

# **Amendments to the United States Sentencing Guidelines**

Effective 2003

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## **Highlights of Key Points**

In addition to permanent amendments that went into effect on November 1, 2003, pursuant to the Sentencing Commission's regular amendment cycle, a number of new amendments to the United States Sentencing Guidelines went into effect at various other times this year. These emergency and non-regular amendments were required by three major pieces of legislation that created new criminal offenses, increased penalties for existing crimes and modified the procedures that govern federal sentencing. The amendments apply at sentencings held after the effective dates, except to the extent that application of any provision would violate the *ex post facto* clause of the United States Constitution, which prohibits retroactive increases in punishment.

**The PROTECT Act**, an acronym for Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 was enacted on April 30, 2003. The PROTECT Act deals primarily with specified child abduction and sex offenses, increasing the maximum and minimum terms of imprisonment and creating new mandatory minimums for various child pornography offenses.

Title IV of the PROTECT Act reforms federal sentencing more broadly. Title IV made wide-ranging changes to basic provisions of the Sentencing Reform Act including drastically restricting the authority of courts to depart in specified child abduction and sex offenses, directing the Sentencing Commission to "substantially reduce the incidence" of downward departures in all cases, modifying the standard of review for departures to require *de novo* review under certain circumstances, and making other guidelines and procedural changes. These sentencing reforms are at times referred to as the "Feeney Amendment," because they resulted from an amendment introduced by Rep. Tom Feeney, a first term Congressman from Florida to AMBER Alert legislation, a national notification system for abducted children, which ultimately was passed as the PROTECT Act.

Most provisions of the PROTECT Act took effect on April 30, 2003, including a series of guideline amendments made directly by Congress. One amendment took effect on May 30, 2003. Another significant number of amendments took effect on October 27, 2003; these pertained to downward departures and were promulgated in response to a directive in § 401(m) of the Act.

**SARBANES-OXLEY Act of 2002**, Pub. L. No. 107-204, enacted in the aftermath of the Enron, Arthur Anderson Accounting, WorldCom and other large scale securities and accounting scandals, became law on July 30, 2002. It contained several directives to the Sentencing

Commission pertaining to fraud and obstruction of justice offenses that required implementation by January 25, 2003. The directives, which are set forth in Sections 805, 905, and 1104 of the Act, required the Commission to address, among other things, the sentencing guidelines applicable to 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. These penalty increases were incorporated into the existing sentencing guideline structure under **§2B1.1**, **§2J1.2**, and **§2E5.3**.

Among other things, Sarbanes-Oxley also increased the statutory maximum penalty for mail and wire fraud to twenty years' imprisonment from five years. This provision originated as an amendment co-sponsored by Senators Biden and Hatch. On April 11, 2003, almost nine months after passage of the Act, Senator Biden made a speech on the Senate floor "to augment, and not supplant, the legislative history and explanatory statements that accompanied passage" of the Sarbanes-Oxley Act, explaining that he was offering the section-by-section analysis "to provide guidance in the legal interpretation" of the provisions of his amendment, which was passed in large part as Title IX of the Sarbanes-Oxley Act. 149 Cong. Rec. S5,326 (daily ed. April 11, 2003). In his post hoc analysis, Senator Biden explained that the increased statutory maximum penalties, "while meant to punish the most egregious offenders more severely, are also intended to raise sentences at the lower end of the sentencing guidelines." *Id.* at S5,328. On April 16, 2003, when the Commission met five days later to consider the permanent amendments to become effective November 1, 2003, it heeded Senator Biden's "legislative history" voting to increase to level 7, the base offense in U.S.S.G. § 2B1.1 for offenses that carry a statutory maximum penalty of twenty years imprisonment or more but retained the base offense level of 6 for all other § 2B1.1 offenses.

**Note:** The emergency amendment that became effective January 25, 2003 retains the single base offense level (6) for all offenses whereas the permanent amendment that took effect on November 1, 2003 provides an alternative base offense levels (6 or 7) based on the statutory maximum penalty applicable to the offense of conviction. The permanent amendment would also cap the combined adjustments under U.S.S.G. §§ 2B1.1(b)(2) and (b)(12) and expands the reach of some of the enhancements to cover registered brokers, dealers and investment advisers.

**BIPARTISAN CAMPAIGN REFORM Act of 2002**, Public Law 107-155, which significantly increased statutory penalties for campaign finance crimes and directed the Commission to promulgate or amend the guidelines accordingly became law on March 27, 2002. The Commission chose to create a new guideline, U.S.S.G. § **2C1.8** (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure) that took effect under emergency authority on January 25, 2003 and permanent amendments that will take effect on November 1, 2003.

An electronic copy of the current guidelines manual, incorporating all the amendments, is found at: <http://www.uscc.gov/2003guid/2003guid.pdf>

## I. Current Application & Ex Post Facto Issues

For persons coming up for sentencing, the court must apply the guidelines that are in effect on the date the defendant is sentenced. See 18 U.S.C. § 3553(a)(4)(A)(i); U.S.S.G. § 1B1.11. Indeed, just this year, Congress amended § 3553(a)(4) to provide that courts must also apply any changes made by Congress, even if not yet incorporated into the official sentencing guidelines. 18 U.S.C. § 3553(a)(4)(A)(i) (courts shall consider the current guidelines “subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)).” PROTECT Act, Pub. L. 108-21, § 401(j)(5).

Notwithstanding this statutory requirement, the *ex post facto* clause in Article 1, § 9, cl. 3 of the United States Constitution prohibits retroactive increases in punishment. Collins v. Youngblood, 497 U.S. 37, 42 (1990). Hence, if a court determines that a current guideline, and any applicable amendments, “makes more burdensome the punishment for a crime, after its commission” the court cannot apply the amendments but must instead apply the guideline in effect at the time the offense was committed. Id.; see also U.S.S.G. § 1B1.11(b)(1).<sup>1</sup> For *ex post facto* purposes, the controlling date is the “last date of the offense, as alleged in the indictment.” United States v. Broderson, 67 F.3d 452, 456 (2d Cir.1995); U.S.S.G. § 1B1.11(b), comment. (n. 2).<sup>2</sup>

## II. Retroactivity – Oxycodone Amendment (Amendment 662)

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<sup>1</sup> Section 1B1.11(b)(1) provides:

If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

<sup>2</sup> For cases addressing the *ex post facto* issue in the guidelines context, see United States v. Harotunian, 920 F.2d 1040, 1042 (1<sup>st</sup> Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Yeaman, 248 F.3d 223, 227-28 (3d Cir. 2001) (prohibition on departing downward for post-sentence rehabilitation, § 5K2.19 could not be applied to an offense that had been committed before the provision came into effect); United States v. Morrow, 925 F.2d 779, 782-83 (4<sup>th</sup> Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021-22 (5<sup>th</sup> Cir. 1990); United States v. Yagi, 947 F.2d 211, 213 n.1 (6<sup>th</sup> Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1386 (7<sup>th</sup> Cir. 1994); United States v. Bell, 991 F.2d 1445, 1448-52 (8<sup>th</sup> Cir. 1993); United States v. Sweeten, 933 F.2d 765, 772 (9<sup>th</sup> Cir. 1991); United States v. Smith, 930 F.1450 (10<sup>th</sup> Cir. 1991); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11<sup>th</sup> Cir. 1990); United States v. Clark, 8 F.3d 839, 844-45 (D.C. Cir. 1993) (departure based on lack of youthful guidance was not precluded where offense was committed before effective date of § 5H1.12, prohibiting such departures).

