Consequently, the statutory ceiling may limit the full range of proportionate guideline sentencing, but the Commission has promulgated this new guideline to cover the wide variety of potential offense conduct that can occur in connection with cultural heritage resources. The Commission has recommended to Congress that the statutory maximum terms of imprisonment for these offenses be raised appropriately.

3. Amendment: The Commentary to § 2B4.1 captioned ''Statutory Provisions'' is amended by striking ''15 U.S.C. 78dd-1, 78dd-2;''.

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended in Note 1 by inserting '', foreign governments, or public international organizations'' after ''local government''; and by striking ''governmental'' and inserting ''any such''.

The Commentary to § 2B4.1 captioned ''Background'' is amended in the sixth paragraph by striking ''to violations of the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-1 and 78dd-2, and''.

The Commentary to § 2C1.1 captioned ''Statutory Provisions'' is amended by inserting ''15 U.S.C. 78dd-1, 78dd-2, 78dd-3;'' before ''18 U.S.C.''.

The Commentary to § 2C1.1 captioned ''Background'' is amended by inserting after the ninth paragraph the following:

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

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 78dd-1 by striking ''2B4.1'' and inserting ''2C1.1'';

in the line referenced to 15 U.S.C. 78dd-2 by striking ''2B4.1'' and inserting ''2C1.1''; by inserting after the line referenced to 15 U.S.C. 78dd-2 following new line:

''15 U.S.C. 78dd-3 2C1.1'';

and in the line referenced to 15 U.S.C. 78ff by striking ''2B4.1'' and inserting ''2C1.1''.

Reason for Amendment: This amendment changes the Statutory Index reference for violations of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2 and 78dd-3), from § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

This change is made because violations of 15 U.S.C. 78dd-1 through 78dd-3 involve public corruption of foreign officials and are, therefore, more akin to public corruption cases than commercial bribery cases. Violations of the 15 U.S.C. 78dd-1 through 78dd-3 typically involve payments to foreign officials for the purposes of influencing their official acts or decisions, inducing them to do or omit an act in violation of their lawful duty, inducing them to influence a foreign government, or securing any improper advantage. These cases also involve payments to foreign political parties or officials, candidates for foreign political office, or persons who act as conduits to these individuals. Most cases prosecuted under 15 U.S.C. 78dd-1 through 78dd-3 involve an intent to influence governmental action.

Conversely, commercial bribery cases sentenced under § 2B4.1 often involve kickback and gratuity payments made to bank officials or others who accept payments in return for influence or some type of exchange from the other person. These cases typically do not involve bribery of public or governmental officials and indeed, the Commentary to the guideline makes this clear in Application Note 1.

This change also is made to comply with the mandate of a mulitlateral treaty entered into by the United States, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In part, this Convention requires signatory countries to impose comparable sentences in both domestic and foreign bribery cases. Domestic public bribery cases are referenced to § 2C1.1. To comply with the treaty, offenses committed in violation of 15 U.S.C. 78dd-1 through 78dd-3 are now similarly referenced to § 2C1.1.

4. Amendment: Section 2D1.1(a)(3) is amended by striking ''below.'' and inserting '', except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11 in the ''TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE'' by striking the line referenced to MDA and inserting the following:

''MDA 250 mg
MDMA 250 mg''.

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

''21. Applicability of Subsection (b)(6).—The applicability of subsection

(b)(6) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section § 5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(6) applies.''.

Section 2D1.8(a)(2) is amended by striking ''16'' and inserting ''26''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by adding at the end the following:

''6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied § 2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in § 2D1.1(a)(3), the court also shall apply the appropriate adjustment under this guideline.''.

Reason for Amendment: This amendment responds to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders. The amendment also clarifies the operation of certain provisions in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

First, the amendment increases the maximum base offense level under subsection (a)(2) of § 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) from level 16 to level 26. This part of the amendment responds to concerns that § 2D1.8 did not adequately punish defendants convicted under 21 U.S.C. 856, pertaining to the establishment of manufacturing operations. That statute originally was enacted to target defendants who maintain, manage, or control so-called ''crack houses'' and more recently has been applied to defendants who facilitate drug use at commercial dance clubs, frequently called ''raves''.

