UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1)(A)(i) congressional amendments to the sentencing guidelines made directly by the PROTECT Act, Pub. L. 108–21, and effective April 30, 2003; and (ii) conforming amendments to the amendments described in subdivision (i), promulgated pursuant to 401(m)(2)(C) of the PROTECT Act and 28 U.S.C. 994, and effective April 30, 2003; and (B) amendment to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) promulgated pursuant to section 104 of the PROTECT Act, and effective May 30, 2003; and (2) submission to Congress of amendments to the sentencing guidelines effective November 1, 2003.

SUMMARY: (1) PROTECT Act Amendments.—In the PROTECT Act, Congress directly amended §§ 2G2.2 (Trafficking in Materials Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 3E1.1 (Acceptance of Responsibility), 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), 5H1.6 (Family Ties and Responsibilities, and Community Ties), 5K2.0 (Grounds for Departure), 5K2.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior), and enacted a new policy statement at § 5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses). These amendments became effective on April 30, 2003. The PROTECT Act requires the Commission to distribute these amendments forthwith to federal courts and probation offices.

Pursuant to 401(m)(2)(C) of the PROTECT Act and section 994 of title 28, United States Code, the Commission promulgated conforming amendments to the congressional amendments to the guidelines made directly by the PROTECT Act. Section 994(x) of title 28, United States Code, requires the Commission to comply with the notice and comment procedures set forth in 5 U.S.C. 553. Section 553 provides, however, a ''good cause'' exception to the general notice and comment requirements if the ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b); *see also* 5 U.S.C. 553(d)(3) (providing an exception to the otherwise applicable 30 day notice period ''as otherwise provided by the agency for good cause found and published with the rule''). The effective date of the congressional amendments noted in the previous paragraph and the Act's directive to distribute such amendments forthwith made it impracticable to publish the conforming amendments in the **Federal Register** to provide an opportunity for public comment before the congressional amendments became effective. The Commission therefore had good cause not to publish those amendments before they became effective.

This notice also sets forth an amendment to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint), which Congress in the Act specifically directed the Commission to make ''[n]otwithstanding any other provision of law regarding the amendment of Sentencing Guidelines''. Pub. L. 108–21, section 104(a). The Act provides that this amendment shall ''take effect on the date that is 30 days after the date of the enactment of this Act.''. *Id.*

(2) Section 994(p) Amendments.—Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index.

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

DATES: (1) PROTECT Act Amendments.—The effective date for the amendments to §§ 2G2.2, 2G2.4, 3E1.1, 4B1.5, 5H1.6, 5K2.0, 5K2.13, and 5K2.20, and the enactment of § 5K2.22, is April 30, 2003. The effective date for the amendment to § 2A4.1 is May 30, 2003.

(2) Section 994(p) Amendments.—The Commission has specified an effective date of November 1, 2003, for the amendments made pursuant to 28 U.S.C. 994(p) set forth in Part Two of 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 website at *http://www.ussc.gov.* The April 30, 2003 Supplement to the 2002 *Guidelines Manual* sets forth the PROTECT Act amendments and the emergency amendments promulgated by the Commission effective January 25, 2003. This Supplement, when used in conjunction with the 2002 Guidelines Manual, constitutes the operative *Guidelines Manual* effective April 30, 2003. It may be accessed through the Commission's Web site as well.

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

(1) PROTECT Act Amendments.—The congressional amendments made by and pursuant to the PROTECT Act are set forth in Part One of this notice.

(2) Section 994(p) Amendments.—Notice of proposed amendments made pursuant to 28 U.S.C. 994(p) was published in the **Federal Register** on December 18, 2002 (*see* 67 FR 77532–77547), and January 17, 2003 (*see* 68 FR 2615–2628). The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 25, 2003. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth in Part Two of this notice. On May 1, 2003, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2003.

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

Diana E. Murphy,

Chair.

Part One: PROTECT Act Amendments

1. Amendment: Section 2G2.2(b) is amended by adding at the end the following:

''(6) If the offense involved—

(A) At least 10 images, but fewer than 150, increase by 2 levels;

(B) At least 150 images, but fewer than 300, increase by 3 levels;

(C) At least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.''.

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

''Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.''.

Section 2G2.4(b) is amended by adding at the end the following:

''(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the offense involved—

(A) At least 10 images, but fewer than 150, increase by 2 levels;

(B) At least 150 images, but fewer than 300, increase by 3 levels;

(C) At least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.''.

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

''Background: Section 401(i)(B) of Public Law 108–21 directly amended subsection (b) to add subdivisions (4) and (5), effective April 30, 2003.''.

Section 3E1.1(b) is amended by inserting ''upon motion of the government stating that'' before ''the defendant has assisted authorities''; and by striking ''taking one or more'' and all that follows through ''1 additional level'' and inserting ''timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 6 by striking ''one or both of''; by striking ''(1) or (2)''; by striking ''(b)(2)'' and inserting ''(b)''; and by adding at the end the following new paragraph:

''Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108–21.''.

The Commentary to § 3E1.1 captioned ''Background'' is amended by striking ''one or more of'' both places it appears; and by adding at the end the following:

''Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in Note 4(B) by striking subdivision (i) as follows:

''(i) In General—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) On at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) There were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, of if there were two separate occasions of prohibited sexual conduct involving the same two minors.''.

and inserting:

''(i) In General—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.''.

The Commentary to § 4B1.5 captioned ''Background'' is amended by striking ''section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314'' and inserting ''section 632 of Public Law 102–141 and section 505 of Public Law 105–314''; and by adding at the end the following:

''Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.''.

Section 5H1.6 is amended by striking ''Family ties'' and inserting ''In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties''; and by inserting after the first sentence the following new paragraph:

''In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.''.

Section 5H1.6 is amended by adding at the end the following:

''Commentary

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.''.

Section 5K2.0 is amended by striking ''Under'' and inserting the following:

''(a) DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—Under'';

and by adding at the end the following:

(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) Has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) Has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.''.

The Commentary to § 5K2.0 is amended by inserting an asterisk after ''Commentary'' and by inserting the following new paragraph before ''The United'':

''[*Section 401(m)(2)(C) of Public Law 108–21 directs the Commission to revise § 5K2.0, within 180 days after the date of the enactment of that Public Law, or October 27, 2003, to conform § 5K2.0 to changes made by that Public Law, including changes to the appellate standard of review for decisions to depart from the guidelines. That directive has not been implemented yet in the following commentary.]''.

The Commentary to § 5K2.0 is amended by striking ''of this policy

statement'' and inserting ''of subsection (a)''.

The Commentary to § 5K2.0 is amended by adding at the end the following:

''Section 401(b)(1) of Public Law 108–21 directly amended this policy statement to add subsection (b), effective April 30, 2003.''.

Section 5K2.13 is amended by striking ''or'' before ''(3)''; and by striking ''public.'' and inserting ''public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.''.

The Commentary to § 5K2.13 is amended by adding at the end the following:

''Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.''.

Section 5K2.20 is amended by striking ''A sentence'' and inserting ''Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a sentence''.

The Commentary to § 5K2.20 is amended by adding at the end the following:

''Background: Section 401(b)(3) of Public Law 108–21 directly amended this policy statement, effective April 30, 2003.''.

Chapter Five, Part K, is amended by adding at the end the following:

''§ 5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.1.

(2) An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.''.

Reason for Amendment: This amendment implements amendments to the guidelines made directly by the PROTECT Act, Pub. L. 108–21. In addition to amendments made directly by the PROTECT Act, this amendment makes technical and conforming amendments to those direct congressional amendments, pursuant to the Commission's authority to promulgate such technical and conforming amendments under section 401(m) of the PROTECT Act and 28 U.S.C. 994.

2. Amendment: Section 2A4.1 is amended in subsection (a) by striking ''24'' and inserting the following:

''(1) 24 (effective before, but not on or after, May 30, 2003).