On November 5, 2003, the Commission designated one amendment – the oxycodone amendment – to be applied retroactively to defendants who have already been sentenced and are serving a term of imprisonment. Amendment 662, the retroactivity amendment, modifies U.S.S.G. § 1B1.10(c) to include the Oxycodone amendment (Amendment 657) in the list of amendments to be applied retroactively. In cases where the Oxycodone amendment, which modified the method for calculating penalties for oxycodone trafficking offenses, lowers the guideline range for a defendant serving a term of imprisonment the defendant may file a motion for resentencing under 18 U.S.C. § 3582(c)(2). See U.S.S.G. § 1B1.10(a); Neal v. United States, 516 U.S. 284 (1996).

Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin, which are generally sold as tablets. Before the amendment, penalties for oxycodone trafficking were based on the entire weight of the tablet. Because different amounts of oxycodone were found in tablets of identical total weight some offenses were sentenced disproportionately to the actual weight of the oxycodone. The Commission believed that the lack of proportionality for offenses involving the same controlled substance was unfair.

Departing from the previous method of weighing the entire mixture or substance containing Oxycodone, the amended Guideline instructs courts to use the actual weight of the Oxycodone in the tablet to establish the base offense level under § 2D1.1(a)(3). The amendment also increases the marijuana equivalency for oxycodone, however. Whereas 1 gram of oxycodone had equaled 500 grams of marijuana, currently 1 gram of oxycodone equals 6700 grams of marijuana. The amendment will thus increase penalties for some offenses while decreasing penalties for others.

In particular, the amendment “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.” U.S.S.G. App. C, Amendment 657. Persons, whose guideline range is lowered as a result of the amendment, may seek to be resentenced pursuant to 18 U.S.C. § 3582(c)(2).

### **III. Overview Of Amendments**

#### **A. November 1, 2003 (Amendments 652-661)**

Ten new permanent amendments went into effect on November 1, 2003 pursuant to the Commission’s regular amendment process, *i.e.*, the Commission submitted the ten amendments to Congress on May 1, 2003; unless disapproved by Congress, they were to go into effect on November 1, 2003 as provided under 28 U.S.C. §994(p). The new amendments modify §2A1.4 (Involuntary Manslaughter); §§ 2B1.1, 2E5.3, 2J1.2, and 2T4.1 (Corporate Fraud); §§ 2B1.1, 2B2.3, and 2B3.2, 3D1.2, and 5E1.2 (Cybersecurity); §§ 2B1.1, 2K1.3, 2K1.4, 2M5.3, 2M6.1, 2Q1.4, 2Q1.5, 2S1.1, 2X2.1, and 2X3.1, (Terrorism); § 2C1.8 (Campaign Finance); § 2D1.1 (Oxycodone Trafficking); § 2L1.2 (Immigration); § 3B1.5 (Offenses Involving Body Armor); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); and make several technical and conforming changes to other guideline provisions.

The permanent amendments repromulgate the emergency corporate fraud and campaign finance amendments that went into effect on January 25, 2003. The permanent corporate fraud amendments were modified from the emergency amendments. For example, the permanent amendment provides an alternative base offense level for offenses with a statutory maximum of 20-year imprisonment or more. It also expands the reach of some of the emergency enhancements by having them apply more broadly to registered brokers, dealers, and investment advisers and their associated persons whereas the emergency enhancement applied only to officers and directors of publicly held entities. On the other hand, the permanent amendment caps the cumulative effect of upward adjustments that address related harms.

The Campaign Reform emergency amendment was repromulgated, without any changes, as a permanent amendment.

**B. October 27, 2003 (Amendment 651)**

An eight-part amendment pertaining to downward departures went into effect on October 27, 2003 in response to § 401(m) of the PROTECT Act, which directed the Commission to “review and substantially reduce the incidence” of downward departures within 180 days of the passage of the Act. The amendment modifies §5K2.0 (Grounds for Departure); §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction); §5H1.6 (Family Ties and Responsibilities); §5H1.7 (Role in the Offense); §5H1.8 (Criminal History); §5K2.10 (Victim’s Conduct); §5K2.12 (Coercion and Duress); §5K2.13 (Diminished Capacity); §5K2.20 (Aberrant Behavior); §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and §6B1.2 (Standards for Acceptance of Plea Agreements). The amendment also creates one new departure, §5K3.1 (Early Disposition Programs); and one new guideline in Chapter One: §1A1.1 (Authority). The new § 1A1.1 replaces the introduction previously found at Chapter One, Part A, which has now been inserted as a Historical Note to § 1A1.1.

The Commission also published a *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, which includes data and findings from the Commission’s review of departures. The Sentencing Commission generally posts all its reports to Congress on its website in an electronic format available for downloading. See <http://www.ussc.gov/reports.HTM>

**C. May 30, 2003 (Amendment 650)**

This amendment, which implements the directive to the Commission in section 104 of the PROTECT Act, Pub. L. 108–21 increases the base offense level for kidnapping offenses in § 2A4.1.

**D. April 30, 2003** (Amendment 649)

A nine-part amendment implementing amendments made directly by the PROTECT Act, Pub. L. 108-21, went into effect April 30, 2003. This amendment modifies § 2G2.2 (Trafficking in Child Pornography), § 2G2.4 (Possession of Child Pornography), § 3E1.1 (Acceptance of Responsibility), § 4B1.5 (Repeat and Dangerous Sex Offenders against Minors), § 5H1.6 (Family Ties and Responsibilities), § 5K2.0 (Grounds for Departure), § 5K2.13 (Diminished Capacity), § 5K2.20 (Aberrant Behavior), and § 5K2.22 (Specific Offender Characteristics as Grounds for Departures in Child Crimes and Sex Offenses).

**E. January 25, 2003** (Amendments 647-648)

Two emergency amendments went into effect on January 25, 2003. The first amendment implemented directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, a law pertaining to serious fraud and related offenses and obstruction of justice but which also increased the statutory maximum penalties for wire and mail fraud from five to twenty years imprisonment. The second amendment implemented directives to the Commission contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, a law that significantly increased statutory penalties for campaign finance crimes. The emergency amendments modified §§ 2B1.1, 2E5.3, 2J1.2, and 2T4.1 (Corporate Fraud); and created a new guideline, § 2C1.8 (Campaign Finance). Both emergency amendments were repromulgated as permanent amendments effective November 1, 2003. The permanent amendments pertaining to corporate fraud included some modifications not included in the emergency amendments.