Prior to this amendment, § 2D1.8(a)(2) provided a maximum base offense level of level 16 for defendants convicted under 21 U.S.C. 856 who had no participation in the underlying controlled substance offense other than allowing use of their premises. The Commission determined that the maximum base offense level of level 16 did not adequately reflect the culpability of offenders who permit distribution of drugs in quantities that under § 2D1.1 result in offense levels higher than level 16. Such offenders knowingly and intentionally facilitate and profit, at least indirectly, from the trafficking of illegal drugs, even though they may not participate directly in the underlying controlled substance offense.

Second, the amendment modifies § 2D1.1(a)(3) to provide a maximum base offense level of level 30 if the defendant receives an adjustment under § 3B1.2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., ''mules'' or ''couriers'' whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).

This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in § 2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under § 3B1.2. The Commission determined that, ordinarily, a maximum base offense level of level 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at § 2D1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments), may increase the offense level above level 30. The maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders.

The amendment also adds an application note in § 3B1.2 that instructs the court to apply the appropriate adjustment under that guideline in a case in which the maximum base offense level in § 2D1.1(a)(3) operates to reduce the defendant's base offense level under § 2D1.1.

Third, the amendment modifies the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in the commentary to § 2D1.1 to reflect more accurately the type and weight of ecstasy pills typically trafficked and consumed. Specifically, the amendment adds a reference for MDMA (3,4-methylenedioxymethamphetamine) in the Typical Weight Per Unit Table and lists the typical weight as 250 milligrams per pill. The amendment also revises the typical weight for MDA to 250 milligrams of the mixture or substance containing the controlled substance. Prior to this amendment, the Table listed the typical weight of MDA as 100 milligrams of the actual controlled substance.

Information provided by the Drug Enforcement Administration indicates that ecstasy usually is trafficked and used as MDMA in pills weighing approximately 250 to 350 milligrams.

The absence of MDMA from the Typical Weight Per Unit (Dose, Pill, or Capsule) Table and the listing for MDA of an estimate of the actual weight of the controlled substance created the potential for misapplying the MDA estimate in a case in which MDMA is involved, which could result in underpunishment in some ecstasy cases. This part of the amendment thus promotes uniform application of § 2D1.1 for offenses involving ecstasy by adding a reference for MDMA and revising the estimated weight for MDA.

Fourth, the amendment addresses two application concerns regarding the two level reduction under § 2D1.1(b)(6) for defendants who meet the criteria set forth in § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). The amendment provides an application note that clarifies that the two level reduction under § 2D1.1(b)(6) does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment. The application note also clarifies that § 5C1.2(b), which provides a minimum offense level of level 17 for certain offenders, is not applicable to § 2D1.1(b)(6).

5. Amendment: Chapter Two is amended in the heading of Part G by striking ''PROSTITUTION'' and inserting ''COMMERCIAL SEX ACTS''.

Chapter Two, Part G is amended in the heading of subpart 1 by striking ''PROSTITUTION'' and inserting ''A COMMERCIAL SEX ACT''.

Section 2G1.1 is amended in the heading by striking ''Prostitution'' and inserting ''A Commercial Sex Act''.

Section 2G1.1(b)(1) is amended by striking ''prostitution'' and inserting ''a commercial sex act''; by inserting ''fraud,'' after ''force,''; and by striking ''by threats or drugs or in any manner''.

Section 2G1.1(b)(4) is amended by striking ''prostitution'' each place it appears and inserting ''a commercial sex act''.

Section 2G1.1(b)(5) is amended by striking ''prostitution'' and inserting ''a commercial sex act''.

Section 2G1.1(c)(3) is amended by striking ''prostitution'' and inserting ''a commercial sex act''.

