UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2009.

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

DATES: The Commission has specified an effective date of November 1, 2009, for the amendments set forth in this notice.

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

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

Notice of proposed amendments was published in the **Federal Register** on January 27, 2009 (*see* 74 FR 4802). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 17–18, 2009. On May 1, 2009, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2009.

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

Ricardo H. Hinojosa,

Acting Chair.

1. *Amendment:* Section 2B1.1(b) is amended by redesignating subdivisions (15) and (16) as subdivisions (16) and (17); and by inserting after subdivision (14) the following:

''(15) If (A) the defendant was convicted of an offense under 18 U.S.C. 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.''.

Section 2B1.1(b) is amended in subdivision (16), as redesignated by this amendment, by striking ''(I)'' after ''involved''; by striking ''; or (II) an intent to obtain personal information'' after ''security''; and by striking ''(i)'' after ''(5)(A)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Foreign instrumentality' '' the following:

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

and by inserting after the paragraph that begins '' 'National cemetery' '' the following:

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

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

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

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 4 by adding at the end the following:

''(E) *Cases Involving Means of Identification.*—For purposes of subsection (b)(2), in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 9(A) by striking the paragraph that begins '' 'Means of identification' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 13 by striking ''(15)'' and inserting ''(16)'' each place it appears; by striking the paragraph that begins '' 'Personal information' ''; and by inserting ''(A)'' before ''(iii)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 14 by striking ''(b)(16)'' and inserting ''(b)(17)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 19(B) by striking ''(15)'' and inserting ''(16)(A)''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the paragraph that begins ''Subsection (b)(14)(B)(i)'' the following:

''Subsection (b)(15) implements the directive in section 209 of Public Law 110–326.'';

and in the paragraph that begins ''Subsection (b)(15)'' by striking ''(15)'' and inserting ''(16)'' each place it appears.

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

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

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

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

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

Reason for Amendment: This multi-part amendment responds to the directive in section 209 of the Identity

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

The Act further required the Commission, in determining the appropriate sentence for the above referenced offenses, to consider the extent to which the guidelines and policy statements adequately account for 13 factors listed in section 209(b) of the Act.

In response to the congressional directive, the amendment increases penalties provided by the applicable guidelines and policy statements by adding a new enhancement and a new upward departure provision. In addition, the amendment expands both the definition of ''victim'' and the factors to be considered in the calculation of loss; each of these expansions may, in an appropriate case, increase penalties in comparison to those provided prior to the amendment.

First, the amendment adds a new two-level enhancement 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). The new enhancement, which addresses offenses involving personal information, is at subsection (b)(15). An existing enhancement, which addresses offenses under 18 U.S.C. 1030 (*i.e.*, computer crimes), was at subsection (b)(15) but has been redesignated as subsection (b)(16).

The new enhancement for offenses involving personal information applies if (A) the defendant was convicted of an offense under 18 U.S.C. 1030 and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information. The ''(A)'' prong of the new personal information enhancement had been a prong of the existing computer crime enhancement, but the tiered structure of that enhancement was such that if a computer crime involved both an intent to obtain personal information and another harm (such as an intrusion into a government computer, an intent to cause damage, or a disruption of a critical infrastructure), only the greatest applicable increase would apply. The amendment responds to concerns that a case involving those other harms is different in kind from a case involving an intent to obtain personal information. Moving the intent to obtain personal information prong out of the computer crime enhancement and into the new enhancement ensures that a defendant convicted under section 1030 receives an incremental increase in punishment if the offense involved both an intent to obtain personal information and another harm addressed by the computer crime enhancement. The ''(B)'' prong of the new personal information enhancement ensures that any defendant, regardless of the statute of conviction, receives an additional incremental increase in punishment if the offense involved the unauthorized public dissemination of personal information. This prong accounts for the greater harm to privacy caused by such an offense.

Second, the amendment amends the Commentary to § 2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used unlawfully or without authority is considered a ''victim.'' The Commentary to § 2B1.1 in Application Note 1 defines ''victim'' in pertinent part to mean ''any person who sustained any part of the actual loss determined under subsection (b)(1)''. An identity theft case may involve an individual whose means of identification was taken and used but who was fully reimbursed by a third party (*e.g.*, a bank or credit card company). Some courts have held that such an individual is not counted as a ''victim'' for purposes of the victims table at § 2B1.1(b)(2). *See United States* v. *Kennedy*, 554 F.3d 415 (3d Cir. 2009) (discussing various cases addressing this issue, including *United States* v. *Armstead*, 552 F.3d 769 (9th Cir. 2008); *United States* v. *Abiodun*, 536 F.3d 162 (2d Cir. 2008); *United States* v. *Connor*, 537 F.3d 480 (5th Cir. 2008); *United States* v. *Icaza*, 492 F.3d 967 (8th Cir. 2007); *United States* v. *Lee*, 427 F.3d 881 (11th Cir. 2005); and *United States* v. *Yagar*, 404 F.3d 967 (6th Cir. 2005)). The Commission determined that such an individual should be considered a ''victim'' for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines. The Commission received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing. This new category of ''victim'' for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.