(1) 32 (effective on and after May 30, 2003).'';

in subsection (b)(4)(C), by inserting ''(effective before, but not on or after, May 30, 2003)'' after ''level'';

and by striking subsection (b)(5) as follows:

''(5) If the victim was sexually exploited, increase by 3 levels.''

and inserting the following:

''(5) If the victim was sexually exploited:

(A) Increase by 3 levels (effective before, but not on or after, May 30, 2003).

(A) Increase by 6 levels (effective on and after May 30, 2003).''.

The Commentary to § 2A4.1 captioned ''Application Notes'' is amended in Note 3 by inserting ''(effective before, but not on or after, May 30, 2003)'' after ''resistance''.

The Commentary to § 2A4.1 captioned ''Background'' is amended by adding at the end the following:

''Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21.''.

Reason for Amendment: This amendment implements the directive to the Commission in section 104 of the PROTECT Act, Pub. L. 108–21.

Part Two: Section 994(p) Amendments

1. Amendment: Section 2A1.4(a)(1) is amended by striking ''10'' and inserting ''12''.

Section 2A1.4(a)(2) is amended by striking ''14'' and inserting ''18''.

Reason for Amendment: This amendment responds to a concern that the federal sentencing guidelines do not adequately reflect the seriousness of involuntary manslaughter offenses. Specifically, the Department of Justice, some members of Congress, and an ad hoc advisory group formed by the Commission to address Native American sentencing guideline issues expressed concern that most federal involuntary manslaughter cases involve vehicular homicides, which analysis of Commission data confirmed. These commentators also indicated that these offenses appear to be underpunished, particularly when compared to comparable cases arising under state law. This disparity with state punishments has been confirmed by studies undertaken by the Commission. In addition, Congress increased the maximum statutory penalty for involuntary manslaughter from three to six years' imprisonment in 1994.

In response to these concerns and the Commission's analysis, this amendment increases the base offense level in § 2A1.4(a)(2) for reckless involuntary manslaughter offenses from level 14 to level 18. This four level increase corresponds to an approximate 50 percent increase in sentence length for these offenses. This amendment also increases the base offense level in § 2A4.1(a)(1) for criminally negligent involuntary manslaughter offenses from level 10 to level 12. The two level increase represents an approximate 25 percent increase in the sentence length for these offenses.

2. Amendment: Sections 2B1.1, 2E5.3, 2J1.2, and 2T4.1, effective January 25, 2003 (see USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendment 647), are repromulgated with the following changes:

Section 2B1.1(a) is amended to read as follows:

''(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.''.

Section 2B1.1(b)(12) is amended by striking ''If the resulting'' and all that follows through ''to level 24.''; and by inserting after subdivision (B) the following:

''(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except as provided in subdivision (D).

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

Section 2B1.1(b) is amended by striking the following:

''(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by 4 levels.'';

and inserting the following:

''(14) If the offense involved—

(A) A violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) A violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by redesignating Notes 2 through 9 as Notes 3 through 10, respectively; by redesignating Notes 11 through 16 as Notes 13 through 18, respectively; by inserting after Note 1 the following:

''2. Application of Subsection (a)(1).—

(A) 'Referenced to This Guideline'.—For purposes of subsection (a)(1), an offense is 'referenced to this guideline' if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of § 1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of 'Statutory Maximum Term of Imprisonment'—For purposes of this guideline, 'statutory maximum term of imprisonment' means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.'';

and by striking ''10. Application of Subsection (b)(12)(B).—'' and inserting ''11. Application of Subsection (b)(12)(B).—''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, in subdivision (B)(ii)(IV) by striking ''or more''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 13, as redesignated by this amendment, by striking ''(b)(13)'' each place it appears and inserting ''(b)(14)''; by striking subdivision (A) and inserting the following:

''(A) Definitions.—For purposes of this subsection:

'Commodities law' means (i) the Commodities Exchange Act (7 U.S.C. 1 *et seq.*); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.

'Commodity pool operator' has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. 1a(4)).

'Commodity trading advisor' has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. 1a(5)).

'Futures commission merchant' has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. 1a(20)).

'Introducing broker' has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. 1a(23)).

'Investment adviser' has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

'Person associated with a broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)).

'Person associated with an investment adviser' has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).

'Registered broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(48)).

'Securities law' (i) means 18 U.S.C. 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.'';

and in subdivision (B) by inserting ''or commodities law'' after ''securities law'' each place it appears.

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

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''Note 2'' and inserting ''Note 3''.

The Commentary to § 2C1.7 captioned ''Application Notes'' is amended in Note 3 by striking ''Note 2'' and inserting ''Note 3''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''In General.—'' before ''Because''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Willful Failure to Pay Court-Ordered Child Support.—'' before ''For offenses''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is § 2B1.1. In such a case, § 2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 1 by inserting before the paragraph that begins ''Substantial interference'' the following:

''Definitions.—For purposes of this guideline:

'Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 4 by inserting ''Upward Departure Considerations.—'' before ''If a weapon''; by striking ''a departure'' and inserting ''an upward departure''; and by inserting at the end the following:

''In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face), an upward departure would be warranted.''.

Section 2J1.3(a) is amended by striking ''12'' and inserting ''14''.

Appendix A, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendments 647 and 648; *see also* this document, Amendment 5), is repromulgated without change.

Reason for Amendment: With this amendment the Commission continues its work to deter and punish economic and white collar crimes, building on its Economic Crime Package of 2001 and subsequent formation in early 2002 of an Ad Hoc Advisory Group on the Organizational Guidelines for sentencing corporations and other organizations. This 2003 amendment also implements directives in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the

''Act''), by making several modifications to §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2J1.2 (Obstruction of Justice), and 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records), as well as conforming changes to §§ 2J1.1 (Contempt), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), and 2T4.1 (Tax Table). The amendment also responds to increased statutory penalties for existing crimes and several severely punished new crimes created by the Act.

The directives in the Act generally pertain to serious fraud and related offenses and obstruction of justice offenses. Congress gave the Commission emergency amendment authority to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, fraud offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. This amendment expands upon the temporary emergency amendment effective January 25, 2003, and repromulgates it as a permanent amendment.

First, the amendment modifies the base offense level in § 2B1.1 to implement more fully the directive contained in section 905(b)(2) of the Act to consider whether the guidelines ''for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act.'' Section 903 of the Act, for example, quadrupled the statutory maximum penalties for wire fraud and mail fraud from five to 20 years' imprisonment, while section 902 made attempts and conspiracies subject to these same heightened penalties. Specifically, the amendment provides a new higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to § 2B1.1 and the offense carries a statutory maximum term of imprisonment of 20 years or more. The alternative base offense levels are intended to calibrate better the base guideline penalty to the seriousness of the wide variety of offenses referenced to that guideline, as reflected by statutory maximum penalties established by Congress.

For those offenses to which the higher alternative base offense will apply (including wire fraud and mail fraud), the effect of the amendment is to limit the availability of a probation only sentence in Zone A of the sentencing table to offenses involving loss amounts of $10,000 or less, assuming a two level reduction for acceptance of responsibility. Prior to the amendment, a Zone A sentence was available for all offenses sentenced under § 2B1.1 involving loss amounts of $30,000 or less. Similarly, for those offenses for which the higher alternative base offense level will apply, the effect of the amendment is to require an imprisonment sentence in Zone D for offenses involving loss amounts of more than $70,000. Prior to the amendment, a Zone D sentence was required for all offenses sentenced under § 2B1.1 involving loss amounts of more than $120,000.

Second, the amendment expands the loss table at § 2B1.1(b)(1) to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, such as the serious corporate scandals that gave rise to several portions of the Act. Prior to the emergency amendment, the loss table at § 2B1.1(b)(1) provided sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The amendment adds two additional loss amount categories to the table; an increase of 28 levels for offenses in which the loss exceeded $200,000,000, and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. These additions to the loss table address congressional concern regarding particularly extensive and serious fraud offenses and also more fully effectuate increases in statutory maximum penalties provided by the Act. The amendment also modifies the tax table in § 2T4.1 in a similar manner to maintain the longstanding proportional relationship between the loss table in § 2B1.1 and the tax table.