**IV. November 1, 2003 Amendments**

**A. U.S.S.G. § 2A1.4 Involuntary Manslaughter** (Amendment 652).

The amendment increases the base offense for involuntary manslaughter offenses:

**1. § 2A4.1(a)(1).** The base offense level for criminally negligent involuntary manslaughter is raised from level 10 to level 12. The two level increase represents an approximate 25 percent increase in the sentence length for these offenses.

**2. § 2A1.4(a)(2).** The base offense level for reckless involuntary manslaughter is raised from level 14 to level 18. This four level increase corresponds to an approximate 50 percent increase in sentence length for these offenses.

**B. U.S.S.G. § 2B1.1 Corporate Fraud (Amendment 653).**

The amendment implements directives in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, by making several modifications to:

- 2B1.1** (Theft, Property Destruction & Fraud);
- 2J1.2** (Obstruction of Justice), and
- 2E5.3** (False Statements in Relation to Documents Required by ERISA & other Acts);

as well as conforming changes to Sections:

- 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 new crimes created by the Act:

**1. § 2B1.1(a).** The base offense level in §2B1.1 is amended to provide a new higher alternative base offense level for white collar offenses where the statutory maximum term of imprisonment is 20 years or more. Twenty-year offenses will now carry a base offense level 7. For offenses where the statutory maximum term of imprisonment is less than 20 years, the base offense level remains at level 6. This change in the base offense level responds to Section 903 of the Act, which increased the statutory maximum penalties for wire fraud and mail fraud from 5 to 20 years' imprisonment and section 902, which made attempts and conspiracies subject to these same heightened penalties.

For those offenses to which a base offense level 7 applies, 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.

**Note:** This is a change from the January 25 emergency amendment, which did not provide for the alternative base offense level 7.

**2. §2B1.1(b)(1).** The loss table at §2B1.1(b)(1) is expanded for higher loss amounts. The amendment adds two additional loss amount categories to the table. For offenses in which the loss exceeded \$200,000,000, an increase of 28 levels now applies. For offenses in which the loss

exceeded \$400,000,000, an increase of 30 levels applies. The amendment also modifies the tax table in §2T4.1 in a similar manner to maintain the proportional relationship between the loss table in §2B1.1 and the tax table. Prior to the emergency amendment, the loss table at §2B1.1(b)(1) the maximum enhancement for the amount of loss was 26 levels, applicable for all offenses in which the loss exceeded \$100,000,000. In this respect, the permanent amendment repromulgates the emergency amendment without change.

**3. § 2B1.1, comment. (n. 3(C)).** A new factor – the reduction in the value of equity securities or other corporate assets that resulted from the offense – is added to the list of general factors set forth in § 2B1.1, comment. (n. 3(C)) that the court may consider in determining the amount of loss under §2B1.1(b)(1). In this respect, the permanent amendment repromulgates the emergency amendment without change.

**4. § 2B1.1(b)(2).** The enhancement for the number of victims is expanded to a total of 6 levels, if the offense involved 250 or more victims. Prior to the emergency amendment, the maximum adjustment for this factor was four levels; a 2-level enhancement if the offense involved more than 10, but fewer than 50, victims (or was committed through mass-marketing), and a 4-level enhancement if the offense involved 50 or more victims.

**5. § 2B1.1(b)(12)(B).** The scope of this existing 4-level enhancement and minimum offense level of level 24 is expanded to apply not just where the offense substantially jeopardized the safety and soundness of a financial institution but to apply under two additional circumstances: (1) if offense substantially endangered 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; and (2) if the offense 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.

**6. § 2B1.1(b)(12)(C).** Caps the cumulative effect of the combination of the two separate adjustments for the number of victims (§ 2B1.1(b)(2)) and the substantial harm to victims or financial institutions (§ 2B1.1(b)(12)(B)) at 8 offense levels. The reason for the cap is to account for the overlapping nature of these two enhancements. The minimum offense level 24 is not affected.

**Note:** The permanent amendment is a change from the emergency amendment, which did not cap the cumulative effect of the two enhancements.

**7. § 2B1.1(b)(12)(B), comment. (n. 10).** A corresponding application note 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.

**8. §2B1.1(b)(14).** Renumbers and expands the 4-level enhancement added by the emergency amendment, numbered § 2B1.1(b)(13) in the emergency amendment.

**Note:** A number of these modifications are a change from the emergency amendment.

**a. § 2B1.1(b)(14)(A)(i).** Repromulgates the emergency amendment to require a 4-level upward adjustment 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.

**b. § 2B1.1(b)(14)(A)(ii) & (iii).** The permanent amendment additionally 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.

**c. § 2B1.1(b)(14)(B)(i), (ii) & (iii).** The permanent 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.

**d. § 2B1.1, comment. (n. 13).** As the emergency amendment, the permanent amendment provides in the commentary that in cases in which the new 4-level upward enhancement applies, the 2-level upward enhancement for abuse of position of trust at §3B1.3 does not apply.

**9. §2J1.2.** Modifies the obstruction of justice guideline by increasing the base offense level from level 12 to level 14 and adding a new 2-level enhancement that 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. This is not a change from the emergency amendment.

**a. § 2J1.2, comment. (n. 4).** Adds a new ground to the *Upward Departure Considerations*, encouraging an upward departure 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.”

**Note:** The permanent amendment is a change from the emergency amendment, which did not include this upward departure ground.

**10. § 2J1.1, comment. (n. 3).** Adds an application note, not included in the emergency amendment, to the contempt guideline that clarifies 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.

**12. § 2J1.3.** Increases the base offense level in the perjury guideline 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.”

**Note:** This increased base offense level is a change from the emergency amendment.

**13. § 2E5.3.** References new offenses (18 U.S.C. § 1520) created by the Sarbanes-Oxley Act relating to destruction of corporate audit records to the existing guideline, §2E5.3 and expands the existing cross reference in §2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses.

### **C. U.S.S.G. § 2B1.1 Cybersecurity (Amendment 654).**

This amendment addresses offenses involving the misuse of, or damage to, computers, implementing 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:

**1. § 2B1.1(b)(13).** Adds a new specific offense characteristic with three alternative enhancements of two, four and six levels depending on the level of harm and the intent of the offender:

**a. § 2B1.1(b)(13)(A)(i).** The first enhancement provides a 2-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.

**b. § 2B1.1(b)(13)(A)(ii).** The second enhancement provides a 4-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.

**c. § 2B1.1(b)(13)(A)(iii).** The third enhancement provides a 6-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 amendment also establishes a minimum offense level of level 24 applicable to offenses where this 6-level enhancement applies.