Third, the amendment makes two changes to Application Note 3(C) regarding the calculation of loss. The first change specifies that the estimate of loss may be based upon the fair market value of property that is copied. This change responds to concerns that the calculation of loss does not adequately account for a case in which an owner of proprietary information retains possession of such information, but the proprietary information is unlawfully copied. The amendment recognizes, for example, that a computer crime that does not deprive the owner of the information in the computer nonetheless may cause loss inasmuch as it reduces the value of the information. The amendment makes clear that in such a case the court may use the fair market value of the copied property to estimate loss. The second change adds a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (*e.g.*, trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense. The new provision responds to concerns that the guidelines did not adequately explain how to estimate loss in a case involving proprietary information such as trade secrets.

Fourth, the amendment moves the definitions of ''means of identification'' and ''personal information'' to Application Note 1, and clarifies that for information to be considered ''personal information,'' it must involve information of an identifiable individual.

Fifth, the amendment amends § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, in Application Note 4 the amendment adds definitions of ''means of identification'' and ''personal information'' that are identical to the definitions of those terms in § 2B1.1. The departure provision responds to concerns that the guideline may not

adequately account for the rare wiretapping offense that involves a substantial number of victims.

Sixth, the amendment clarifies Application Note 2(B) of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). The first sentence of Application Note 2(B) specifies that an adjustment under § 3B1.3 shall apply to a defendant who exceeds or abuses his or her authority to ''obtain'' or ''use'' a means of identification. The second sentence then provides, as an example of such a defendant, an employee of a state motor vehicle department who exceeds or abuses his or her authority by ''issuing'' a means of identification. To make the two sentences consistent, the amendment clarifies the first sentence so that it expressly applies not only to obtaining or using a means of identification, but also to issuing or transferring a means of identification.

Finally, the amendment makes several technical changes. In particular, it corrects several places in the *Guidelines Manual* that erroneously refer to subsection ''(b)(15)(iii)'' of § 2B1.1; the reference should be to subsection (b)(15)(A)(iii) (redesignated by the amendment as (b)(16)(A)(iii)). Also, it conforms a statutory reference in § 2B1.1(b)(15)(A)(ii) (redesignated by the amendment as (b)(16)(A)(ii)), which refers to 18 U.S.C. 1030(a)(5)(A)(i); the Act redesignated this statute as 18 U.S.C. 1030(a)(5)(A).

The Commission determined that certain factors listed in the directive are adequately accounted for by existing provisions in the *Guidelines Manual. See, e.g.,* §§ 2B1.1(b)(1), (b)(9)(C), (b)(13), (b)(16) (as redesignated by the amendment); 2B2.3(b)(1), (b)(3); 2B3.2(b)(3)(B); 2H3.1(b)(1)(B); and 3B1.4 (Using a Minor To Commit a Crime)).

2. *Amendment:* Section 2D1.1(a) is amended by redesignating subdivision (3) as subdivision (5); and by inserting after subdivision (2) the following:

''(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or''.

Section 2D1.1(c)(5) is amended by inserting ''700,000 or more units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''.

Section 2D1.1(c)(6) is amended by inserting ''At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''.

Section 2D1.1(c)(7) is amended by inserting ''At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''.

Section 2D1.1(c)(8) is amended by inserting ''At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''.

Section 2D1.1(c)(9) is amended by inserting ''At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''.

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

Section 2D1.1(c)(11) is amended by inserting ''At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''; and by inserting ''or Hydrocodone'' after ''(except Ketamine''.

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

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

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

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

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

Section 2D1.1(c)(17) is amended by inserting ''Less than 250 units of Schedule III Hydrocodone;'' after the line referenced to ''Schedule I or II Depressants''; and by inserting ''or Hydrocodone'' after ''(except Ketamine''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(E) in the subdivision captioned ''Schedule III Substances (except ketamine)'' by inserting in the heading ''and hydrocodone'' after ''(except ketamine''; and in the sentence that begins ''***Provided'' by inserting ''(except ketamine and hydrocodone)'' after ''Schedule III substances''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(E) by inserting after the subdivision captioned ''Schedule III Substances (except ketamine)'' the following subdivision:

''*Schedule III Hydrocodone*****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

******Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 999.99 kilograms of marihuana.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(E) in the subdivision captioned ''Schedule IV Substances (except flunitrazepam)'' by inserting an additional asterisk after ''*****'' each place it appears.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(E) in the subdivision captioned ''Schedule V Substances'' by inserting an additional asterisk after ''******'' each place it appears.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(E) in the subdivision captioned ''List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)'' by inserting an additional asterisk after ''*******'' each place it appears.

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

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

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

Reason for Amendment: This amendment responds to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–425 (the ''Act'').