Section 2G1.1(d)(1) is amended by striking ''prostitution'' and inserting ''a commercial sex act''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''For purposes of this guideline—'' the following paragraph:

'''Commercial sex act' has the meaning given that term in 18 U.S.C. 1591(c)(1).''; and by striking '''Promoting prostitution' means'' and all that follows through ''law enforcement officer.'' and inserting the following:

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

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

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''fraud,'' after ''force,''; and by striking ''prostitution'' and inserting ''commercial sex act''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Notes 3, 4, 7, 8, and 11 by striking ''prostitution'' each place it appears and inserting ''a commercial sex act''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended by striking Note 12 and inserting the following:

''12. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 victims.''.

Reason for Amendment: This amendment ensures that appropriately severe sentences for sex trafficking crimes apply to commercial sex acts such as production of child pornography, in addition to prostitution, and also targets offenders who use fraud to entrap victims. It proposes several changes to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the ''Act''), Public Law 106–386, pertaining to the new offense at 18 U.S.C. 1591, which prohibits knowingly transporting or harboring any person, or benefitting from such transporting or harboring, knowing either that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be forced to engage in a commercial sex act.

In response to the Act, the Commission in 2001 promulgated an amendment that referenced 18 U.S.C. 1591 to 2G1.1 and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material) and provided an encouraged upward departure in those guidelines to address cases in which (1) the defendant was convicted under 18 U.S.C. 1591 and the offense involved a victim who had not attained the age of 14 years; or (2) the offense involved more than 10 victims. (See Supplement to Appendix C, Amendment 612, effective May 1, 2001, and Amendment 627, effective November 1, 2001).

This amendment proposes three substantive changes to § 2G1.1. First, this amendment broadens the conduct covered by the guideline beyond prostitution to encompass all commercial sex acts, consistent with the scope of the Act. Second, this amendment expands the ''force or coercion'' prong of § 2G1.1(b)(1) to also cover offenses involving fraud. This change addresses the increased punishment provided by 18 U.S.C. 1591 for offenses effected by force, fraud, or coercion. Third, the amendment deletes the portion of the encouraged upward departure provision in § 2G1.1 pertaining to the age of the victim because such conduct already is taken into account by that guideline.

6. Amendment: Section 2K2.4 is amended by redesignating subsection (b) as subsection (d); and by striking subsection (a) and inserting the following:

''(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1 (Career Offender), the guideline sentence shall be determined under § 4B1.1(c). Except for §§ 3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by redesignating Notes 2 through 5 as Notes 4 through 7, respectively; and by striking Note 1 and inserting the following:

''1. Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. 924(c) or 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) Upward Departure Provision.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. 924(c) or 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. 924(c) or 929(a) offense but is not determined to be a career offender under § 4B1.1.

3. Application of Subsection (c).—In a case in which the defendant (A) was convicted of violating 18 U.S.C. 924(c) or 18 U.S.C. 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1 (Career Offender), the guideline sentence shall be determined under § 4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, by inserting ''Weapon Enhancement.—'' before ''If a sentence under''; and by inserting in the last

paragraph ''in which the defendant is determined not to be a career offender'' after ''In a few cases''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by striking Note 5, as redesignated by this amendment, and inserting the following:

''5. Chapters Three and Four.—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in § 3E1.1 (Acceptance of Responsibility) may apply, as provided in § 4B1.1(c); and (B) no other adjustments in Chapter Three and no provisions of Chapter Four, other than §§ 4B1.1 and 4B1.2, shall apply.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 6, as redesignated by this amendment, by inserting ''Terms of Supervised Release.—'' before ''Imposition of a term''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 7, as redesignated by this amendment, by inserting ''Fines.—'' before ''Subsection''; and by striking ''(b)'' and inserting ''(d)''; and by striking ''Note 2'' and inserting ''Note 4''.

Section 4B1.1 is amended by striking ''A defendant is a career offender'' and all that follows through ''Category VI.'' and inserting the following:

''(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.''.