(1) **§ 2B1.1, comment. (n. 12).** New 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 under **§ 2B1.1(b)(13)(A)(iii)** is the only conduct that forms the basis for the §2B1.1(b)(12)(B) enhancement.

(2) **§ 2B1.1(b), comment. (n. 18(B)) – Upward Departure Grounds.**

A new ground was added to the list of upward departure considerations for cases in which **§2B1.1(b)(13)(A)(iii)** applies and the disruption of the critical infrastructure is “so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters.”

**d. § 2B1.1, comment. (n. 12).** “Critical infrastructure” is defined in a new application note to include “gas and oil production, storage and delivery systems . . . telecommunications networks, . . . financing and banking systems, emergency services . . . transportation systems and services , , , and government operations that provide essential services to the public.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)). “Personal information” is also defined to include medical records, wills, diaries, private correspondence, including e-mail, financial records, photographs of a sensitive or private nature and similar information.

**2. § 2B1.1, comment. (n. 3) – Definition of Loss.** The amendment modifies the rule of construction relating to the calculation of loss in protected computer cases in several ways, including several modifications to the costs included as pecuniary harm, namely the reasonable costs of 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.” (emphasis on modifications).

**3. § 2B1.1(b), comment. (n. 18(A)(ii)) – Upward Departure Grounds.** Expands the grounds for upward departure to expressly state that an upward departure would be warranted for an offense under 18 U.S.C. § 1030 involving damage to a protected computer, if “as a result of that offense death resulted.”

**4. §2B2.3 and §2B3.2.** Modifies the guidelines that cover misdemeanor trespasses on government computers and extortionate demands to damage protected computers to provide enhancements where the computer systems are 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.

**D. Terrorism – Miscellaneous Guidelines (Amendment 655).**

**1. §2K1.4(a)(1) – Arson and Property Damage by Use of Explosives.** Amends the alternative base offense levels so that the base offense 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".

**2. §2Q1.5 and §2Q1.4.** Consolidates the guidelines for offenses that involve tampering or threatened tampering with public water systems by providing three alternative base offense levels 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:

**a. §2Q1.4(a)(1).** Increased the base offense level for tampering with a public water system from level 18 to level 26. The 6-level enhancement for the risk of death or serious bodily injury that previously existed was incorporated into the base offense level. Also added was a graduated enhancement of 2-, 3-, or 4-levels for serious or life-threatening bodily injury.

**b. §2Q1.4(a)(3).** Increased the base offense level for threatening to tamper with a public water system, without conduct evidencing an intent to carry out the threat, from level 10 to level 16. The Commission explained that 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.

**3. §2S1.1 – Money Laundering.** Eliminates the six level enhancement for terrorism in the money laundering guideline because the terrorism adjustment at §3A1.4 (minimum Offense Level 32 and Criminal History category VI) adequately covers offenses that involved or intended to promote terrorism.

**4. §2X2.1 – Aiding and Abetting.** Refers the new offense of providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses, 18 U.S.C. § 2339C(1)(A) to the aiding and abetting guideline.

**5. §2X3.1 – Accessory After the Fact.** Raises the maximum offense level in §2X3.1 from level 20 to level 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense.

**E. U.S.S.G. § 2C1.8 Campaign Finance (Amendment 656).**

Repromulgates without change the emergency amendment that became effective on January 25, 2003, which implemented the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, (the "BCRA") to promulgate guidelines for violations of the Federal Election Campaign Act of 1971 and related election laws. The BCRA significantly increased statutory penalties for campaign finance crimes, which formerly had been treated as misdemeanors establishing a new statutory maximum term of imprisonment for even the least serious of these offenses of two years, and five years for more serious offenses.

The new guideline has a base offense level of level 8 and provides five specific offense characteristics that enhance the punishment for aggravating conduct, including a reference to the fraud loss table in §2B1.1 to increase the offense level by reference to the amounts involved in the illegal campaign finance transactions; provides alternative enhancements if the offense involved a foreign national (2-levels) or a foreign government (4-levels); provides alternative enhancements of 2-levels each when the offense involves either "governmental funds" or an intent to derive "a specific, identifiable non-monetary Federal benefit;" provides a 2-level enhancement when the offender engages in "30 or more illegal transactions;" and provides a 4-level enhancement if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." Also provides a cross reference to the bribery ( U.S.S.G. § 2C1.1) or gratuity (U.S.S.G. § 2C1.2).

**F. Drugs**

**U.S.S.G. § 2D1.1 Oxycodone (Amendment 657).**

**1. § 2D1.1, footnote (B) and comment. (n. 9 & 10).** Amends the Drug Equivalency tables in §2D1.1 to provide that sentences for oxycodone offenses be determined by using the weight of the actual oxycodone instead of calculating the weight of the entire pill as previously required. The amendment also provides a new drug equivalency for oxycodone offenses: 1 gram of actual oxycodone equals 6,700 grams of marihuana; prior to November 1, 2003, 1 gram of oxycodone was equal to 500 grams of marihuana.

Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin, prescription pain relievers generally sold in pill form. According to the Commission, sentences for these offenses were not always proportional: "(1) because of the formulations of the different medicines; and (2) because different amounts of oxycodone are found in pills of identical weight." The new 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." U.S.S.G. App. C, Amendment 657.

**2. Retroactivity** (Amendment 662). On November 5, 2003, the Sentencing Commission made this amendment retroactive, which will allow previously sentenced defendants for whom this amendment may result in a reduced sentence to seek to be resentenced pursuant to 18 U.S.C. §3582(c)(2). See U.S.S.G. § 1B1.10. The Commission estimates that fewer than 100 persons, currently serving sentences, will be eligible for immediate release as a result of the retroactivity of the amendment. The *ex post facto* clause of the United States Constitution prohibits retroactive application in cases where the change would result in a more severe sentence. Article 1, § 9, Cl. 3.

**U.S.S.G. § 2D1.11 Red Phosphorus** (Amendment 661).

Although listed in the Miscellaneous Amendments, which purportedly include amendments that make “technical and conforming changes” to various guidelines, the 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. Red Phosphorus had not previously been a scheduled chemical nor listed in the Chemical Quantity Table in § 2D1.11.

**G. U.S.S.G. § 2L1.2 Immigration** (Amendment 658).

According to the Commission, this amendment “clarifies” the meaning of some of the terms used in the guideline for persons convicted of illegal reentry after having been previously deported.

**1. § 2L1.2(b)(1)(A)(vii).** Deletes the term “committed for profit” that had previously modified an “alien smuggling offense” in the 16-level adjustment for aggravated felonies.

**2. §2L1.2(b)(1), comment. (n. 1).** Adds commentary to define the offenses of: "alien smuggling", "child pornography", and "human trafficking." Some of these offenses, as defined by the amendment, do not meet the statutory definition of an aggravated felony in 8 U.S.C. § 1101(a)(43).