The amendment also adds a new factor to the general, enumerated factors that the court may consider in determining the amount of loss under § 2B1.1(b)(1). Specifically, the amendment adds the reduction in the value of equity securities or other corporate assets that resulted from the offense to the list of general factors set forth in Application Note 3(C) of § 2B1.1. This factor was added to provide courts additional guidance in determining loss in certain cases, particularly in complex white collar cases.

Third, the amendment addresses the directive contained in section 1104(b)(5) of the Act to ''ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50.'' The amendment implements this directive by expanding the existing enhancement at § 2B1.1(b)(2) based on the number of victims involved in the offense. Prior to the emergency amendment, subsection (b)(2) provided a two level enhancement if the offense involved more than 10, but less than 50, victims (or was committed through mass-marketing), and a four level enhancement if the offense involved 50 or more victims. The amendment provides an additional two level increase, for a total of six levels, if the offense involved 250 or more victims. The Commission determined that an enhancement of this magnitude appropriately responds to the pertinent directive and accounts for the extensive nature of, and the large scale victimization caused by, such offenses.

Fourth, the amendment addresses directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Specifically, section 805(a)(4) directs the Commission to ensure that ''a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims.'' In addition, section 1104(b)(1) directs the Commission to ''ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses.'' The amendment implements these directives by expanding the scope of the existing enhancement at § 2B1.1(b)(12)(B).

Prior to the emergency amendment, § 2B1.1(b)(12)(B) provided a four level enhancement and a minimum offense

level of level 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The amendment expands the scope of this enhancement by providing two additional parts. The first part applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. The addition of this part reflects the Commission's determination that such an offense undermines the public's confidence in the securities and investment market much in the same manner as an offense that jeopardizes the safety and soundness of a financial institution undermines the public's confidence in the banking system. This part also reflects the likelihood that an offense that endangers the solvency or financial security of an employer of this size will similarly affect a substantial number of individual victims, without requiring the court to determine whether the solvency or financial security of each individual victim was substantially endangered.

A corresponding application note for § 2B1.1(b)(12)(B) sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. The list of factors that the court shall consider when applying the new enhancement includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce. As appropriate, the court may consider other factors not enumerated in the application note.

The amendment also modifies the application note to previously existing § 2B1.1(b)(12)(B), the financial institutions enhancement, to be consistent structurally with the new part of the enhancement. Prior to the emergency amendment, the presence of any one of the factors enumerated in the application note would trigger the financial institutions enhancement under § 2B1.1(b)(12)(B). Under the amendment, the application note to the financial institutions enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense substantially jeopardized the safety and soundness of a financial institution. The list of factors that the court shall consider when applying this enhancement includes references to insolvency, substantially reducing benefits to pensioners and insureds, and an inability to refund fully any deposit, payment, or investment on demand.

The second part added to § 2B1.1(b)(12)(B) by the amendment applies to offenses that substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense. The Commission concluded that the specificity of the directive in section 805(a)(4) required an enhancement focused specifically on conduct that endangers the financial security of individual victims. Thus, use of this part of the enhancement will be appropriate in cases in which there is sufficient evidence for the court to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of those victims. The Commission also determined that the enhancement provided in § 2B1.1(b)(12)(B) shall apply cumulatively with the enhancement at § 2B1.1(b)(2), which is based solely on the number of victims involved in the offense, to reflect the particularly acute harm suffered by victims of offenses to which the new parts of subsection (b)(12)(B) apply. To account for the overlapping nature of such conduct in some cases, however, the Commission added a provision at subsection (b)(12)(C) that limits the cumulative impact of subsections (b)(2) and (b)(12)(B) to eight levels, except for application of the minimum offense level of level 24.

Fifth, the amendment addresses the directive contained at section 1104(a)(2) of the Act to ''consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses.'' The emergency amendment implemented this directive by providing a new, four level enhancement that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company.

The amendment expands the scope of this enhancement to cover registered brokers and dealers, associated persons of a broker or dealer, investment advisers, and associated persons of an investment adviser. The amendment also expands the scope of this enhancement to apply if the offense involves a violation of commodities law and, at the time of the offense, the defendant was an officer or director of a futures commission merchant or introducing broker, a commodities trading advisor, or a commodity pool operator. The Commission concluded that a four level enhancement appropriately reflects the culpability of offenders who occupy such positions and who are subject to heightened fiduciary duties imposed by securities law or commodities law similar to duties imposed on officers and directors of publicly traded corporations. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and a corresponding application note provides that, in cases in which the new, four level enhancement applies, the existing two level enhancement for abuse of position of trust at § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

The corresponding application note also expressly provides that the enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud or commodities fraud statute (*e.g.,* 18 U.S.C. 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (*e.g.,* 18 U.S.C. 1341, prohibiting mail fraud), provided that the offense involved a violation of ''securities law'' or ''commodities law'' as defined in the application note.

Sixth, the amendment modifies § 2J1.2 to address the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. Specifically, section 805(a) of the Act directs the Commission to ensure that the base offense level and existing enhancements in § 2J1.2 are sufficient to deter and punish obstruction of justice offenses generally, and specifically are adequate in cases involving the destruction, alteration, or fabrication of a large amount of evidence, a large number of participants, the selection of evidence that is particularly probative or essential to the investigation, more than minimal planning, or abuse of a special skill or a position of trust. Section 1104(b) of the Act further directs the Commission to ensure that the ''guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated.''

The amendment implements these directives by making two modifications to § 2J1.2. First, the amendment increases the base offense level in § 2J1.2 from level 12 to level 14. Second, the amendment adds a new two level enhancement to § 2J1.2. This enhancement applies if the offense (1)

involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation. The amendment also adds an upward departure provision for offenses sentenced under § 2J1.2 that involve extreme acts of violence, for example, retaliating against a government witness by throwing acid in the witness's face. The Commission determined that existing adjustments in Chapter Three for aggravating role, § 3B1.1, and abuse of position of trust or use of special skill, § 3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Seventh, the amendment also increases the base offense level in the perjury guideline, § 2J1.3, from level 12 to level 14 in order to maintain the longstanding proportional relationship between the offense levels provided in the guidelines for perjury and obstruction of justice.

Eighth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, is referenced to § 2E5.3. Section 1520 provides a statutory maximum penalty of ten years' imprisonment for knowing and willful violations of document maintenance requirements as set forth in that section or in rules or regulations to be promulgated by the Securities and Exchange Commission pursuant to that section. The amendment also expands the existing cross reference in § 2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant violated 18 U.S.C. 1520 in order to obstruct justice, the cross reference provision in § 2E5.3 requires the court to apply § 2J1.2 instead of § 2E5.3. Other new offenses are listed in Appendix A (Statutory Index), as well as in the statutory provisions of the relevant guidelines.

Finally, the amendment amends the contempt guideline, § 2J1.1, by adding an application note clarifying that (1) § 2B1.1 is the most analogous guideline in a case involving a violation of a judicial order enjoining fraudulent behavior; and (2) the enhancement at § 2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply in such a case.

3. Amendment: Section 2B1.1(b) is amended by inserting after subsection (b)(12) the following:

''(13)(A) (Apply the greatest) If the defendant was convicted of an offense under:

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

(ii) 18 U.S.C. 1030(a)(5)(A)(i), increase by 4 levels.

(iii) 18 U.S.C. 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting '', 2701'' after ''2332b(a)(1)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3(A)(v), as redesignated by Amendment 2, by striking subdivision (III) and inserting the following:

''(III) Offenses Under 18 U.S.C. 1030.—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by inserting before Note 13, as redesignated by Amendment 2, the following:

''12. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of subsection (b)(13):

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

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

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

(B) Subsection (b)(13)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(13)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(12)(B), do not apply the enhancement under subsection (b)(12)(B).''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 18, as redesignated by Amendment 2, by adding at the end of subdivision (A)(ii) the following:

''An upward departure would be warranted, for example, in an 18 U.S.C. 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.'';

by redesignating subdivision (B) as subdivision (C); and by inserting after subdivision (A) the following:

''(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(13)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by adding at the end the following paragraph:

''Subsection (b)(13) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(13)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.''.