The Act amended the Controlled Substances Act (21 U.S.C. 801 *et seq.*) to

create two new offenses involving controlled substances, increased the statutory maximum terms of imprisonment for all Schedule III and IV controlled substance offenses and for second and subsequent Schedule V controlled substance offenses, and added a sentencing enhancement for Schedule III controlled substance offenses in a case in which ''death or serious bodily injury results from the use of such substance''. The Act also included a directive to the Commission that states:

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

First, the amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance. The statutory enhancement provides a maximum term of imprisonment of 15 years, or 30 years if the violation is committed after a prior conviction for a felony drug offense. *See* 21 U.S.C. 841(b)(1)(E), 960(b)(5). The amendment addresses the statutory enhancement by amending § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide two new alternative base offense levels at subsections (a)(3) and (a)(4) for offenses involving Schedule III controlled substances in which death or injury results that are comparable to the alternative base offense levels at subsections (a)(1) and (a)(2) for offenses involving Schedule I and II controlled substances in which death or injury results. To reflect the harms involved in these offenses and the criminal histories of repeat drug offenders, the alternative base offense levels are set at level 30 if the defendant committed the offense after one or more prior convictions for a similar offense and level 26 otherwise.

Second, the amendment modifies the Drug Quantity Table in § 2D1.1 to increase the maximum base offense level for offenses involving Schedule III hydrocodone from level 20 to level 30, without modifying any other offense level. The amendment extends the Drug Quantity Table for Schedule III hydrocodone offenses to level 30 using the existing marihuana equivalency (*i.e.,* 1 pill of Schedule III hydrocodone = 1 gram of marihuana). The Commission determined that a maximum base offense level of 30 is appropriate for Schedule III hydrocodone offenses because of data and testimony indicating a relatively high prevalence of misuse (when compared to other, non-marihuana drugs of abuse), an increasing number of emergency room visits involving this drug, and the very large volume of hydrocodone pills illicitly distributed, either over the Internet or in specialized pain clinics.

Finally, the amendment addresses the two new offenses created by the Act. The first new offense, at 21 U.S.C. 841(h), prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment depends on the controlled substance involved. The amendment amends Appendix A (Statutory Index) to reference 21 U.S.C. 841(h) to § 2D1.1 because distribution of a controlled substance is an element of the offense. That guideline also is appropriate because it includes an enhancement at subsection (b)(6) that provides a two-level increase in a case in which ''a person distributes a controlled substance through mass-marketing by means of an interactive computer service'' (*e.g.*, sale of a controlled substance by means of the Internet).

The second new offense, at 21 U.S.C. 843(c)(2)(A), prohibits the use of the Internet to advertise for sale a controlled substance and has a statutory maximum term of imprisonment of four years. Offenses under 21 U.S.C. 843(c) already are referenced in Appendix A (Statutory Index) to § 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy). The amendment modifies the title of that guideline to indicate that it covers any scheduled controlled substance.

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

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 8 in the paragraph that begins ''Note, however'' by striking ''(B)'' and inserting ''(C)''.

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

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

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

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

(1) (Apply the greatest) If the offense involved—

(A) a failure to heave to when directed by law enforcement officers, increase by 2 levels;

(B) an attempt to sink the vessel, increase by 4 levels; or

(C) the sinking of the vessel, increase by 8 levels.

Commentary

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

Application Note:

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

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

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

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

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

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

Reason for Amendment: This amendment responds to the Drug Trafficking Vessel Interdiction Act of 2008, Public Law 110–407 (the ''Act''). The Act created a new offense at 18 U.S.C. 2285 making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submersible vessel in international waters with the intent to evade detection. Section 103 of the Act directed the Commission to amend the guidelines, or promulgate new guidelines, to provide adequate penalties for persons convicted of offenses under 18 U.S.C. 2285 and included a list of circumstances for the Commission to consider.

First, the amendment amends § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if a submersible or semi-submersible vessel was used in a drug importation offense. The Commission determined that a drug importation offense involving the use of a

submersible or semi-submersible vessel poses similar risks and harms as a drug importation offense involving an unscheduled aircraft (which subsection (b)(2) already covers). The amendment also makes a conforming change to a reference in Application Note 8.

Second, the amendment creates a new guideline at § 2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. 2285. The new guideline provides a base offense level of 26 and includes a tiered specific offense characteristic and upward departure provisions to address certain aggravating circumstances listed in the directive. Public testimony indicates that submersible and semi-submersible vessels to date have been used for the purpose of transporting drugs. Such conduct receives a minimum offense level of 26 under § 2D1.1(b)(2), discussed above, regardless of the type or quantity of drug involved in the offense. The Commission determined that a base offense level of 26 in § 2X7.2 for an offense under section 2285 would be appropriate to promote proportionality.

The specific offense characteristic in § 2X7.2 provides a two-level enhancement for failing to heave to, a four-level enhancement for attempting to sink the vessel, and an eight-level enhancement for sinking the vessel; the greatest applicable enhancement applies. Offenses involving such conduct are more serious because they create greater risk of harm to the crew of the illegal vessel and the interdicting law enforcement personnel, particularly in a case in which the illegal vessel is sunk and its crew must be rescued. In addition, sinking the vessel destroys evidence of illegal activity. The upward departure provisions provide that an upward departure may be warranted if the defendant engaged in a pattern of activity involving the use of a submersible or semi-submersible vessel, or if the offense involved the use of the vessel as a part of an ongoing criminal organization or criminal enterprise.