**a. "Alien Smuggling Offense"** is defined, at **U.S.S.G. § 2L2.1, comment. (n. 1(B)(i))**, by reference to the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(N), which 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)". The Commission is of the opinion that the “the amendment, in effect, adopts the Fifth Circuit’s interpretation of "alien smuggling". See United States v. Solis-Campoano, 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).”

**b. “Crime of Violence” as modified by the amendment**

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.

**U.S.S.G. § 2L2.1, comment. (n. 1(B)(iii)).** The previous definition could be interpreted to require that even as to the enumerated offenses, "the use, attempted use, or threatened use of physical force against the person of another" was an element of the offense.

**c. “Sentence of Imprisonment”** is now defined by reference to meaning given the term in U.S.S.G. § 4A1.2(b), “without regard to the date of the conviction.” **U.S.S.G. § 2L2.1, comment. (n. 1(B)(vii)).** The new definition explicitly explains that the “length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release.” Citing a string of decisions, the Commission asserts that this is a “clarifying” amendment, consistent with existing case law. 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).

**d. Juvenile Offenses** are explicitly excluded from consideration for the aggravated felony enhancement in U.S.S.G. § 2L1.2 (b)(1), “unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. **U.S.S.G. § 2L2.1, comment. (n. 1(A)(iv)).**

**H. U.S.S.G. § 3B1.5 Offenses Involving Body Armor** (Amendment 659).

This amendment implements the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273, which required the Sentencing Commission to provide an appropriate enhancement for any crime of violence or drug trafficking crime in which the defendant used body armor by creating a new Chapter Three adjustment. The Act included a sense of Congress that any such enhancement should be at least two levels:

1. **§ 3B1.5(2)(A).** Provides a 2-level upward 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.

2. **§ 3B1.5(2)(B).** Provides an alternative 4-level upward adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

3. **§ 3B1.5, comment. (n. 1).** Defines "drug trafficking crime" to include any felony punishable under the Controlled Substances Act; "crime of violence" to include offenses that involve the use or attempted use of physical force against property as well as persons. These definitions are broader than the definitions of "crime of violence" and "drug trafficking offense" used in other guidelines. The definition of "body armor" is the statutory definition provided in 18 U.S.C. § 921(a)(35). Also defines "use" to include both active employment and bartering but excludes "mere possession."

4. **§ 3B1.5, comment. (n. 2).** Explains that the 4-level upward adjustment applies based on the defendant's own conduct, that is, where the defendant used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

**I. U.S.S.G. § 5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment (Amendment 660).**

This amendment addresses a number of recurring issues litigated under this guideline.

1. **§ 5G1.3(b).** Amends this subsection with language that more explicitly explains that a concurrent sentence shall be imposed when the prior sentence was imposed for an offense that is relevant conduct to the instant offense and resulted in an increase in the sentence for the instant offense. The Commission classifies the amendment as "clarifying the application of subsection (b)" in resolving the circuit conflict 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).

Generally, when an amendment is "clarifying" it will be applied retroactively. However, where the amendment conflicts with circuit precedent a number of circuits have held that the amendment amounts to a substantive change that implicates the *ex post facto* clause and cannot be applied retroactively. United States v. Saucedo, 950 F.2d 1508, 1512-17 (10<sup>th</sup> Cir. 1991) (amendment to role adjustment would not be applied retroactively because it conflicted with circuit precedent and would result in more severe sentence); accord United States v. Capers, 61 F.3d 1100, 1110-12 (4<sup>th</sup> Cir. 1995) (amendment to § 3B1.1 "is not a mere clarification because it works a

substantive change in the operation of the guideline in this circuit”); United States v. Bertoli, 40 F.3d 1384, 1407 n.21 (3d Cir. 1994) (“our own independent interpretation of the pre-amendment language is controlling” in determining whether an amendment is “clarifying”); United States v. Prezioso, 989 F.2d 52, 53-54 (1<sup>st</sup> Cir. 1993) (although the Commission labeled the amendment “clarifying” it would not be given retroactive effect “in light of clear circuit precedent to the contrary”). In this instance, the amendment conflicts with circuit precedent in some circuits and in those circuits should not be applied retroactively.

**2. § 5G1.3, comment. (n. 3(C)).** The amendment resolves a circuit split concerning whether the imposition of a sentence is required to be consecutive when the 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. Although the Commission recommends a consecutive sentence, it does not require it and the court is free to impose the sentence for the instant offense concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. See United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999) (sentence is not required to be consecutive); accord 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).

**3. §5K2.23. Discharged Terms of Imprisonment.** The amendment replaces the downward departure provision previously included in the commentary to § 5G1.3 with a new policy statement in Chapter 5K that authorizes a departure where the defendant has completed serving a sentence that would have required a concurrent sentence under the provisions of 5G1.3(b) had the sentence not been fully discharged. A reference to the new departure ground is included in the commentary. See U.S.S.G. § 5G1.3, comment. (n. 4).

**4. § 5G1.3, comment. (n. 3).** The amendment specifies that courts may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c) but may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense. Resolves a circuit conflict regarding whether the sentencing court may adjust the instant sentence for time already 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).

## **J. Miscellaneous Amendments (Amendment 661).**

This is a six-part amendment that makes what the Commission terms “technical and conforming” changes to various guidelines provisions:

**1. § 1B1.1, comment. (n. 4).** Restates the commentary that provides that adjustments for multiple specific offense characteristics are to be applied cumulatively, unless otherwise specified and that multiple adjustments under Chapters Two and Three and Criminal History determinations are to be applied cumulatively unless otherwise specified.

2. **§ 2D1.11. Chemical Quantity Table.** Adds red phosphorus to the listed chemicals, as noted above.

3. **§ 2G2.1, comment. (n. 6).** Modifies the upward departure provision to state that one is warranted “if the offense involved more than 10 victims” and deleting the language that one was also warranted where an offense under 18 U.S.C. § 1591 involved a victim younger than 14. The provision is now identical to one found in U.S.S.G. § 2G1.1, comment (n. 12).

4. **§ 2G2.2(b)(5). Trafficking in Child Pornography.** Modifies the 2-level upward adjustment for use of a computer for the transmission of materials to also apply in cases where a computer was used to receive or distribute such materials.

5. **§§ 2A3.1 & 4B1.5. Definition of Prohibited Sexual Conduct.** Restructures the definition of “prohibited sexual conduct” in the commentary to these guidelines to eliminate ambiguity.

6. **Appendix A. Statutory Index.** Amends the statutory index to reference various new offenses and makes other technical modifications.

## **PROTECT Act Amendments**

### **V. October 27, 2003 Departure Amendment** (Amendment 651)

A. **§ 5K2.0. Grounds for Departure.** The amendment replaces the previous policy statement with an entirely new one that explains departure methodology with language that more closely tracks the statutory standard for granting departures in 18 U.S.C. § 3553(b). It also incorporates other changes made by the PROTECT Act, in particular it sets out the two-track system that Congress created in the PROTECT Act: one for downward departures in child crime and sex offenses; and the other for downward departures in all other cases as well as for upward departures.