Section 4B1.1 is amended by adding after ''corresponding to that adjustment.'' the following:

''(c) If the defendant is convicted of 18 U.S.C. 924(c) or 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. 924(c) or 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. 924(c) or 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. 924(c) or 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. 924(c) or 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. 924(c) or 929(a) Offenders

§ 3E1.1 Reduction	Guideline Range for the 18 U.S.C. 924(c) or 929(a) Count(s)
No reduction	360-life
2-level reduction	292–365
3-level reduction	262–327.''.

The Commentary to § 4B1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''3. Application of Subsection (c).—

(A) In General.—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. 924(c) or 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(a).

(B) Subsection (c)(2).—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

(C) 'Otherwise Applicable Guideline Range'.—For purposes of subsection (c)(2)(A), 'otherwise applicable guideline range' for the count(s) of conviction other than the 18 U.S.C. 924(c) or 18 U.S.C. 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. 924(c) or 18 U.S.C. 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§ 4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

(ii) If the count(s) of conviction other than the 18 U.S.C. 924(c) or 18 U.S.C. 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under § 4B1.1(a) and (b).

(D) Imposition of Consecutive Term of Imprisonment.—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) Example.—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. 924(c) count) qualifies the defendant as a career offender under § 4B1.1(a). Under § 4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentence in accordance with § 5G1.2(e).''.

The Commentary to § 4B1.1 captioned ''Background'' is amended by adding at the end the following:

''Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. 924(c) or 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category

VI and offense level 37 (assuming § 3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under § 3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under § 3E1.1 applies).''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''A prior conviction for violating 18 U.S.C. 924(c)'' and all that follows through the end of that paragraph and inserting the following:

''A violation of 18 U.S.C. 924(c) or 929(a) is a 'crime of violence' or a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'crime of violence' or a 'controlled substance offense'. (Note that in the case of a prior 18 U.S.C. 924(c) or 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)''.

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

Section 5G1.2(a) is amended by striking ''The'' and inserting ''Except as provided in subsection (e), the''; and by inserting a comma after ''other term of imprisonment''.

Section 5G1.2 is amended by adding after subsection (d) the following:

''(e) In a case in which subsection (c) of § 4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. 924(c) or 929(a) count shall be imposed to run consecutively to any other count.''.

The Commentary to § 5G1.2 is amended by striking the first paragraph and inserting the following:

''Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ('total punishment') is determined by the court after determining the adjusted combined offense level and the Criminal History Category. Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.'';

by indenting the second and third paragraphs 2 ems from the left margin; and by striking the fourth paragraph and inserting the following:

''2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—Subsection (a) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of § 4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. See, e.g., the Commentary to §§ 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to § 2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

3. Career Offenders Covered under Subsection (e).—

(A) Imposing Sentence.—The sentence imposed for a conviction under 18 U.S.C. 924(c) or 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under § 4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. 924(c) or 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under § 4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. 924(c) or 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) Examples.—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 60 months on the 18 U.S.C. 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. 841 count. As required by statute, the sentence on the 18 U.S.C. 924(c) count is imposed to run consecutively.

(ii) The defendant is convicted of one count of 18 U.S.C. 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. 841 count and a sentence of 87 months on the 18 U.S.C. 924(c) count to run consecutively to the sentence on the 21 U.S.C. 841 count.

(iii) The defendant is convicted of two counts of 18 U.S.C. 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. 2113(a) (20 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 400 months is appropriate (applicable guideline range of 360-life). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 40 months on the 18 U.S.C. 2113(a) count. The sentence on each count is imposed to run consecutively to the other counts.''.

Reason for Amendment: This amendment is intended to comply with the statutory directive in 28 U.S.C. 994(h) by providing a guideline sentence at or near the statutory maximum of life imprisonment for cases in which certain serious firearm offenses establish the defendant as a career offender.