Third, the amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. 2285 to § 2X7.2.

4. *Amendment:* Section 2A6.1(b) is amended by redesignating subdivision (5) as subdivision (6); by inserting after subdivision (4) the following:

''(5) If the defendant (A) is convicted under 18 U.S.C. 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. 115, increase by 2 levels.'';

and in subdivision (6), as redesignated by this amendment, by striking ''and (4)'' and inserting ''(4), and (5)''.

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

''Subsection (b)(5) implements, in a broader form, the directive to the Commission in section 209 of the Court Security Improvement Act of 2007, Public Law 110–177.''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1513 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1,'' before ''2J1.2''.

Reason for Amendment: This amendment responds to the Court Security Improvement Act of 2007, Public Law 110–177 (the ''Act''), and other related issues.

First, the amendment responds to the directive in section 209 of the Act, which required the Commission to review the guidelines applicable to threats punishable under 18 U.S.C. 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member) that occur over the Internet, and determine ''whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code.'' The directive further required the Commission to consider the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.

The amendment implements the directive by amending § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to provide a new two-level enhancement for a case in which the defendant is convicted under 18 U.S.C. 115, made a public threatening communication, and knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. 115. The Commission determined that the policy concerns underlying the directive regarding threats occurring over the Internet apply equally to threats made public by other means (*e.g.*, radio, television broadcast) and that the response to the directive therefore should be technology neutral. The threat guideline, § 2A6.1, adequately accounts for offenses involving multiple threats and multiple victims through the existing specific offense characteristic at subsection (b)(2) and the upward departure provision in Application Note 4.

Second, the amendment amends Appendix A (Statutory Index) to add references for 18 U.S.C. 1513 (Retaliating against a witness, victim, or an informant) to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 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 addition to § 2J1.2 (Obstruction of Justice). The additional references more adequately reflect the range of conduct covered by 18 U.S.C. 1513, including killing or attempting to kill a witness, causing bodily injury to a witness, and damaging the tangible property of a witness. In addition, 18 U.S.C. 1512 (Tampering with a witness, victim, or an informant), which covers a similar range of conduct, including killing or attempting to kill a witness and using physical force against a witness, is referenced to the same Chapter Two, Part A guidelines.

5. *Amendment:* Section 2H4.1(a) is amended by striking ''(Apply the greater)'' after ''Offense Level''; and by striking subdivision (2) and inserting the following:

''(2) 18, if (A) the defendant was convicted of an offense under 18 U.S.C. 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. 1593A based on an act in violation of 18 U.S.C. 1592.''.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by inserting '', 1593A'' after ''1592''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended by adding at the end the following:

''4. In a case in which the defendant was convicted under 18 U.S.C. 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.''.

Section 2L1.1(b) is amended by striking subdivision (8) and inserting the following:

''(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If

the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under § 3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 6 by inserting ''(A)'' after ''(b)(8)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1350 the following:

''18 U.S.C. 1351 2B1.1'';

and by inserting after the line referenced to 18 U.S.C. 1592 the following:

''18 U.S.C. 1593A2H4.1''.

Reason for Amendment: This amendment responds to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457 (the ''Act''), which included a directive to the Commission and created two new offenses.

First, the amendment responds to the directive in section 222(g) of the Act. It directed the Commission to—

review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if—

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

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

The amendment amends § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative prong to the enhancement at subsection (b)(8), which covers cases in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment. The new alternative prong, at subsection (b)(8)(B), applies in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under § 3B1.1 (Aggravating Role). In such a case, a two-level increase applies, but if the alien engaging in the prostitution had not attained the age of 18 years, a six-level increase applies. Because this is an alternative enhancement, it does not apply if the enhancement for coercion at § 2L1.1(b)(8)(A) is greater.

The amendment also amends Application Note 6 to provide that, while an adjustment under § 3A1.3 (Restraint of Victim) does not apply in a case that receives an enhancement under § 2L1.1(b)(8)(A), such an adjustment may apply in a case that receives an enhancement under § 2L1.1(b)(8)(B).

Second, the amendment responds to a new offense created by the Act, 18 U.S.C. 1351 (Fraud in foreign labor contracting). The new offense has a statutory maximum term of imprisonment of five years. Because this new offense has fraud as an element, the amendment references this new offense in Appendix A (Statutory Index) 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).