1. **§ 5K2.0(a). For Upward Departures and for Downward Departures, Other than in Child Crimes and Sex Offenses**

a. **§ 5K2.0(a)(1). In General.** Sets out the basic statutory standard for departures – the existence of a “circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a” departure.<sup>3</sup> Using a Koon-like structure, it explains the circumstances under which a departure may be warranted.

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<sup>3</sup> The objectives set forth in 18 U.S.C. § 3553(a)(2) are: (a) just punishment; (b) adequate deterrence; (c) protection of the public; and (d) defendant's rehabilitation needs.

**b. §5K2.0(a)(2). Circumstances Not Adequately Taken into Consideration.**

**(1) §5K2.0(a)(2)(A). Identified Circumstances.** Explains that if the circumstance is identified in § 5K2, the section that identifies circumstances that the Commission may not have taken into consideration, a departure “may be warranted.”

**(2) §5K2.0(a)(2)(B). Unidentified Circumstances.** Explains that if the circumstance is not identified in the guidelines, a departure may be warranted “in the exceptional case.”

**c. §5K2.0(a)(3). Circumstances Present to a Degree Not Adequately Taken into Consideration.** Explains that a departure may be warranted if the circumstance is present in the offense to a “degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.”

**d. §5K2.0(a)(4). Circumstances Not Ordinarily Relevant.** Explains that offender characteristics and other circumstances identified in § 5H or elsewhere in the guidelines as “not ordinarily relevant” may form the basis for a departure only if “present to an exception degree.”

**2. § 5K2.0(b). Downward Departures in Child Crimes and Sex Offenses.** Explains that a downward departure may be granted in child crimes and sex offenses only if (1) the mitigating circumstance has been “affirmatively and specifically identified as a permissible ground;” (2) has not been adequately considered by the Commission; and (3) should result in a downward departure. It also explains that only a ground enumerated in § 5K2 is one that has been “affirmatively and specifically identified as a permissible ground.”

**3. § 5K2.0(c). Multiple Circumstances.** Explains that where multiple grounds not independently sufficient to warrant a departure are used as the basis for a departure, three requirements must be met: (1) the combination of circumstances must make the case “an exceptional one;” (2) each circumstance must be present to “a substantial degree;” and (3) each circumstance must be “identified in the guidelines as a permissible ground.” For this purpose, a circumstance is “identified” even if merely identified as “not ordinarily relevant.”

**4. § 5K2.0(d). Prohibited Departures.** Circumstances that cannot be used as a basis for a departure are collected in this section. In addition to circumstances already prohibited, the Commission has prohibited five new circumstances (noted with emphasis):

- a. Race, sex, national origin, creed, religion, & socio-economic status (§ 5H1.1);
- b. Lack of guidance as a youth & similar circumstances (§ 5H1.12);
- c. Financial difficulties & economic pressures upon a trade/business (§ 5K2.12);
- d. Post-sentencing rehabilitative efforts (§ 5K2.19);
- e. Drug or alcohol dependence or abuse; **gambling addiction** (§ 5H1.4);
- f. **Acceptance of responsibility** (§ 3E1.1);

- g. **Role in the offense**, (§§ 3B1.1 and 3B1.2);
- h. **Defendant’s plea of guilty** (§ 6B1.2);
- i. **Fulfillment of restitution obligations required by law**;
- j. Any other circumstance specifically prohibited as a ground.

**5. § 5K2.0(e). Specific Written Reasons for Departures.** Requires courts to state “specific reasons for departure in open court at the time of sentencing and . . . state those reasons with specificity in the written judgment and commitment order.” This change is consistent with the new specificity requirements in 18 U.S.C. § 3553(c) made by the PROTECT Act.

**B. Departures Under Chapter Five, Part H**

**1. § 5H1.4 Gambling Addiction.** The Commission prohibited departures based on gambling addictions, by adding a sentence to § 5H1.4, the policy statement that provides that physical condition is not ordinarily relevant and that prohibits departures based on drug or alcohol dependence or abuse.

**2. § 5H1.6. Family Circumstances.** Adds factors to be considered when granting a downward departure on this ground. First, courts must consider a non-exhaustive list of circumstances: (1) seriousness of offense; (2) involvement of family members in the offense; and (3) danger to family members from offense. See § 5H1.6, comment. (n. 1). Where the departure is based on loss of caretaking or financial support, four distinct circumstances must also be present in the case: (1) service of sentence within the range will cause an extraordinary, substantial and direct loss of essential caretaking or financial support to the family; (2) such loss “substantially exceeds” the harm ordinarily incident to incarceration; (3) the defendant’s caretaking or financial support is irreplaceable to the family because no effective or ameliorative programs are reasonably available; and (4) the departure will effectively address the loss of the caretaking or financial support.

**3. § 5H1.7. Role in the Offense.** This policy statement, which previously read simply that “role in the offense is relevant in determining the applicable guideline range,” now states “but is not a basis for departing from that range.”

**C. Other Departures Under Chapter Five, Part K**

**1. § 5K2.10 Victim’s Conduct.** The “proportionality and reasonableness of the defendant’s response to the victim’s provocation” was added to the five existing factors that courts should consider in determining whether a departure is warranted on this ground.

**2. § 5K2.12 Coercion and Duress.** The “proportionality of the defendant’s actions to the seriousness of the coercion, blackmail, or duress involved” was added to the two existing factors that courts should consider in determining the extent of a departure for this ground.

3. **§ 5K2.13 Diminished Capacity.** Adds a requirement that the reduced mental capacity must have "contributed substantially" to the commission of the offense requiring a seemingly more stringent causal relationship whereas previously the "extent to which the reduced mental capacity contributed to the commission of the offense" was a factor only in determining the "the extent of the departure."

4. **§ 5K2.20 Aberrant Behavior.** Restricts this departure as follows:

a. **Prior criminal conduct:** If defendant has more than one Criminal History point; a prior felony conviction; or "any other significant prior criminal behavior" a downward departure is prohibited regardless of "whether the conviction or significant prior criminal behavior is countable under Chapter Four;"

b. **Safety Valve defendants:** Amends the commentary so that defendants whose offense of conviction is a "serious drug offense" are precluded from eligibility for an aberrant behavior departure even when they are eligible for the Safety Valve, a circumstance that had previously made them eligible for aberrant behavior departures in cases where the offense of conviction was a "serious drug offense;"

c. **Fraud schemes:** Adds commentary explaining that fraud schemes "generally" would not meet the requirement that conduct not be "repetitious or significant planned behavior;"

D. **Criminal History, § 4A1.3.** The policy statement is substantially restructured, making several modifications that limit criminal history departures including:

1. **ACCA defendants:** Eliminates criminal history downward departures for offenders who are Armed Career Criminals, as defined in USSG § 4B1.4;

2. **Repeat Dangerous Sex Offenders:** Eliminates criminal history downward departures for repeat dangerous sex offenders, as defined in USSG §4B1.5;

3. **Career Offenders:** Limits departures for career offenders, as defined in §4B1.1, to a single criminal history category;

4. **Safety Valve:** Prohibits the use of a criminal history downward departure to qualify a defendant for "Safety Valve" eligibility;

5. **Floor for Criminal History Departures:** Cannot result in a departure "below the lower limit of the applicable guideline range" for Criminal History category I.