Section 2B2.3(b)(1) is amended by striking ''or '' after ''airport;'' and by inserting after ''residence'' the following:

''; or (F) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 1 by inserting after ''United States Code.'' the following paragraph:

'' 'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.'';

and by inserting after ''Instructions).'' the following paragraph:

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

Section 2B3.2(b)(3)(B) is amended to read as follows:

''(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of subdivisions (i)(I) through (i)(V), increase by 3 levels.''.

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

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

'Abducted,' 'bodily injury,' 'brandished,' 'dangerous weapon,' 'firearm,' 'otherwise used,' 'permanent or life-threatening bodily injury,' 'physically restrained,' and 'serious bodily injury' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

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

The Commentary to § 2M3.2 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''793(a)''; and by inserting '', 1030(a)(1)'' after ''(g)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2512 the following:

''18 U.S.C. 2701 2B1.1''.

Reason for Amendment: This amendment addresses the serious harm and invasion of privacy that can result from offenses involving the misuse of, or damage to, computers. It implements the directive in section 225(b) of the Homeland Security Act of 2002, Pub. L. 107–296, which required the Commission to review, and if appropriate amend, the guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. 1030 (fraud and related activity in connection with computers) to ensure that the guidelines and policy statements reflect the serious nature and growing incidence of such offenses and the need for an effective deterrent and appropriate punishment. The directive further requires the Commission to consider the extent to which eight specific factors were or were not accounted for by the guidelines. The amendment responds to the directive by making several changes to §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2B2.3 (Trespass), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). These changes are designed to supplement existing guidelines and policy statements and thereby ensure that offenses under 18 U.S.C. 1030 are adequately addressed and punished.

First, the amendment adds a new specific offense characteristic at § 2B1.1(b)(13) with three alternative enhancements of two, four, and six levels. The first enhancement provides a two level increase for convictions under 18 U.S.C. 1030 that involve either (1) a computer system used to maintain or operate a critical infrastructure or used in furtherance of the administration of justice, national defense, or national security; or (2) an intent to obtain private personal information. The second enhancement provides a four level increase for a conviction under 18 U.S.C. 1030(a)(5)(A)(i), which requires a heightened showing of intent to cause damage. The third enhancement provides a six level increase, with a minimum offense level of level 24, for a conviction under 18 U.S.C. 1030 that resulted in a substantial disruption of a critical infrastructure. The graduated levels ensure incremental punishment for increasingly serious conduct, and were chosen in recognition of the fact that conduct supporting application of a more serious enhancement frequently will encompass behavior relevant to a lesser enhancement as well. Accordingly, the most serious applicable enhancement will apply in any particular case.

The minimum offense level of level 24 applicable to the third such enhancement was chosen to maintain parity with the minimum offense level that applies to an offense that substantially jeopardized the safety and soundness of a financial institution, substantially endangered the solvency or financial security of a publicly traded company or an organization of at least 1,000 employees, or substantially endangered the solvency or financial security of 100 or more victims. *See* § 2B1.1(b)(12)(B). Because of the potential overlap in certain cases, the commentary provides that the enhancement at § 2B1.1(b)(12)(B) will not apply in a case in which the conduct supporting the six level critical infrastructure enhancement is the only conduct that forms the basis for the § 2B1.1(b)(12)(B) enhancement.

The minimum offense level of level 24 applicable to the third enhancement also reflects the fact that some offenders to whom the enhancement may apply will be subject to a statutory maximum penalty of five years' imprisonment, *i.e.,* those convicted of an offense under 18 U.S.C. 1030(a)(5)(A)(ii). To ensure that the most egregious cases involving critical infrastructure are adequately addressed, the amendment also provides an encouraged upward departure for cases in which the disruption of the critical infrastructure has a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters.

A definition of critical infrastructure is provided in the commentary. This definition is derived in part from the definition of critical infrastructure in the USA PATRIOT Act (*see* Pub. L. 107–56, section 1016; 42 U.S.C. 5195c(e)) but was modified to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope. Examples of critical infrastructures are provided.

Second, the proposed amendment modifies the rule of construction relating to the calculation of loss in protected computer cases. This change was made to incorporate more fully the statutory definition of loss at 18 U.S.C. 1030(e)(11), added as part of the USA PATRIOT Act, and to clarify its application to all 18 U.S.C. 1030 offenses sentenced under § 2B1.1.

Third, the proposed amendment expands the upward departure note in § 2B1.1. That note provides that an upward departure may be warranted if an offense caused or risked substantial non-monetary harm, including physical harm. The amendment adds a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. 1030 involving damage to a protected computer that results in death.

Fourth, the amendment modifies § 2B2.3, to which 18 U.S.C. 1030(a)(3) (misdemeanor trespass on a government computer) offenses are referenced, and § 2B3.2, to which 18 U.S.C. 1030(a)(7) (extortionate demand to damage protected computer) offenses are referenced, to provide enhancements relating to computer systems used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security. The amendment expands the scope of existing enhancements to ensure that trespasses and extortions involving these types of important computer systems are addressed.

Finally, the amendment references offenses under 18 U.S.C. 2701 (unlawful access to stored communications) to § 2B1.1. Prior to the Act, a first offense under section 2701 was classified as a misdemeanor offense, and the guidelines did not reference the statute in Appendix A (Statutory Index). Given that the Act increased the penalties available for 18 U.S.C. 2701 offenses, the amendment references the statute in Appendix A. Section 2701 offenses are referenced to § 2B1.1 because such offenses involve the obtaining, altering, or denial of authorized access to stored wire or electronic communications, conduct that is related to fraud, theft, and property damage, which are covered by § 2B1.1.

4. Amendment: The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Amendment 3, is further amended in subdivision (A)(ii) of Note 18, as redesignated by Amendment 2, by adding at the end the following:

''An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.''.

Section 2K1.3(a) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

''(3) 18, if the defendant was convicted under 18 U.S.C. 842(p)(2);''.

Section 2K1.3(b)(3) is amended by inserting ''(A) was convicted under 18 U.S.C. 842(p)(2); or (B)'' after ''defendant''.

Section 2K1.3(c)(1) is amended by inserting ''(A) was convicted under 18 U.S.C. 842(p)(2); or (B)'' after ''defendant''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''(3)'' and inserting ''(4)''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in the second paragraph of Note 9 by striking ''(3)'' and inserting ''(4)''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 11 by adding at the end the following new paragraph:

''In addition, for purposes of subsection (c)(1)(A), ''that other offense'' means, with respect to an offense under 18 U.S.C. 842(p)(2), the underlying Federal crime of violence.''.

Section 2K1.4(a)(1)(B) is amended by striking ''or a ferry'' and inserting ''a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use''.

Section 2K1.4(a)(2) is amended to read as follows:

''(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or''.

The Commentary to § 2K1.4 captioned ''Statutory Provisions'' is amended by inserting '', 2332f'' after ''2332a''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'''State or government facility', 'infrastructure facility', 'place of public use', and 'public transportation system' have the meaning given those terms in 18 U.S.C. 2332f(e)(3), (5), (6), and (7), respectively.''.

Section 2M5.3 is amended in the heading by adding ''or For a Terrorist Purpose'' after ''Organizations''.

Section 2M5.3(b)(1) is amended in subdivision (C) by striking ''or'' after ''explosives;''; in subdivision (D) by inserting ''the intent,'' after ''with'' and by inserting a comma after ''knowledge''; and by inserting ''; or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act'' after ''(A) through (C)''.

The Commentary to § 2M5.3 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' before ''2339B''; and by inserting '', 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B))'' after ''2339B''.

The Commentary to § 2M5.3 captioned ''Application Notes'' is amended in Note 2(A) by inserting ''funds or other'' after ''volume of the''.

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

Section 2M6.1(a)(3) is amended by inserting ''or'' after the semicolon.