Third, the amendment responds to another new offense created by the Act, 18 U.S.C. 1593A (Benefitting financially from peonage, slavery, and trafficking in persons). This new offense applies when a person has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation. The amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. 1593A to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) because that guideline covers the relevant underlying statutes, 18 U.S.C. 1581(a) and 1592. The amendment also amends § 2H4.1 to provide that a defendant convicted of 18 U.S.C. 1593A receives the same base offense level as if the defendant were convicted of committing the underlying violation. Accordingly, if the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation of 18 U.S.C. 1592, the defendant would receive the same base offense level, 18, as if the defendant had been convicted of 18 U.S.C. 1592. If the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation of 18 U.S.C. 1581(a), the defendant would receive the same base offense level, 22, as if the defendant had been convicted of 18 U.S.C. 1581(a).

The amendment also amends the Commentary to § 2H4.1 to provide that a downward departure may be warranted in a case in which the defendant is convicted under 18 U.S.C. 1589(b) or 1593A if the defendant benefitted from participating in a venture described in those sections in reckless disregard of the fact that the venture had engaged in the criminal activities described in those sections. This downward departure provision recognizes that a defendant who commits such an offense in reckless disregard of the fact that the venture engaged in such criminal activities may be less culpable than a defendant who acts with knowledge of that fact.

Finally, the amendment makes a technical change to § 2H4.1(a) by striking the phrase ''(Apply the greater)''.

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

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

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

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

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

Reason for Amendment: This amendment amends § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to clarify guideline application issues regarding the sentencing of counterfeiting offenses involving ''bleached notes.'' A bleached note is genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be a note of higher denomination. The amendment responds to concerns expressed by federal judges and members of Congress regarding which guideline should apply to offenses involving bleached notes.

Courts in different circuits have resolved differently the question of whether an offense involving bleached notes should be sentenced under § 2B5.1 or § 2B1.1 (Larceny,

Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). *Compare United States* v. *Schreckengost*, 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under § 2B1.1), *and United States* v. *Inclema*, 363 F.3d 1177 (11th Cir. 2004) (same), *with United States* v. *Dison*, 2008 WL 351935 (W.D. La. Feb. 8, 2008) (applying § 2B5.1 in a case involving bleached notes), *and United States* v. *Vice*, 2008 WL 113970 (W.D. La. Jan. 3, 2008) (same).

The amendment resolves this issue by providing that an offense involving bleached notes is sentenced under § 2B5.1. The amendment does so by deleting Application Note 3 and revising the definition of ''counterfeit'' to more closely parallel relevant counterfeiting statutes, including 18 U.S.C. 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). It establishes a new definition at Application Note 1 providing that counterfeit ''refers to an instrument that has been falsely made, manufactured, or altered.'' Under the new definition, altered instruments are treated as counterfeit and sentenced under § 2B5.1. Technological advances in counterfeiting, such as bleaching notes, have rendered obsolete the previous distinction in the guidelines between an instrument falsely made or manufactured in its entirety and a genuine instrument that is altered.

The amendment also adds a prong to the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed. Blank or partially blank bleached notes are similar to counterfeiting paper in how they are involved in counterfeiting offenses. Accordingly, this new prong ensures that an offender who controlled or possessed blank or partially blank bleached notes is subject to the same two-level enhancement as an offender who controlled or possessed ''counterfeiting paper similar to a distinctive paper'', as subsection (b)(2)(B)(i) already provides.

Finally, the amendment amends Appendix A (Statutory Index) by striking the reference to § 2B1.1 for two offenses that do not involve elements of fraud. Specifically, the amendment deletes the reference to § 2B1.1 for offenses under 18 U.S.C. 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities).

7. *Amendment:* The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''*Undue Influence''* by adding at the end ''The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.''; by inserting after the paragraph that begins ''*Undue Influence''* the following:

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

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

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

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended in Note 3(B) in the paragraph that begins ''*Undue Influence''* by adding at the end ''The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.''; by inserting after the paragraph that begins ''*Undue Influence''* the following:

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

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

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

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

Three circuits have expressed different views on two issues: first, whether the undue influence enhancement can apply in a case involving attempted sexual conduct; and second, whether the undue influence enhancement can apply in a case in which the only minor involved is a law enforcement officer. *Compare United States* v. *Root,* 296 F.3d 1222, 1234 (11th Cir. 2002) (holding that the undue influence enhancement in § 2A3.2 can apply in instances of attempted sexual conduct, including a case in which the only ''victim'' involved in the case is an undercover law enforcement officer), *and United States* v. *Vance,* 494 F.3d 985, 996 (11th Cir. 2007) (holding that the undue influence enhancement in § 2G1.3 can apply in a case in which the minor is fictitious), *with United States* v. *Mitchell,* 353 F.3d 552, 554, 557 (7th Cir. 2003) (holding that the undue influence enhancement in § 2A3.2 ''cannot apply in the case of an attempt where the victim is an undercover police officer'', and suggesting that it cannot apply in any case in which ''the offender and victim have not engaged in illicit sexual conduct''), *and United States* v. *Chriswell,* 401 F.3d 459, 469 (6th Cir. 2005) (holding that the undue influence enhancement in § 2A3.2 ''is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen'' but leaving open the possibility that it can apply in other instances of attempted sexual conduct).