**E. Early Disposition Programs**

Implementing the directive in § 401(m)(2)(B), creates a new downward departure that provides:

Upon motion of the Government, the court may depart

downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

**F. Plea Agreements, § 6B1.2**

Revises § 6B1.2 to require specific written reasons for the granting of a departure in the judgment and commitment order in cases where a downward departure is granted pursuant to a recommendation in plea agreement entered pursuant to Rule 11(c)(1)(B) or Rule 11(c)(1)(c), Fed. Rules of Crim. Procedure.

**G. Authority & General Application Principles, § 1A1.1**

Creates a new guideline, § 1A1.1 that sets forth the Commission’s authority to promulgate guidelines, policy statements and commentary, referencing 28 U.S.C. § 994(a). Inserts in the commentary, as a “historical note” to this guideline the entire Chapter 1, Part A introduction, as it existed in 1987, that had previously been in the Guidelines Manual.

**H. Miscellaneous Amendments**

**1. § 1B1.1, comment. (n. 1).** Replaces the previous list of definitions, with a new list that adds a definition for “departures” and places all the terms defined in alphabetical order.

**VI. May 30, 2003 Amendment**  
(Amendment 650)

**A. § 2A4.1 Kidnapping.** Increases the base offense level to level 32; increases the upward adjustment in cases where the victim was sexually exploited to 6 levels, where it had previously been 3 levels; and eliminates the 1 level downward adjustment applicable in cases where the victim was released before 24 hours had elapsed. These modifications were directed by § 104 of the PROTECT Act.

**VII. April 30, 2003 Amendment**  
(Amendment 649)

- A. § 2G2.2. Trafficking in Child Pornography.** Amends the guideline to add a graduated enhancement of from 2 to 5 levels based on the number of images involved in the offense.
- B. § 2G2.4 Possession of Child Pornography.** Amends the guidelines to add a graduated enhancement of from 2 to 5 levels based on the number of images involved in the offense and adds a 4-level enhancement if the offense involved material that portrays “sadistic or masochistic conduct or other depictions of violence.”
- C. § 3E1.1 Acceptance of Responsibility.** Amends § 3E1.1 to authorize the third point for acceptance of responsibility only "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by 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."
- D. § 4B1.5 Repeat and Dangerous Sex Offender Against Minors.** Broadens the definition of "pattern of activity involving prohibited sexual conduct" to include sexual conduct with the same minor victim on separate occasions whereas a pattern of activity previously required prohibited sexual conduct on separate occasions with at least two minor victims.
- E. § 5H1.6 Family Circumstances.** Prohibits family circumstances departures where the offense of conviction involves specified child crimes and sex offenses.
- F. § 5K2.0 Grounds for Departure.** Amends this policy statement to permit downward departures in child-related and sex offense cases only on grounds that have been “affirmatively and specifically identified as permissible grounds by Sentencing Commission in part K of Chapter 5.
- G. § 5K2.13 Diminished Capacity.** Prohibits diminished capacity departures where the offense of conviction involves specified child crimes and sex offenses.
- H. § 5K2.20 Aberrant Behavior.** Prohibits aberrant behavior departures where the offense of conviction involves specified child crimes and sex offenses.
- I. § 5K2.22 Characteristics as Downward Departures in Child & Sex Offenses.** Adds this new ground for downward departures to authorize age and extraordinary physical impairment as grounds for downward departures in child crime and sex offenses only in the limited circumstances spelled out in § 5H1.1 (elderly & infirm) and § 5H1.4 (extraordinary physical impairment); prohibits downward departures on the basis of drug, alcohol, or gambling dependence in child crime and sex offenses.

**VII. January 25, 2003 Emergency Amendments**  
(Amendments 647 & 648)

**A. Emergency Amendments – Effective Date**

The United States Sentencing Commission promulgated two emergency amendments in response to congressional directives in the (1) Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (“Corporate Fraud”) and (2) the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (“Campaign Reform”). The Corporate Fraud and the Campaign Reform amendments took effect on January 25, 2003. Both amendments were promulgated pursuant to a grant of “emergency authority” in the respective legislation. The emergency amendments were in effect from January 25, 2003 until October 31, 2003. On November 1, 2003, permanent amendments went into effect. The permanent Corporate Fraud amendment expanded, in part, on the emergency amendments.

**B. Corporate Fraud Emergency Amendment**

The amendment is a six-part amendment. Four new provisions were added to U.S.S.G. § 2B1.1; the guideline for obstruction of justice was modified; and new offenses created by the Act were addressed by making various changes to Appendix A and expanding the cross-reference in §2E5.3 (ERISA false statements & related offenses) to include fraud, obstruction of justice and the various new offenses.

**1. U.S.S.G. § 2B1.1(b)(1) – Loss Table Expanded**

The amendment expands the loss table to provide an increase of 28 levels for cases where the loss is more than \$200 million and an increase of 30 levels where the loss is more than \$400 million. Previously, the loss table provided an enhancement up to a maximum of 26 levels for offenses in which the loss was greater than \$100 million. Section 2B1.1(b)(1) now provides, in pertinent part:

If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
...	
(O) More than \$200,000,000	add 28
(P) More than \$400,000,000	add 30

See U.S.S.G. App. C, Amend. 647 at 51 (Supp. to 2002 Supp. to App. C). The amendment also provides a corresponding increase in the tax table in U.S.S.G. § 2T4.1 to “maintain the longstanding proportional relationship” between the two loss tables. *Id.* at 59. The Commission adopted this amendment to address the statutory maximum penalty increase from 5 to 20 years for wire and mail fraud offenses in §903 of the Sarbanes-Oxley Act. *Id.*

## 2. U.S.S.G. § 2B1.1(b)(2)(C) – Multiple Victims

The amendment expands the enhancement in §2B1.1(b)(2) for multiple victims. There are now three possible enhancement levels for this factor where previously there were two. A new 6-level increase applies where the offense involved 250 or more victims. The existing 4-level increase where the offense involved 50 or more victims remains. The 2-level enhancement is modified to apply where the offense involves as few as 10 victims; previously it had applied if the offense involved **more than 10** victims.

Unchanged by this amendment is the 2-level enhancement that applies if the offense was committed through mass-marketing.

This amendment responds to §1104(b)(5) of the Sarbanes-Oxley Act, which directed the Commission to “ensure that the guideline offense levels and enhancements under the 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.” See U.S.S.G. App. C, Amend. 647 at 57 (Supp. to 2002 Supp. to App. C).