Section 2M6.1(a)(4) is amended by inserting ''(A)'' after ''if''; and by inserting ''(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.'' after ''or''.

Section 2M6.1(a) is amended by striking subdivision (5).

Section 2M6.1(b)(1) is amended by striking the comma after ''(a)(2)'' and

inserting ''or''; and by striking '', or (a)(5)''.

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

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

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''(only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D)),'' after ''842(p)(2)''; and by striking '', but including any biological agent, toxin, or vector''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins ''Select biological agent''' by inserting ''(A)'' after ''identified''; by inserting ''and maintained'' after ''established''; and by striking ''511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 CFR part 72.'' and inserting ''351A of the Public Health Service Act (42 U.S.C. 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. 8401).''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 2 by striking ''(a)(3)'' each place it appears and inserting ''(a)(4)(B)''.

Chapter Two, Part Q, is amended by striking § 2Q1.4 in its entirety and inserting the following new guideline:

''§ 2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

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

(1) 26;

(2) 22, if the offense involved (A) a threat to tamper with a public water system; and (B) any conduct evidencing an intent to carry out the threat; or

(3) 16, if the offense involved a threat to tamper with a public water system but did not involve any conduct evidencing an intent to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense resulted in (A) 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.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, 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) in any other case, 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 extortion, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 42 U.S.C. 300i–1.

Application Notes:

1. Definitions.—For purposes of this guideline, 'permanent or life-threatening bodily injury' and 'serious bodily injury' have the meaning given those terms in Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

3. Departure Provisions.—

(A) Downward Departure Provision.—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) Upward Departure Provisions.—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. See Application Note 4 of § 3A1.4 (Terrorism).''.

Chapter Two, Part Q, is amended by striking § 2Q1.5 in its entirety.

Section § 2S1.1(b)(1)(B)(iii) is amended by striking ''terrorism,''.

The Commentary to § 2S1.1 captioned ''Statutory Provisions'' is amended by inserting'', 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(C))'' after ''1957''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting ''(but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(A) and (B))'' after ''1960''.

The Commentary to § 2X2.1 captioned ''Statutory Provisions'' is amended by inserting '', 2339C(a)(1)(A)'' after ''2339A''.

The Commentary to § 2X2.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''or § 2339C(a)(1)(A)'' after ''2339A''; and by inserting '', or provided or collected funds for,'' after ''supported''.

Section 2X3.1(a) is amended to read as follows:

''(a) Base Offense Level:

(1) 6 levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level 4.

(3)(A) The base offense level under this guideline shall be not more than level 30, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall be not more than level 20.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. 2339 or 2339A; or (ii) the conduct involved harboring a person who committed any offense listed in 18

U.S.C. 2339 or 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. 2332b(g)(5). In such a case, the base offense level under this guideline shall be not more than level 30, as provided in subdivision (A).''.

The Commentary to § 2X3.1 captioned ''Statutory Provisions'' is amended by inserting '', 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C (a)(1)(A))'' after ''2339A''.

The Commentary to § 2X3.1 captioned ''Application Notes'' is amended in Note 1 by inserting '', or in the case of a violation of 18 U.S.C. 2339C(c)(2)(A), 'underlying offense' means the violation of 18 U.S.C. 2339B with respect to which the material support or resources were concealed or disguised'' after ''that offense)''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1960 by inserting ''2S1.1,'' before ''2S1.3'';

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

''18 U.S.C. 2332f 2K1.4, 2M6.1'';

by inserting after the line referenced to 18 U.S.C. 2339B the following new lines:

''18 U.S.C. 2339C(a)(1)(A) 2X2.1
18 U.S.C. 2339C(a)(1)(B) 2M5.3
18 U.S.C. 2339C(c)(2)(A) 2X3.1
18 U.S.C. 2339C(c)(2)(B) 2M5.3, 2X3.1'';

and in the line referenced to 42 U.S.C. 300i–1 by striking '', 2Q1.5''.

Reason for Amendment: This amendment is a three part amendment that (1) further responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56; (2) responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188; and (3) responds to the Terrorist Bombings Preparedness and Response Act of 2002, Pub. L. 107–197.

First, this amendment makes changes to the money laundering and transactions structuring guidelines to complete work begun in 2002 to address the provisions of the USA PATRIOT Act. The amendment eliminates the six level enhancement for terrorism in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity) because such conduct is adequately accounted for by the terrorism adjustment at § 3A1.4 (Terrorism). The terrorism adjustment at § 3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5). Therefore, if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism, as defined in § 3A1.4, that adjustment will apply. This amendment also provides for the treatment of certain offenses under 18 U.S.C. 1960. The amendment changes Appendix A (Statutory Index) to refer violations of 18 U.S.C. 1960 to both §§ 2S1.1 and 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Case or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Referring violations of 18 U.S.C. 1960(b)(1)(C) to § 2S1.1 is appropriate because the essence of this offense is money laundering, rather than structuring transactions to evade reporting requirements.

The amendment also raises the maximum offense level in § 2X3.1 (Accessory After the Fact) from level 20 to level 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense. The Commission determined that the heightened maximum offense level of level 30 is appropriate for offenses involving the harboring of terrorists because of the relative seriousness of those offenses. Specifically, the heightened maximum offense level applies in any case in which the defendant is convicted under 18 U.S.C. 2339 or 2339A or in which the conduct involved harboring a person who committed any offense listed under those statutes, or who committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5).

Second, the amendment responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The amendment refers certain new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, § 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy).

The amendment also responds to amendments made to the Safe Drinking Water Act (42 U.S.C. 300i–1(a)) made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Section 1432(a) of the Safe Drinking Water Act prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from five years' imprisonment to 20 years' imprisonment. Section 1432(b) of the Act prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from three years' imprisonment to ten years' imprisonment.

The amendment consolidates §§ 2Q1.5 (Threatened Tampering with Public Water System) and 2Q1.4 (Tampering or Attempted Tampering with Public Water System). This consolidation reflects the similar manner in which threats to carry out a nuclear, biological, or chemical weapons offense are treated under § 2M6.1. Three alternative base offense levels are provided for the substantive offense and for a threat to carry out the substantive offense, either accompanied or unaccompanied by other conduct evidencing an intent to carry out the threat.

The amendment also increases the base offense level for offenses involving tampering and threatened tampering with a public water system. The amendment increases the base offense level for tampering with a public water system from level 18 to level 26. The six level enhancement for the risk of death or serious bodily injury (in the predecessor guideline) is incorporated into the base offense level, as are two levels for bodily injury (similar to the treatment of this aggravated conduct in the consumer product tampering guideline). A graduated enhancement for serious or life-threatening bodily injury, modeled after the nuclear, biological, and chemical guideline and the consumer product tampering guideline, is added. Likewise, the base offense level for threatening to tamper with a public water system, without conduct evidencing an intent to carry out the threat, is increased from level 10 to level 16. A base offense level of level 22 is provided if there is conduct evidencing an intent to carry out the threat. For point of comparison, the existing base offense levels for threatening communications under § 2A6.1 (Threatening or Harassing Communications) is level 12, and for threatened use of nuclear, biological, and chemical weapons under § 2M6.1 is level 20. These substantial increases in the base offense levels for threatened tampering of a public water system are

provided to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Additionally, the enhancement in subsection (b)(2) regarding the disruption of the public water system has been expanded slightly to make it consistent with similar enhancements in other related guidelines, such as the nuclear, biological, and chemical guideline, § 2M6.1.

This amendment adds an invited upward departure provision in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. 43. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the amendment adds an invited upward departure provision in the commentary of § 2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Third, the amendment amends Appendix A (and the Statutory Provisions of the pertinent Chapter Two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, and provides conforming amendments within a number of Chapter Two guidelines to incorporate more fully the new offenses into the offense guidelines. Section 102 of the Act created a new offense at 18 U.S.C. 2332f, which provides in subsection (a) that ''whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (1) with the intent to cause death or serious bodily injury, or (2) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss'' and in subsection (b) that ''whoever attempts or conspires to commit [such] an offense'' shall be punished as provided under 18 U.S.C. 2332a(a). Section 2332a offenses currently are referenced to §§ 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1. The amendment refers this new offense to those guidelines as well. In addition, the amendment amends the alternative base offense levels in § 2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. 2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and ''places of public use''.