The amendment resolves the first issue by providing that the undue

influence enhancement can apply in a case involving attempted sexual conduct. Specifically, the amendment amends the Commentary in §§ 2A3.2 and 2G1.3 to provide that ''[t]he voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.''

The amendment resolves the second issue by providing in the Commentary to §§ 2A3.2 and 2G1.3 that the undue influence enhancement does not apply in a case in which the only ''minor'' involved in the offense is an undercover law enforcement officer. The Commission determined that the undue influence enhancement should not apply in a case involving only an undercover law enforcement officer because, unlike other enhancements in the sex offense guidelines, the undue influence enhancement is properly focused on the effect of the defendant's actions on the minor's behavior.

The amendment also makes a stylistic change to the language in the Commentary of both §§ 2A3.2 and 2G1.3, and makes a technical change to the Background of § 2A3.2.

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

The Commentary to § 2B1.1 captioned ''Background'' is amended in the paragraph that begins ''Subsection (b)(6)'' by inserting ''and the directive to the Commission in section 3 of Public Law 110–384'' after ''105–101''.

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

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

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

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

Section 2G2.2(a)(1) is amended by striking ''or'' after ''2252(a)(4),''; and by inserting '', or § 2252A(a)(7)'' after ''2252A(a)(5)''.

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

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

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

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

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

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

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

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

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by redesignating Note 6 as Note 7; and by inserting after Note 5 the following:

''6. *Cases Involving Adapted or Modified Depictions.*—If the offense involved material that is an adapted or modified depiction of an identifiable minor (*e.g.,* a case in which the defendant is convicted under 18 U.S.C. 2252A(a)(7)), the term 'material involving the sexual exploitation of a minor' includes such material.''.

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

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

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by inserting '', 2442'' before the period at the end.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following:

'' 'Peonage or involuntary servitude' includes forced labor, slavery, and recruitment or use of a child soldier.''.

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

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

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

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

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

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

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

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

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

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

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in Note 6 by striking the asterisk after ''confinement''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking the paragraph that begins ''*Note:'' and the paragraph that begins ''However,''.

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

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

''(6) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See* § 5F1.8 (Intermittent Confinement).''.

Section 5F1.1 is amended by striking the asterisk after ''release.''; and by striking the paragraph that begins

''*Note: Section 3583(d)'' and the paragraph that begins ''However,''.

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

''§ 5F1.8. *Intermittent Confinement*

Intermittent confinement may be imposed as a condition of probation during the first year of probation. *See* 18 U.S.C. 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See* 18 U.S.C. 3583(d).

Commentary

Application Note:

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

Chapter Seven, Part A, Subpart 2(b) is amended in the paragraph that begins ''With the exception'' by striking ''With the exception'' and all that follows through ''sentence of probation.'' and inserting ''The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.)''; and by striking the paragraph that begins ''*Note: Section 3583(d)'' and the paragraph that begins ''However,''.

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

''5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See* § 5F1.8 (Intermittent Confinement).''.

Section 8D1.3(b) is amended by striking '', (2) notice to victims'' and all that follows through ''or area,'' and inserting ''or (2) community service, unless the court has imposed a fine, or''; and by striking the paragraph that begins ''*Note:''*.

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

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

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

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

by inserting after the line referenced to 8 U.S.C. 1375a(d)(3)(C),(d)(5)(B) the following:

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

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

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

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

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

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

''15 U.S.C. 80b–9(c) 2J1.1, 2J1.5'';

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

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

by inserting after the line referenced to 15 U.S.C. 1176 the following:

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

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

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

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

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

by inserting after the line referenced to 18 U.S.C. 115(b)(4) the following:

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

in the line referenced to 18 U.S.C. 2280 by inserting ''2A6.1,'' after ''2A4.1,'';
in the line referenced to 18 U.S.C. 2332a by inserting ''2A6.1,'' before ''2K1.4'';
by inserting after the line referenced to 18 U.S.C. 2425 the following:

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

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

by striking the line referenced to 33 U.S.C. 506;

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

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

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

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

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

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

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

''50 U.S.C. App. 527 (e)2X5.2''.

Reason for Amendment: This multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

First, the amendment amends Appendix A (Statutory Index) to include offenses created by the Housing and Economic Recovery Act of 2008, Public Law 110–289, and other offenses similar to those offenses, as follows:

(1) The new offense at 12 U.S.C. 4636b is referenced to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The similar existing offense at 12 U.S.C. 1818(j) is also referenced to § 2B1.1. These offenses are similar to economic crimes and are best accounted for by § 2B1.1.

(2) The new offense at 12 U.S.C. 4641 is referenced to § 2J1.1 (Contempt) and § 2J1.5 (Failure to Appear by Material Witness); similar existing offenses (2 U.S.C. 192, 390; 7 U.S.C. 87f(e); 12 U.S.C. 1844(f), 2273, 3108(b)(6); 15 U.S.C. 78u(c), 80a–41(c), 80b–9(c), 717m(d); 16 U.S.C. 825f(c); 26 U.S.C. 7210; 33 U.S.C. 1227(b); 42 U.S.C. 3611; 47 U.S.C. 409(m); 49 U.S.C. 14909, 16104) are also referenced to § 2J1.1 and § 2J1.5. Contempt offenses can involve a range of conduct. The Commission determined that referencing these offenses to both § 2J1.1 and § 2J1.5 will best account for the range of conduct involved. Another similar offense, 33 U.S.C. 506, is deleted from Appendix A (Statutory Index) because it has been repealed.