## 3. U.S.S.G. § 2B1.1(b)(12)(B) – Endangering Solvency or Financial Security

The amendment expands the scope of § 2B1.1(b)(12)(B) by adding two additional prongs for application of this 4-level enhancement. The first amended prong applies where the offense “substantially endangered the solvency or financial security of any organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees.” §2B1.1(b)(12)(B)(ii). The Commission explains that this amendment reflects its

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 prong 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.

Reason for Amendment, U.S.S.G. App. C, Amend. 647 at 57 (Supp. to 2002 Supp. to App. C).

The second amended prong applies to offenses that substantially endangered the solvency or financial security of “100 or more victims,” regardless of whether a publicly traded organization was affected by the offense. **§2B1.1(b)(12)(B)(iii)**. In its reasons for the amendment, the Commission states that this enhancement is “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.” *Id.* at 58. The Commission also chose to make the 4-level enhancement for endangering the solvency or financial security of 100 or more victims apply in addition to the 4- or 6-level enhancement that applies under **§2B1.1(b)(2)** where the offense involved a substantial number of victims.

The amendment responds to directives contained in §§ 805(a)(4) and 1104(b)(1) of the Sarbanes-Oxley Act. *Id.* at 57.

Unaffected by the amendment is the 2-level enhancement that applies “if the defendant derived more than \$1,000,000 from one or more financial institutions as a result of the offense” and the 4-level enhancement where the offense “substantially jeopardized the safety and soundness of a financial institution.” **§2B1.1(b)(12)(B)(i)**. Also unchanged is the level 24 offense level minimum that applies if any of the enhancements in §2B1.1(b)(12)(A) or (B) apply.

**a. Application of § 2B1.1(b)(12)(B): §2B1.1, comment. (n. 10)**

New commentary corresponding to the expanded provisions of **§ 2B1.1(b)(12)(B)** sets out a “non-exhaustive” list of factors for courts to consider in determining whether to apply the 4-level enhancement because the offense endangered the solvency or financial security of a publicly traded company or an organization that had more than 1,000 employees. The factors listed refer to (i) insolvency or substantial reduction in the value of the organization’s assets; (ii) a bankruptcy filing; (iii) substantial reduction in the value of company stock or employee retirement accounts; (iv) a substantial reduction in the organization’s work force; (v) a substantial reduction in the organization’s employee pension benefits; and (vi) the liquidity of the organization’s securities were substantially endangered as for example, where trading of the company’s securities was halted.

The amendment also modifies the commentary for the unmodified prong in **§2B1.1(b)(12)(B)** that applies if the offense substantially jeopardized the safety and soundness of a financial institution to a “non-exhaustive” list of factors for structural consistency with the new commentary. Previously, the commentary had required application of the 4-level enhancement if any one of the listed factors were present. This list of factors – insolvency, substantial reduction in pension benefits, inability to make refunds, and a merger because of a depletion of assets – remain essentially unchanged.

#### **4. U.S.S.G. § 2B1.1(b)(13) – Securities Fraud Enhancement**

The amendment provides a new 4-level enhancement 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." This enhancement responds to §1104(a)(2) of the Sarbanes-Oxley Act.

##### **a. Application of § 2B1.1(b)(13): §2B1.1, comment. (n. 11)**

The commentary explains that this new 4-level enhancement applies even without a conviction for an offense that charges a violation of securities law. If the conduct underlying the offense of conviction violates securities law, a person convicted under a general fraud statute is subject to this enhancement. **U.S.S.G. § 2B1.1, comment. (n. 11(B)).**

In the Commission's view,

an officer or director of a publicly traded company who commits such an offense violates certain heightened fiduciary duties imposed by securities law upon such individuals. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the new enhancement to apply

*Reason for Amendment*, U.S.S.G. App. C, Amend. 647 at 58 (Supp. to 2002 Supp. to App. C). To avoid double counting of this factor, the Commission also inserted language stating that the adjustment for abuse of position of trust or use of a special skill in §3B1.3 is not to be applied if the 4-level enhancement in **§2B1.1(b)(13)** applies. See **U.S.S.G. § 2B1.1, comment. (n. 11(C))**.

#### **5. U.S.S.G. § 2J1.2 – Obstruction of Justice**

The amendment makes two modifications to the guideline for obstruction of justice. First it increases the base offense level from level 12 to level 14. It also adds a new 2-level enhancement that applies where the offense involved the destruction of a substantial number of records, especially probative or essential evidence, or was otherwise extensive.

This amendment responds to the directives in §§ 805(a) and 1104(b) of the Sarbanes-Oxley Act.

#### **6. Miscellaneous Modifications**

The amendment addresses new offenses created by the Act by including the new statutory provisions in Appendix A. The new offenses include 18 U.S.C. § 1520 (destruction of corporate audit records), which is referenced to U.S.S.G. § 2E5.3. The cross-reference in § 2E5.3(a)(2) is also expanded to cover fraud and obstruction of justice offenses.

## **C. Campaign Reform Emergency Amendment**

A new guideline, **§2C1.8** was created for offenses that involve campaign finance violations. It has a base offense level 8 to reflect that although these offenses are similar to fraud offenses they are generally “more serious due to the additional harm, or the potential harm, of corrupting the elective process.” See U.S.S.G. App. C, Amend. 647 at 63 (Supp. to 2002 Supp. to App. C).

In addition, the new guideline contains five separate specific aggravating offense characteristics. Several of these apply if the offense involved a particular aggravating factor. These are: (1) an offense level increase from the loss table in §2B1.1 where the illegal transactions exceed \$5 thousand; (2) a 2-level enhancement if the offense involved illegal transactions made by or received from a foreign national or, if a foreign government, 4-level enhancement; and (3) a 2-level enhancement if the transaction was made or obtained through intimidation, threat or coercion. Two of the aggravating factors apply only if the defendant was the one who engaged in the conduct. These are: (1) a 2-level enhancement if the defendant committed the offense “for the purpose of obtaining a specific, identifiable, non-monetary Federal benefit”; and (2) a 2-level enhancement if the defendant engaged in 30 or more transactions. **U.S.S.G. § 2C1.8(b)(1)-(5)**.

The new guideline also includes a cross-reference to the bribery and gratuity guideline in situations if the “offense involved a bribe or gratuity.” **U.S.S.G. § 2C1.8(c)**.

### **1. Grouping of Multiple Counts -- U.S.S.G. §3D1.2(d)**

For purposes of grouping multiple counts, the new guideline is listed at U.S.S.G. §3D1.2(d), the section that includes guidelines that determine the offense level by aggregating the total amount of harm or loss. Campaign finance offenses will thus trigger the "same course of conduct" and "common scheme or plan" provisions in the relevant conduct guideline, U.S.S.G. § 1B1.3(a)(2).