This amendment provides special rules in §§ 4B1.1 (Career Offender) and 5G1.2 (Sentencing on Multiple Counts of Conviction) for determining and imposing a guideline sentence in a case in which the defendant is convicted of an offense under 18 U.S.C. 924(c) or 929(a) and, as a result of that conviction, is determined to be a career offender under §§ 4B1.1 and 4B1.2 (Definitions of Terms Used in Section 4B1.1). The amendment supplements Amendment 600 (effective November 1, 2000) in which the Commission first addressed implementation of the statutory changes in penalties for 18 U.S.C. 924(c) and 929(a) offenses made by the Act to Throttle the Criminal Use of Guns, Public Law 105–386. At that time, the Commission deferred addressing the more complicated issues of whether convictions under 18 U.S.C. 924(c) and 929(a) can qualify as instant offenses for purposes of § 4B1.1, and if they do so qualify, how the sentence would be imposed. Promulgation of this amendment reflects the Commission's decision that the amendment, while somewhat complex, is necessary to comply appropriately with 28 U.S.C. 994(h).

Operationally, this amendment achieves two goals. First, it permits 18 U.S.C. 924(c) or 929(a) offenses, whether as the instant or prior offense of conviction, to qualify for career offender purposes. Second, it ensures that, in a case in which such an instant offense establishes the defendant as a career offender, the resulting guideline sentence is determined under § 4B1.1 using a count of conviction that has a statutory maximum of life imprisonment. The special rule necessarily is somewhat more complex because of the need to address certain anomalies that infrequently would occur in the absence of such a rule, i.e., that a very serious offender could receive a lower sentence by virtue of the application of § 4B1.1 than that which would otherwise be received by imposing the statutorily required minimum sentence consecutively to the otherwise applicable guideline range.

This amendment does not change the current guideline rules precluding application of guideline weapon enhancements in a case in which the defendant is convicted of a 18 U.S.C. 924(c) or 929(a) offense. Furthermore, under this amendment, in a case in which the defendant is convicted of a 18 U.S.C. 924(c) or 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a career offender, the current guideline rules for sentencing on that 18 U.S.C. 924(c) or 929(a) count continue to apply. Accordingly, under § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapter Three (Adjustments) or Chapter Four (Criminal History and Criminal Livelihood) apply to adjust the guideline sentence for that 18 U.S.C. 924(c) or 929(a) count.

However, under this amendment, in a case in which the 18 U.S.C. 924(c) or 929(a) count establishes the defendant as a career offender, which the court will determine under §§ 4B1.1 and 4B1.2, new special rules and instructions will apply. To determine the guideline sentence on the 18 U.S.C. 924(c) or 929(a) count, the court moves directly from § 2K2.4 to § 4B1.1 and applies the new special instruction therein. New special instructions for imposing sentence in these cases also have been added to § 5G1.2.

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

''§ 3A1.2. Official Victim

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

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

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

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

increase by 3 levels.''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 1 by inserting ''Applicability to Certain Victims.—'' before ''This guideline applies''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended by striking Note 2 and by redesignating Notes 3 through 6 as Notes 2 through 5, respectively.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 2, as redesignated by this amendment, by inserting ''Nonapplicability in Case of Incorporation of Factor in Chapter Two.—'' before ''Do not apply''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by inserting ''Application of Subsection (a).—'' before ''Motivated by such''; and by striking ''subdivision'' and inserting ''subsection''.

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

''4. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in circumstances tantamount to aggravated assault (i) against a law enforcement officer, committed in the course of, or in immediate flight following, another offense; or (ii) against a prison official, while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility. While subsection (b) may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against such official victims that is sufficiently serious to create at least a 'substantial risk of serious bodily injury'.

(B) Definitions.—For purposes of subsection (b):

''Custody and control'' includes ''non-secure custody'', i.e., custody with no significant physical restraint. For example, a defendant is in the custody and control of a prison or other correctional facility if the defendant (i) is on a work detail outside the security perimeter of the prison or correctional facility; (ii) is physically away from the prison or correctional facility while on a pass or furlough; or (iii) is in custody at a community corrections center, community treatment center, 'halfway house', or similar facility. The defendant also shall be deemed to be in the custody and control of a prison or other correctional facility while the defendant is in the status of having

escaped from that prison or correctional facility.