Second, the amendment amends Appendix A (Statutory Index) to include offenses upgraded from misdemeanors to felonies by the Consumer Product Safety Improvement Act of 2008, Public Law 110–314. These offenses (15 U.S.C. 1192, 1197(b), 1202(c), 1263, 2068) are referenced to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). These offenses cover a range of conduct (from paperwork violations

to making or selling a nonconforming product) and a range of mental states (from strict liability to knowing, willful, or intentional misconduct). The Commission determined that these offenses are similar to offenses referenced to § 2N2.1, which has provisions to account for aggravating and mitigating circumstances that may be involved in such offenses. Technical and conforming changes are also made to indicate that § 2N2.1 covers consumer product safety offenses.

Third, the amendment amends Appendix A (Statutory Index) to include an offense created by the Veterans' Benefits Improvement Act of 2008, Public Law 110–389. The new offense, 50 U.S.C. App. § 527(e), is a Class A misdemeanor and, accordingly, is referenced to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The amendment also references 10 U.S.C. 987(f), a similar Class A misdemeanor, to § 2X5.2.

Fourth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Public. Law 109–162. The offense, 18 U.S.C. 117, covers domestic assault by a person with two or more prior convictions for domestic assault offenses. It is similar to the offenses referenced to § 2A6.2 (Stalking or Domestic Violence) and, therefore, is referenced to that guideline.

Fifth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008, Public Law 110–340. The offense, 18 U.S.C. 2442, is referenced to § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). The offenses currently indexed to § 2H4.1 include five offenses that relate to illegal use of an individual's labor and have the same statutory maximum term of imprisonment as the new child soldiers offense (20 years imprisonment or, if death results, life). Likewise, § 2H4.1 has provisions to account for aggravating and mitigating circumstances that may be involved in a child soldiers offense. Technical and conforming changes are also made to indicate that § 2H4.1 applies to the new offense.

Sixth, the amendment makes changes throughout the *Guidelines Manual* to reflect the amendments made by the Judicial Administration and Technical Amendments Act of 2008, Public Law 110–406, to the probation and supervised release statutes (18 U.S.C. 3563, 3583). The changes include a new guideline for intermittent confinement at § 5F1.8 (Intermittent Confinement) that parallels the statutory language, as well as technical and conforming changes. These changes conform the *Guidelines Manual* to reflect what Congress has provided.

Seventh, the amendment responds to the Let Our Veterans Rest in Peace Act of 2008, Public Law 110–384, which directed the Commission to review and, if appropriate, amend the guidelines to ''provide adequate sentencing enhancements'' for any offense involving ''desecration, theft, or trafficking'' in a veteran's grave marker. There is a specific offense characteristic at subsection (b)(6) of § 2B1.1 for damage, destruction, or theft of a veteran's grave marker. The amendment amends this specific offense characteristic so that it also covers trafficking in a veteran's grave marker.

Eighth, the amendment makes changes in the child pornography guidelines, § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) and § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), so that they reflect the amendments made to the child pornography statutes (18 U.S.C. 2251 *et seq.*) by the Effective Child Pornography Prosecution Act of 2007, Public Law 110–358, and the PROTECT Our Children Act of 2008, Public Law 110–401. The changes relate primarily to cases in which child pornography is transmitted over the Internet. Under the amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. The amendment also amends the child pornography guidelines so that the term ''distribution'' includes ''transmission'', and the term ''material'' includes any visual depiction, as now defined by 18 U.S.C. 2256 (*i.e.,* to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format). These changes conform the child pornography guidelines to reflect what Congress has provided.

Ninth, the amendment amends Appendix A (Statutory Index) so that the threat guideline, § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. 2280 and 2332a are referenced. A person may be charged and convicted of committing such an offense by threat. In such a case, § 2A6.1 may be the most appropriate guideline.