Section 202 of the Act created a new offense at 18 U.S.C. 2339C. The amendment refers the new offense at 18 U.S.C. 2339C(1)(A) to § 2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the amendment treats these offenses in the same manner as 18 U.S.C. 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is also made in § 2X2.1 to provide a definition for the ''underlying offense'' that is aided and abetted.

The amendment also refers the new offense at 18 U.S.C. 2339C(a)(1)(B) to § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to § 2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the provision of material support to terrorists, which appropriately is referenced to § 2M5.3. The amendment expands § 2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Additionally, 18 U.S.C. 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were (1) provided in violation of 18 U.S.C. 2339B, or (2) provided or collected in violation of 18 U.S.C. 2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. 2339C(c) is 10 years. The amendment references offenses under 18 U.S.C. 2339C(c)(2)(A) to § 2X3.1 (Accessory After the Fact), because the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. 2339B. An amendment is made in § 2X3.1 to provide a definition of the ''underlying offense'' to which the defendant is an accessory.

The amendment references offenses under 18 U.S.C. 2339C(c)(2)(B) to §§ 2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(1)(A), the offense should be sentenced under § 2X3.1. This is because the concealment occurs with respect to funds the defendant knows are to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B), the offense should be sentenced under § 2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is added to the Statutory Provisions of §§ 2M5.3 and 2X3.1.

Finally, an amendment is made to § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transaction Involving Explosive Materials) to add an additional base offense level of level 18 for certain offenses committed under 18 U.S.C. 842(p)(2) involving explosives, destructive devices, or weapons of mass destruction. The statute is referenced in Appendix A to §§ 2K1.3 and 2M6.1. The applicable offense levels at § 2M6.1 are

levels 42 and 28. The applicable base offense level at § 2K1.3 is level 12. The base offense level of level 12 appears to be disproportionately low compared with other 20 year offenses and compared with the treatment of 18 U.S.C. 842(p)(2) offenses under § 2M6.1. This is especially true in light of the definition of destructive device, defined at 18 U.S.C. 921(a)(4) to include any explosive, incendiary, or poison gas (1) bomb; (2) grenade; (3) rocket having a propellant charge of more than four ounces; (4) missile having an explosive or incendiary charge of more than one-quarter ounce; (5) mine; or (6) device similar to any of the devices described in the preceding clauses.

The amendment makes the enhancement at § 2K1.3(b)(3) and the cross reference at § 2K1.3(c)(1) applicable to 18 U.S.C. 842(p)(2) offenses. In cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18. Alternatively, the cross reference at subsection (c)(1) references such cases either to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Guideline)), or to the most analogous homicide guideline if death resulted, if the resulting offense level is greater. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

5. Amendment: Part C of Chapter Two and §§ 3D1.2 and 5E1.2, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendment 648), are repromulgated without change. Appendix A, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendments 647 and 648; see also this document, Amendment 2), is repromulgated without change.

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, (the ''BCRA''), with an effective date of January 25, 2003. (*See* Amendment 648.) This amendment repromulgates without change the emergency amendment as a permanent amendment.

This amendment implements the directive from Congress contained in the BCRA to the effect that the Commission ''promulgate a guideline, or amend an existing guideline * * *, for penalties for violations of the Federal Election Campaign Act of 1971 [the ''FECA''] and related election laws * * *.'' The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years, and for more serious offenses, the maximum term of imprisonment is five years.

To punish these offenses effectively, the Commission chose to create a new guideline at § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property). The Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. The offenses that will be sentenced under § 2C1.8 include: violations of the statutory prohibitions against ''soft money'' (2 U.S.C. 441i); restrictions on ''hard money'' contributions (2 U.S.C. 441a); contributions by foreign nationals (2 U.S.C. 441e); restrictions on ''electioneering communications'' (as defined in 2 U.S.C. 434(f)(3)(C)); certain fraudulent misrepresentations (2 U.S.C. 441h); and ''conduit contributions'' (2 U.S.C. 441f).

The new guideline has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses (sentenced under § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) at a base offense level of level 6), nevertheless are more serious due to the additional harm, or the potential harm, of corrupting the elective process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct that may occur during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at § 2C1.8(b)(1), that uses the fraud loss table in § 2B1.1 incrementally to increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for ''a large aggregate amount of illegal contributions.''

Second, the new guideline provides alternative enhancements, at § 2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of attempts by foreign entities to tamper with the United States' election processes.

Third, the new guideline provides alternative enhancements of two levels each, at § 2C1.8(b)(3), when the offense involves either ''governmental funds,'' defined broadly to include federal, state, or local funds, or an intent to derive ''a specific, identifiable non-monetary Federal benefit'' (*e.g.*, a presidential pardon). Each of these enhancements responds to specific directives of the BCRA.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in ''30 or more illegal transactions.'' After a review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a ''large number'' in that context. This enhancement also responds to a specific directive in the BCRA to the effect that the Commission provide enhanced sentencing for cases involving ''a large number of illegal transactions.''

Fifth, the new guideline provides a four level enhancement, at § 2C1.8(b)(5), if the offense involves the use of ''intimidation, threat of pecuniary or other harm, or coercion.'' This enhancement responds to information, received from the Federal Election Commission and the Public Integrity Section of the Department of Justice, which characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate,

if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under § 2C1.8.

Section 3D1.2 (Groups of Closely Related Counts) has been amended, consistent with the principles underlying the rules for grouping multiple counts of conviction, to include § 2C1.8 offenses among those in which the offense level is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm. (*See* § 3D1.2(d)).

Finally, § 5E1.2 (Fines for Individual Defendants) has been amended specifically to reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range unless the defendant began negotiations with the Federal Election Commission only after the defendant became aware that the defendant was the subject of a criminal investigation.

6. Amendment: Section 2D1.1(c) is amended in Note (B) of the ''*Notes to Drug Quantity Table'' by adding at the end the following new paragraph:

''The term 'Oxycodone (actual)' refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 by striking ''or'' after ''amphetamine,''; and by inserting '', or oxycodone'' after ''methamphetamine''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10, in the Drug Equivalency Tables, in the subdivision captioned ''Schedule I or II Opiates*'' by striking ''1 gm of Oxycodone = 500 gm of marihuana'' and inserting ''1 gm of Oxycodone (actual) = 6700 gm of marihuana''.

Reason for Amendment: This amendment responds to proportionality issues in the sentencing of oxycodone trafficking offenses. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin. This prescription drug generally is sold in pill form and, prior to this amendment, the sentencing guidelines established penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines; and (2) because different amounts of oxycodone are found in pills of identical weight.

As an example of the first issue, the drug Percocet contains, in addition to oxycodone, the non-prescription pain reliever acetaminophen. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. In contrast, the weight of the oxycodone accounts for a substantially greater proportion of the weight of an OxyContin pill. To illustrate this difference, a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg with oxycodone accounting for 0.9 percent of the total weight of the pill. By comparison, the weight of an OxyContin pill containing 10 mg of oxycodone is approximately 135 mg with oxycodone accounting for 7.4 percent of the total weight. Consequently, prior to this amendment, trafficking 364 Percocet pills or 1,481 OxyContin pills resulted in the same five year sentence of imprisonment. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.8 grams of actual oxycodone while the 1,481 OxyContin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of OxyContin. Three different amounts of oxycodone (10, 20, and 40 mg) are contained in pills of identical weight (135 mg). As a result, prior to this amendment, an individual trafficking in a particular number of OxyContin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues, the amendment changes the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide sentences for oxycodone offenses using the weight of the actual oxycodone instead of calculating the weight of the entire pill. The amendment equates 1 gram of actual oxycodone to 6,700 grams of marihuana. This equivalency keeps penalties for offenses involving 10 mg OxyContin pills identical to levels that existed prior to the amendment, substantially increases penalties for all other doses of OxyContin, and decreases somewhat the penalties for offenses involving Percocet.