''Prison official'' means any individual (including a director, officer, employee, independent contractor, or volunteer, but not including an inmate) authorized to act on behalf of a prison or correctional facility. For example, this enhancement would be applicable to any of the following: (i) An individual employed by a prison as a corrections officer; (ii) an individual employed by a prison as a work detail supervisor; and (iii) a nurse who, under contract, provides medical services to prisoners in a prison health facility.

''Substantial risk of serious bodily injury'' includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious injury) if it occurs.''.

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

''5. Upward Departure Provision.—Certain high level officials, e.g., the President and Vice President, although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted.''.

Reason for Amendment: This amendment expands the category of persons who may be considered official victims for purposes of triggering the two level enhancement at § 3A1.2 (Official Victim). This amendment is promulgated in response to concerns expressed by the Bureau of Prisons regarding *United States* v. *Walker,* 202 F.3d 181 (3d Cir. 2000). Walker held that an individual employed by the prison to supervise food service functions who was attacked by an inmate subordinate was not a ''corrections officer'' within the scope of § 3A1.2. The Bureau of Prisons advised the Commission that the Bureau uses a variety of employees, contractors, and volunteers to supervise inmates and that maintenance of a safe and stable institutional environment is fostered by knowledge on the part of inmates that anyone in prison employment or performing an authorized role within a prison is afforded the protection of § 3A1.2. In accord with the Bureau's recommendation, the amendment includes a broad definition of ''prison official'' to include prison employees, as well as independent contractors and volunteers on prison premises with official authorization, but does not include inmates.

8. Amendment: Section 5B1.3(a) is amended by striking the period at the end of subdivision (9) and inserting a semicolon; and by adding after subdivision (9) the following:

''(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a).''.

Section 5D1.3(a) is amended by striking the period at the end of subdivision (7) and inserting a semicolon; and by adding after subdivision (7) the following:

''(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a).''.

Reason for Amendment: This amendment adds a mandatory condition to §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide a DNA sample if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000, Public Law 106–546. Pursuant to section 3 of the Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (e.g., murder, kidnapping).

9. Amendment: The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by adding at the end the following:

''7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.''.

Reason for Amendment: This amendment modifies § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to include certain discharged terms of imprisonment. Specifically, the amendment adds commentary to § 5G1.3 to provide that courts are not prohibited from considering a downward departure in a case in which § 5G1.3(b) would have applied if the term of imprisonment had not been discharged. In the case of undischarged terms of imprisonment, § 5G1.3(b) currently authorizes a court to adjust the sentence if the conduct underlying the undischarged term of imprisonment has been fully taken into account in the offense level for the instant federal offense. See Application Note 2 of the Commentary to § 5G1.3. By adding the new commentary, the Commission makes clear that discharged terms of imprisonment may merit a downward departure for a similar reason. The amendment thereby addresses a circuit conflict regarding the propriety of a downward departure under such circumstances. Compare, e.g., *United States* v. *O'Hagan,* 139 F.3d 641, 657 (8th Cir. 1998) (holding that a sentencing court could downwardly depart to adjust for time served on a discharged state sentence); *United States* v. *Blackwell,* 49 F.3d 1232, 1241–42 (7th Cir. 1995) (same) with *United States* v. *McHan,* 101 F.3d 1027, 1040 (4th Cir. 1996) (holding that downward departure to allow an adjustment for a discharged term was based on an error of law and therefore an abuse of discretion), cert. denied, 520 U.S. 1281 (1997).

10. Amendment: The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in subdivision (A) of Note 7 by striking ''18 U.S.C. 1028(d)(3)'' and inserting ''18 U.S.C. 1028(d)(4)''.

Section 2B4.1(b)(2) is amended to read as follows:

''(2) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.''.

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended by striking Notes 4 and 5 and inserting the following:

''4. Gross Receipts Enhancement under Subsection (b)(2)(A).—

(A) In General.—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

(B) Definition.—''Gross receipts from the offense'' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).

5. Enhancement for Substantially Jeopardizing the Safety and Soundness

of a Financial Institution under Subsection (b)(2)(B).—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.''.