Tenth, the amendment addresses subsection (a)(7) of 18 U.S.C. 2252A, a new child pornography offense created by the PROTECT Our Children Act of 2008, Public Law 110–401. The offense makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, ''child pornography that is an adapted or modified depiction of an identifiable minor.'' A violator is subject to a maximum term of imprisonment of 15 years. This offense is already referenced in Appendix A (Statutory Index) to the child pornography distribution guideline, § 2G2.2, by virtue of the fact that all offenses under section 2252A(a) are referenced to that guideline. The Commission determined that the distribution guideline is the appropriate guideline for this offense because distribution is a required element of this offense, in that the offender must either distribute the material or produce it with intent to distribute. The distribution guideline also has provisions to account for aggravating and mitigating circumstances that may be involved in these offenses. The amendment provides a base offense level of 18 for this offense, which is four levels lower than the base offense level for other child pornography distribution offenses referenced to § 2G2.2. The Commission determined that the lower base offense level was appropriate for this offense because, unlike for other child pornography distribution offenses, the process of creating the image does not involve the sexual exploitation of a child, and Congress provided a lower penalty structure for this offense (a maximum term of imprisonment of 15 years, and no mandatory minimum term of imprisonment) than for other child pornography distribution offenses (typically, a maximum term of imprisonment of 20 years and a mandatory minimum of 5 years). The lower base offense level also accounts for the fact that the enhancements at subsections (b)(3) (for distribution) and (b)(6) (for use of a computer) will likely apply in these cases. Finally, to ensure that § 2G2.2 treats material involving an adapted or modified image in the same

manner as it treats material involving any other form of child pornography, the amendment provides a new Application Note to § 2G2.2 to clarify that, if the offense involved material that is an adapted or modified depiction of an identifiable minor, the term ''material involving the sexual exploitation of a minor'' includes such material.

9. *Amendment:* The Commentary to § 3C1.3 captioned ''Application Note'' is amended in Note 1 by striking ''as adjusted'' and inserting ''including, as in any other case in which a Chapter Three adjustment applies (*see* § 1B1.1 (Application Instructions)), the adjustment provided''; and by adding at the end ''Similarly, if the applicable adjusted guideline range is 30–37 months and the court determines a 'total punishment' of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. 3147 would satisfy this requirement.''.

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

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to § 2J1.7 (now Application Note 1 to § 3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level adjustment. *See United States* v. *Confredo,* 528 F.3d 143 (2d Cir. 2008); *United States* v. *Stevens,* 66 F.3d 431 (2d Cir. 1995); *United States* v. *Wilson,* 966 F.2d 243 (7th Cir. 1992).

The amendment clarifies that the court determines the applicable guideline range for a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. 3147 as in any other case. Therefore, under ordinary guideline application principles, only one guideline range applies to such a defendant. *See* § 1B1.1 (Application Instructions) (instructing the sentencing court to, in this order: (1) Determine the offense guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level and specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) ''[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above''). At that point, the court determines an appropriate ''total punishment'' using that applicable guideline range, and then divides the total sentence between the underlying offense and the section 3147 enhancement as the court considers appropriate.

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

Reason for Amendment: This amendment responds to the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110–403, which added two sentencing enhancements to violations of 18 U.S.C. 2320 (Trafficking in counterfeit goods or services). Under those sentencing enhancements, if the offender causes or attempts to cause serious bodily injury, the statutory maximum term of imprisonment is increased from 10 years to 20 years; if the offender causes or attempts to cause death, the statutory maximum is increased to any term of years (or to life).

The amendment amends § 2B5.3 (Criminal Infringement of Copyright or Trademark) at subsection (b)(5) to clarify that the enhancement in that subsection, which applies when the offense involved the risk of serious bodily injury, also applies when the offense involved the risk of death. This brings the language of that enhancement back into parallel with the corresponding enhancement in subsection (b)(13) of § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission envisioned, when it added the enhancement to § 2B5.3, that paralleling the fraud guideline would promote proportionality. *See* Appendix C to the *Guidelines Manual,* Amendment 590 (''The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore, this enhancement is consistent with an identical provision in the fraud guideline.''). Accordingly, the amendment also increases the minimum offense level in § 2B5.3(b)(5) from level 13 to level 14, bringing it back into parallel with the minimum offense level in § 2B1.1(b)(13).

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

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

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

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

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

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

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

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

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

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

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

''18 U.S.C. 2251(c) 2G2.1'';

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

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

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

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

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

and in the line referenced to 42 U.S.C. 3611(f) by striking ''(f)'' and inserting ''(c)''.

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

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

The amendment also resolves certain technical issues that have arisen in the *Guidelines Manual* with respect to child pornography offenses. First, it makes technical changes to the Commentary in § 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 more accurately indicate which offenses under 18 U.S.C. 2251 are referenced to § 2G2.1. Second, it makes technical changes to the Commentary in § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) to address the fact that offenses under 18 U.S.C. 2252A(g) are now covered by § 2G2.6 (Child Exploitation Enterprises) (*see* Appendix C to the *Guidelines Manual,* Amendment 701), while offenses under section 2252A(a) and (b) continue to be covered by § 2G2.2. Third, it makes a technical change to the Commentary in § 2G2.3 (Selling or Buying of Children for Use in the Production of Pornography) to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. 2251A is now 30 years imprisonment. Fourth, it makes technical changes in subsection (c)(1) of § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) to address the fact that § 2G2.4 no longer exists, having been consolidated into § 2G2.2 effective November 1, 2004 (*see* Appendix C to the *Guidelines Manual,* Amendment 664). Fifth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. In doing so, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by § 2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by § 2G2.2.

[FR Doc. E9–10737 Filed 5–7–09; 8:45 am]

BILLING CODE 2211–01–P