7. Amendment: Section 2L1.2(b)(1)(A)(vii) is amended by striking ''committed for profit''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (A)(iv) and inserting the following:

''(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.''.

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

''(B) Definitions.—For purposes of subsection (b)(1):

(i) 'Alien smuggling offense' has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(N)).

(ii) 'Child pornography offense' means (I) an offense described in 18 U.S.C. 2251, 2251A, 2252, 2252A, or 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Crime of violence' means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An offense under Federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. 5845(a), or of an explosive material as defined in 18 U.S.C. 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

(VI) An offense under state or local law consisting of conduct that would

have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) 'Human trafficking offense' means (I) any offense described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, 1588, 1589, 1590, or 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) 'Sentence of imprisonment' has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) '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).''.

Section 2L1.2 captioned ''Application Notes'' is amended by striking Note 2 and inserting the following:

''2. Definition of 'Felony'.—For purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.''.

Section 2L1.2 captioned ''Application Notes'' is amended by striking Notes 4 and 5; by redesignating Note 3 as Note 4; and by inserting after Note 2 the following:

''3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).''.

Section 2L1.2 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) and inserting the following:

''(B) 'Three or more convictions' means at least three convictions for offenses that are not considered 'related cases', as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).''.

Reason for Amendment: In 2001 the Commission comprehensively revised § 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions. In response to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors, particularly along the southwest border between the United States and Mexico, this amendment builds upon the 2001 amendment by clarifying the meaning of some of the terms used in § 2L1.2(b)(1).

First, the amendment adds commentary to define the following offenses: ''alien smuggling'', ''child pornography'', and ''human trafficking.'' Prior to the amendment, these offenses received a 16 level increase but were not defined. The lack of definitions led to litigation regarding the meaning and scope of some of these terms. The Commission has determined that these offenses warrant application of the 16 level enhancement even though some of these offenses, as defined by the amendment, may not meet the statutory definition of an aggravated felony in 8 U.S.C. 1101(a)(43).

The amendment provides a definition of ''alien smuggling offense'' in a manner consistent with the ''aggravated felony'' definition in 8 U.S.C. 1101(a)(43)(N). This statutory definition excludes ''a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person)''. This definition generally is consistent with the guideline's previous terminology of ''alien smuggling offense committed for profit,'' and results in a 16 level increase only for the most serious of such offenses. The new definition also responds to concerns about whether an alien smuggling offense includes the offenses of harboring or transporting aliens. By explicitly incorporating the statutory definition of alien smuggling within the guideline definition, the amendment, in effect, adopts the Fifth Circuit's interpretation of ''alien smuggling''. *See United States* v. *Solis-Campozano,* 312 F.3d 164 (5th Cir. 2002) (holding that ''alien smuggling offense'' was not limited to the ''offense of alien smuggling'' but includes transporting aliens brought into the country as well).

Second, the amendment adds commentary that clarifies the meaning of the term ''crime of violence'' by providing that the term ''means any of the following: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.'' The previous definition often led to confusion over whether the specified offenses listed in that definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense ''the use, attempted use, or threatened use of physical force against the person of another.'' The amended definition makes clear that the enumerated offenses are always classified as ''crimes of violence,'' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another.

Third, the amendment adds commentary at Application Note 1(B)(vii) explaining that the term ''sentence of imprisonment'' has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release. The Commission's approach in clarifying this definition is consistent with the case law interpreting the term and the use of the term in Chapter Four of the guidelines. *See, e.g., United States* v. *Moreno-Cisneros,* 319 F.3d 456 (9th Cir. 2003) (holding that the length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release); *United States* v. *Compian-Torres,* 320 F.3d 514 (5th Cir. 2003) (same). Compare *United States* v. *Hidalgo-Macias,* 300 F.3d 281 (2d Cir. 2002) (holding that the imposition of a sentence of imprisonment following revocation of probation is a modification of the original sentence and must be considered part of the sentence imposed for the original offense), *with United States* v. *Rodriguez-Arreola,* 313 F.3d 1064 (8th Cir. 2002) (holding that the term ''sentence imposed'' when applied to an indeterminate sentence is the maximum term that a defendant may serve).

Fourth, the amendment adds commentary providing that the enhancements in subsection (b)(1) do

not apply to a conviction for an offense committed before the defendant was eighteen years of age, unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. This provision is consistent with the approach in Chapter Four of the guidelines.

The amendment also makes other minor technical and clarifying changes.

8. Amendment: Chapter Three, Part B, is amended by adding at the end the following new guideline:

''§ 3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

If—

(1) The defendant was convicted of a drug trafficking crime or a crime of violence; and

(2) (Apply the greater)—

(A) The offense involved the use of body armor, increase by 2 levels; or

(B) The defendant used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense, increase by 4 levels.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Body armor' means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. *See* 18 U.S.C. 921(a)(35).

'Crime of violence' has the meaning given that term in 18 U.S.C. 16.

'Drug trafficking crime' has the meaning given that term in 18 U.S.C. 924(c)(2).

'Offense' has the meaning given that term in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Use' means (A) active employment in a manner to protect the person from gunfire; or (B) use as a means of bartering. 'Use' does not mean mere possession (*e.g.,* 'use' does not mean that the body armor was found in the trunk of the car but not used actively as protection). 'Used' means put into 'use' as defined in this paragraph.

2. Application of Subdivision (2)(B).—Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant', for purposes of subdivision (2)(B), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Background: This guideline implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).''.

Reason for Amendment: This amendment responds to the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the ''Act''), Pub. L. 107–273. The directive requires the Sentencing Commission to review and amend the guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in 18 U.S.C. 16) or drug trafficking crime (as defined in 18 U.S.C. 924(c)) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act included a sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the amendment creates a new Chapter Three adjustment at § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). The new adjustment provides for the greater of a two level adjustment if the defendant was convicted of a crime of violence or a drug trafficking crime and the offense involved the use of body armor, or a four level adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

An application note defines ''drug trafficking crime'' (as defined in 18 U.S.C. 924(e)(2)). This definition includes any felony punishable under the Controlled Substances Act. The application note also defines ''crime of violence'' (as defined in 18 U.S.C. 16). This definition includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of ''crime of violence'' and ''drug trafficking offense'' used in a number of other guidelines. The definition of ''body armor'' is the same as the statutory definition provided in 18 U.S.C. 921(a)(35).

An application note makes clear that in order for § 3B1.5 to apply, the body armor must be used, *i.e.,* actively employed either in a manner to protect the person from gunfire or as a means of bartering. Mere possession is insufficient to trigger the adjustment.

Another application note explains that in order for the heightened, four level adjustment to apply, the defendant must have used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

9. Amendment: Section 5G1.3(b) is amended to read as follows:

''(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) The court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) The sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.''.

Section 5G1.3(c) is amended by inserting ''involving an undischarged term of imprisonment'' after ''case''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by striking Notes 2 through 7 and inserting the following:

''2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under § 1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level

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

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgement in a Criminal Case Order (i) the applicable subsection (*e.g.*, § 5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to § 5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) The factors set forth in 18 U.S.C. 3584 (referencing 18 U.S.C. 3553(a));

(ii) The type (*e.g.*, determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) The time served on the undischarged sentence and the time likely to be served before release;

(iv) The fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) Any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of § 7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to § 5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* § 5K2.23 (Discharged Terms of Imprisonment).''.

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

''§ 5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A sentence below the applicable guideline range may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.''.

Reason for Amendment: This amendment addresses a number of issues in § 5G1.3 (Imposition of a

Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

First, this amendment clarifies the rule for application of subsection (b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment by stating that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. By clarifying the application of subsection (b), this amendment addresses conflicting litigation regarding the meaning of ''fully taken into account.'' Compare, *e.g.*, *United States* v. *Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is ''fully taken into account'' if and only if the guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding), *with United States* v. *Fuentes,* 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been ''fully taken into account'' when the prior offense is part of the same course of conduct, common scheme, or plan).