The Commentary to § 2D1.9 captioned ''Statutory Provision'' is amended by striking ''(e)'' and inserting ''(d)''.

Section 2D1.11(a) is amended by striking ''below'' and inserting ''or (e), as appropriate''.

Section 2D1.11(e) is amended in Note (A) of the Notes following the ''CHEMICAL QUANTITY TABLE'' by striking ''of this guideline'' and inserting ''or (e) of this guideline, as appropriate''.

The Commentary to § 2D1.11 captioned ''Statutory Provisions'' is amended by striking ''841(d)(1)'' and inserting ''841(c)(1)''; and by striking ''(g)(1)'' and inserting ''(f)(1)''.

The Commentary to § 2D1.13 captioned ''Statutory Provisions'' is amended by striking ''841(d)(3)'' and inserting ''841(c)(3)''; and by striking ''(g)(1)'' and inserting ''(f)(1)''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''theft, property destruction, or''.

Section 2Q1.6(a)(3) is amended by inserting ''or'' after ''(Aggravated Assault);''.

Section 2T1.1(c) is amended in Note (D) of subdivision (1) by striking ''subdivisions'' and inserting ''subdivision''.

Amendment 568 (effective November 1, 1997) is repromulgated with the following changes: Section 4B1.4(b)(3)(A) is amended to read as follows:

''(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a)*; or''; and

section 4B1.4(c)(2) is amended to read as follows:

''(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a); or''.

Section 5C1.1(c)(2) is amended by inserting an asterisk after ''confinement''.

Section 5C1.1(d)(2) is amended by inserting an asterisk after ''confinement''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in the first sentence of subdivision (C) of Note 3 by inserting an asterisk after ''confinement''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in the first sentence of subdivision (B) of Note 4 by inserting an asterisk after ''confinement''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in the first sentence of Note 6 by inserting an asterisk after ''confinement''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by inserting after Application Note 8 the following:

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

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

Section 5D1.2(c) is amended by inserting ''(Policy Statement)'' before ''If the''.

Section 5D1.3 is amended by inserting an asterisk after ''Confinement'' in the heading of subsection (e)(1); and by inserting after subsection (e)(1) the following:

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

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

The Commentary to § 5E1.2 captioned ''Application Notes'' is amended in Note 5 by striking ''; and 42 U.S.C. 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act''.

Section 5F1.1 is amended by striking ''release.'' and inserting the following: ''release.*

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

the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

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

The Commentary to § 5F1.5 captioned ''Background'' is amended in the first paragraph by striking ''(b)(6)'' each place it appears and inserting ''(b)(5)''.

The Commentary to § 5F1.5 captioned ''Background'' is amended by striking the last paragraph and inserting the following:

''The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. 3563(b)(5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. See 18 U.S.C. 3742(a)(3). The government may appeal if the sentence includes a less limiting condition of probation than the minimum established in the guideline. See 18 U.S.C. 3742(b)(3).''.

The Commentary to § 5F1.7 is amended in the first paragraph by inserting ''Background:'' before ''Section 4046''.

Chapter Seven, Part A, subpart 2 is amended in the second paragraph of subdivision (b) by striking ''intermittent confinement,'' and inserting ''residency in, or participation in the program of, a community corrections facility,*''; and by inserting after subdivision (b) the following:

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

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

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended in Note 5 by striking ''(11). Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. 3583(d).'' and inserting the following:

''(10).*

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

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. 1417(a)(5),(6),(b)(2) the following new line:

''16 U.S.C. 1437(c) 2A2.4'';

by inserting after the line referenced to 18 U.S.C. 2244 the following new line:

''18 U.S.C. 2245 2A1.1'';

in the line referenced to 21 U.S.C. 841(d)(1),(2) by striking ''(d)'' and inserting ''(c)'';

in the line referenced to 21 U.S.C. 841(d)(3) by striking ''(d)'' and inserting ''(c)'';

in the line referenced to 21 U.S.C. 841(e) by striking ''(e)'' and inserting ''(d)'';

in the line referenced to 21 U.S.C. 841(g)(1) by striking ''(g)'' and inserting ''(f)'';

by inserting after the line referenced to 42 U.S.C. 5157(a) the following new line:

''42 U.S.C. 5409 2N2.1''; and

by inserting after the line referenced to 42 U.S.C. 9603(d) the following new line:

''42 U.S.C. 14905 2B1.1''.