Second, this amendment addresses how this guideline applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. Under this amendment, the sentence for the instant offense may be imposed concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment; however, the Commission recommends a consecutive sentence in this situation. This amendment also resolves a circuit conflict concerning whether the imposition of such sentence is required to be consecutive. The amendment follows holdings of the Second, Third, and Tenth Circuits stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. *See United States* v. *Maria,* 186 F.3d 65, 70–73 (2d Cir. 1999); *United States* v. *Swan,* 275 F.3d 272, 279–83 (3d Cir. 2002); *United States* v. *Tisdale,* 248 F.3d 964, 977–79 (10th Cir. 2001).

Third, this amendment provides a new downward departure provision in § 5K2.23 (Discharged Terms of Imprisonment) regarding the effect of discharged terms of imprisonment. This provision replaces the departure provision previously set forth in Application Note 7 of § 5G1.3. By placing the departure provision in Chapter Five, Part K, this amendment brings structural clarity to § 5G1.3 because the guideline applies to undischarged, rather than discharged, terms of imprisonment. For ease of application, the new commentary in § 5G1.3 provides a reference to § 5K2.23.

Finally, this proposed amendment addresses a circuit conflict regarding whether the sentencing court may grant ''credit'' or adjust the instant sentence for time served on a prior undischarged term covered under subsection (c). *Compare Ruggiano* v. *Reish,* 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with *United States* v. *Fermin,* 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). The amendment makes clear that the court may not adjust or give ''credit'' for time served on an undischarged term of imprisonment covered under subsection (c). However, the amendment adds commentary to § 5G1.3 to provide that courts may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense.

10. Amendment: Section 1B1.1 is amended by inserting before subsection (a) the following new paragraph:

''Except as specifically directed, the provisions of this manual are to be applied in the following order:''.

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

''4. (A) Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in § 2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.

(B) Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under § 2B3.1(b)(3) and an official victim adjustment under § 3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.''.

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

''7. Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: § 2B1.1 (Theft, Property Destruction, and Fraud).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by striking '''Prohibited sexual conduct''' and all that follows through ''child pornography.'' and inserting the following:

'''Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense. 'Prohibited sexual conduct' includes the production of child pornography, but does not include trafficking in, or possession of, child pornography.''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''19 U.S.C. 2401f;'' before ''29 U.S.C.''.

The Commentary to § 2C1.3 captioned ''Statutory Provisions'' is amended by inserting ''; 40 U.S.C. 14309(a), (b)'' after ''1909''.

Section § 2D1.11(e)(1) is amended in the subdivision captioned ''List I Chemicals'' by striking the period after ''Gamma-butyrolactone'' and inserting a semi-colon; and by adding at the end the following:

''714 G or more of Red Phosphorus.''.

Section 2D1.11(e)(2) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 214 G but less than 714 G of Red Phosphorus;''.

Section 2D1.11(e)(3) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 71 G but less than 214 G of Red Phosphorus;''.

Section 2D1.11(e)(4) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 50 G but less than 71 G of Red Phosphorus;''.

Section 2D1.11(e)(5) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 29 G but less than 50 G of Red Phosphorus;''.

Section 2D1.11(e)(6) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 7 G but less than 29 G of Red Phosphorus;''.

Section 2D1.11(e)(7) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 6 G but less than 7 G of Red Phosphorus;''.

Section 2D1.11(e)(8) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 4 G but less than 6 G of Red Phosphorus;''.

Section 2D1.11(e)(9) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 3 G but less than 4 G of Red Phosphorus;''.

Section 2D1.11(e)(10) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''Less than 3 G of Red Phosphorus;''.

The Commentary to 2G2.1 captioned ''Application Notes'' is amended by striking Note 6 and inserting the following:

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

Section 2G2.2(b)(5) is amended by inserting '', receipt, or distribution'' after ''transmission''.

The Commentary to § 2H2.1 captioned ''Statutory Provisions'' is amended by inserting '', 1015(f)'' after ''597''.

The Commentary to § 2K2.5 captioned ''Statutory Provisions'' is amended by inserting ''; 40 U.S.C. 5104(e)(1)'' after ''930''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by inserting '', 8313'' after ''7734''.

The Commentary to § 2R1.1 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; and by striking ''§ 1'' and inserting ''§§ 1, 3(b)''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended Note 4(A) by striking ''(i) means'' and inserting ''means any of the following: (i)''; by striking ''includes'' each place it appears; by inserting ''or'' before ''(iii)''; and by striking ''; and (iv)'' and inserting ''. It''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. 7734 the following new line:

''7 U.S.C. 8313 2N2.1'';

by inserting after the line referenced to 15 U.S.C. 1 the following new line:

''15 U.S.C. 3(b) 2R1.1'';

in the line referenced to 18 U.S.C. 1015 by inserting ''(a)–(e)'' after ''1015'';

by inserting after the line referenced to 18 U.S.C. 1015(a)–(e), as amended by this amendment, the following new line:

''18 U.S.C. 1015(f) 2H2.1'';

by inserting after the line referenced to 19 U.S.C. 2316 the following new line:

''19 U.S.C. 2401f 2B1.1''; and

by inserting after the line referenced to 38 U.S.C. 3502 the following new lines:

''40 U.S.C. 5104(e)(1) 2K2.5

40 U.S.C. 14309(a), (b) 2C1.3''.

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

First, this amendment makes changes to § 1B1.1 (Application Instructions) to (1) provide an instruction making clear that the application instructions are to be applied in the order presented in the guideline; (2) provide an application note making clear that, absent an instruction to the contrary, Chapter Two enhancements, Chapter Three adjustments, and determinations under Chapter Four triggered by the same conduct are to be applied cumulatively; and (3) provide an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.

Second, this amendment adds red phosphorus to the Chemical Quantity Table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) in response to a recent classification of red phosphorus as a List I chemical.

Third, this amendment conforms the departure provision in Application Note 6 of § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to Application Note 12 of § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

Fourth, this amendment amends subsection (b)(5) of § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) to include receipt and distribution in the enhancement for use of a computer.

Fifth, this amendment restructures the definitions of ''prohibited sexual conduct'' in §§ 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of ''means'' and ''includes''.

Finally, this amendment responds to new legislation and makes other technical amendments as follows:

(1) Amends Appendix A (Statutory Index) and § 2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security and Rural Investment Act of 2002 (the ''Act''), Pub. L. 107–171. The first new offense provides a statutory maximum of one year of imprisonment for violating the Animal Health Protection Act (Subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or article for distribution or sale. The Act also provides a statutory maximum of ten years' imprisonment for a subsequent violation of either offense.

(2) Amends Appendix A and § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) in response to a new offense (19 U.S.C. 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment

assistance to qualifying agricultural commodity producers.

(3) Amends Appendix A, §§ 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The proposed amendment references 40 U.S.C. 5104(e)(1) to § 2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of one year. The amendment references 40 U.S.C. 14309(a) and (b) to § 2C1.3.

(4) Amends Appendix A and § 2H2.1 (Obstructing an Election or Registration) to provide a guideline reference for offenses under 18 U.S.C. 1015(f). Prior to this amendment, 18 U.S.C. 1015 was referenced to §§ 2B1.1, 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). However, 18 U.S.C. 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. Accordingly, the amendment references 18 U.S.C. 1015(f) to § 2H2.1 (Obstructing an Election or Registration).

(5) Amends Appendix A and § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) in response to a new offense (15 U.S.C. 3) created by section 14102 (the Antitrust Technical Corrections Act of 2002) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. The new offense provides a statutory maximum term of imprisonment of three years, and a maximum fine of $10,000,000 for a corporation, or $350,000 for an individual, for monopolizing, or attempting or conspiring to monopolize, any part of the trade or commerce in or between any states, or territories of the United States, or between any such states, or territories of the United States and any foreign nations.

[FR Doc. 03–12176 Filed 5–15–03; 8:45 am]

BILLING CODE 2211–01–P