Reason for Amendment: This thirteen-part amendment makes several technical and conforming changes to various guideline provisions.

First, the amendment conforms the language concerning offenses that ''affected a financial institution'' in subsection (b)(2) of § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) with subsection (b)(12) of § 2B1.1 (Theft, Property Destruction, and Fraud).

Second, the amendment: (1) updates statutory references in §§ 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Public Law 106–172; and (2) corrects references to the new chemical quantity tables in § 2D1.11.

Third, the amendment corrects a change to the commentary of § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package (see Supplement to Appendix C, Amendment 617, effective November 1, 2001).

Fourth, the amendment inserts a missing ''or'' in subsection (a)(3) of

§ 2Q1.6 (Hazardous or Injurious Devices on Federal Lands).

Fifth, the amendment corrects a grammatical error in Note (D) of subsection (c)(1) of § 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) by replacing ''subdivisions (A), (B), or (C)'' with ''subdivision (A), (B), or (C)''.

Sixth, the amendment repromulgates amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to § 4B1.4 (Armed Career Criminal) from amendment 568.

Seventh, the amendment conforms §§ 5C1.1 (Imposition of a Term of Imprisonment), 5D1.3 (Conditions of Supervised Release), and 5F1.1 (Community Confinement), Part A of Chapter Seven (Violations of Probation and Supervised Release), and § 7B1.3 (Revocation of Probation or Supervised Release) to current statutory provisions at 18 U.S.C. 3563 and 3583 and provides an explanatory note concerning the status of intermittent confinement and community confinement as conditions of supervised release.

Eighth, the amendment clarifies that language in subsection (c) of § 5D1.2 (Term of Supervised Release) is a policy statement (because it recommends the maximum term of supervised release for sex offenders rather than requires it).

Ninth, the amendment deletes from Application Note 5 of § 5E1.2 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.

Tenth, the amendment updates statutory references in § 5F1.5 (Occupational Restrictions).

Eleventh, the amendment inserts a missing ''Background'' heading in § 5F1.7 (Shock Incarceration Program).

Twelfth, the amendment references 18 U.S.C. 2245, which covers sexual abuse resulting in death, to § 2A1.1 (First Degree Murder) in Appendix A (Statutory Index) because the offense requires the death of a person.

Finally, the amendment responds to new legislation as follows:

(1) It updates, in § 2B1.1, a statutory reference in the definition of ''means of identification'' to correspond to a redesignation made by the Internet False Identification Prevention Act of 2000, Public Law 106–578.

(2) It provides guideline references in Appendix A for two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Public Law 106–569 (''the Act''). First, section 608 of the Act amends section 610(a) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5409(a)) which makes it unlawful to fail to comply with a state's installation program. Under section 611 of the National Housing Construction and Safety Standard Act of 1974 (42 U.S.C. 5410(b)), knowing and willful violations of subsection 610(a) are punishable by imprisonment of not more than one year. The amendment references this provision to § 2N2.1. Second, section 708 of the Act created section 543 in Title V of the Housing Act of 1949 (42 U.S.C. 1490(s)(a)), which provides a criminal penalty of not more than five years' imprisonment for equity skimming. The amendment references this provision to § 2B1.1.

(3) It references offenses under section 307(c) of the National Marine Sanctuaries Act (16 U.S.C. 1437(c)) to § 2A2.4 (Obstructing or Impeding Officers). Section 307(c) of the National Marine Sanctuaries Act, as amended by the National Marine Sanctuaries Amendments Act of 2000, Public Law 106–513, prohibits the interference with the enforcement of conservation activities authorized in title 16, United States Code, including refusing to permit any officer authorized to enforce such title to board a vessel for purposes of conducting a search or inspection in connection with the enforcement of such title.

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