CONGRESSIONAL DIRECTIVES TO THE SENTENCING COMMISSION
1988-2015

Introduction

In addition to the directives to the Commission set forth in the Sentencing Reform Act, *see* 28 US.C. §§ 991, 994, Congress has continuously influenced sentencing policy through formal statutory directives. Congress often directs the Commission to study whether penalties should be increased, and to amend the guidelines only "if appropriate." But beginning as early as 1988, Congress has also specifically directed the Commission to amend a guideline in a particular way, such as by increasing the base offense level or by adding a specific offense characteristic with a particular or minimum increase in offense level. With the PROTECT Act, Congress bypassed the Commission altogether and directly amended the *Guidelines Manual* itself.

In 2004, the Commission collected every congressional directive enacted since the advent of the guidelines system in the form of a table. *See Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Appendix B (Nov. 2004). This document updates that table so that it spans 1988 to the present. It also supplements the information in the Commission's table by including the actual language of the directive and describing in detail the changes made to the *Guidelines Manual* in response to the directive. In this form, the table is intended to serve as a research tool for deconstructing a particular guideline, focusing on the Commission's actions in response to each directive and showing whether the Commission's response complied with the directive, exceeded its scope, contradicted it, or failed to respond at all.

Taken comprehensively, this table also makes clear that the Commission has functioned like the "junior varsity Congress" predicted by Justice Scalia in *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting), promulgating guidelines in response to political pressure and without independent empirical study or analysis, often in cumulative fashion. By mandating these actions through an administrative agency located in the judicial branch, Congress has effectively "cloak[ed] [its] work in the neutral colors of judicial action," in violation of the separation of powers. *Id.* at 407. With the Supreme Court's more recent insistence that the Commission is an independent body whose characteristic institutional role is to shape sentencing policy based on empirical evidence and national experience, a guideline driven by congressional mandates may be open to renewed constitutional challenge as a violation of the separation of powers.

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1 SD	11/18/88	100-690 Anti-Drug Abuse Act of 1988, sec. 6453(a).	Drug Importation by aircraft or other vessel	[P]romulgate guidelines or amend existing guidelines to provide that a defendant convicted of violating section 1010(a) of the Controlled Substances Import and Export Act (21 U.S.C. 960(a)) under circumstances in which – (1) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance; or (2) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is (A) two levels greater than the level that would have been assigned had the offense not been committed under circumstances set forth in (A) or (B) above; and (B) in no event less than level 26.	**Amend. No. 134 (Nov. 1, 1989)** **USSG § 2D1.1** • Amended § 2D1.1 by adding a specific offense characteristic at subsection (b)(2) that exactly tracks the language of the directive. • "The purpose of the amendment is to implement the directive to the Commission in Section 5453 of the Anti-Drug Abuse Act of 1988."

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2 SD	11/18/88	100-690 Anti-Drug Abuse Act of 1988, sec. 6454(a), (c).	Drug Involving minors	[P]romulgate guidelines or amend existing guidelines to provide that a defendant convicted of violating sections 405, 405A, or 405B of the Controlled Substances Act (21 U.S.C. 845 [now § 859], 845a [now § 860] or 845b [now § 861]) involving a person under 18 years of age shall be assigned an offense level under chapter 2 of the sentencing guidelines that is – (1) two levels greater than the level that would have been assigned for the underlying controlled substance offense; and (2) in no event less than level 26. The guidelines referred to [above], as promulgated or amended under such subsection, shall provide that an offense that could be subject to multiple enhancements pursuant to such subsection is subject to not more than one such enhancement.”	**Amend. No. 135 (Nov. 1, 1989)** **USSG §§ 2D1.2, 2D1.12** • Deleted §§ 2D.12 (Involving Juveniles in the Trafficking of Controlled Substances) and 2D1.3 (Distributing Controlled Substances to Individuals Younger than Twenty-One Years, To Pregnant Women, or Within 1000 Feet of a School or College) in their entirety and replaced with a new § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals), which is not included in Appendix C as it was promulgated at the time, but read as follows: **§ 2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals** (a) Base offense level (Apply the greatest): (1) 2 plus the offense level from § 2D1.1; or (2) 26, if the offense involved a person less than eighteen years of age; or (3) 13, otherwise. 54 Fed. Reg. 21,348 (May 17, 1989).

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					• The Commission followed the directive with respect to offenses under former 21 U.S.C. §§ 845, 845a, and 845b involving minors. It also expanded the amendment to "include the provision of Sections 6458 and 6459 of that Act." [For reference, section 6458 of the Act added protected locations to 21 U.S.C. § 845a (now 21 U.S.C. § 860), such as playgrounds and swimming pools," and section 6459 added to 21 U.S.C. § 845b (now 21 U.S.C. § 86) the offense of "receiving a controlled substance from a person under 18 years of age."] • The Commission did more than called for by the directive because the amendment also made the guideline ranges for *other* offenses covered by USSG § 2D1.2, including offenses involving pregnant women under current 21 U.S.C. § 861(d) and protected locations under current 21 U.S.C. § 860 (such as schools, playgrounds, and universities), the same as the guideline ranges directed by Congress for offenses "involving a person under 18 years of age." Comparing hypothetical ranges that would have applied under the old guideline (which is set forth in Appendix C for this amendment) with the new guideline (set forth above) shows that in many instances, ranges were also increased for these offenses as a result of this amendment. • The Commission gave no reason for including

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					these other offenses in the amendments (in other words, it gave no reason why sentences for drug offenses involving pregnant women or protected locations should be raised as well). Notably, § 860 also prohibits drug trafficking at colleges and universities, which largely involve persons over the age of 18. Thus, the guideline governing trafficking within 1,000 feet of a university is driven, without any reason, by a policy relating to minors. • The Commission acknowledged that the amendment went beyond the directive, noting that "the amendment also covers the provisions of 21 U.S.C. §§ 845 [now § 859], 845a [now § 860], and 845b [now § 861] not included in the statutory direction to the Commission."
3 SD	11/18/88	100-690 Anti-Drug Abuse Act of 1988, sec. 6468(c).	Drug Within federal prisons	Promulgate guidelines, or amend existing guidelines, to provide that a defendant convicted of violating section 1791(a)(1) of title 18, United States Code, and punishable under section 1791(b)(1) [providing a narcotic drug or methamphetamine to an inmate] of that title as so redesignated, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is – (1) two levels greater than the level that would have been assigned had the offense not been committed in prison; and	**Amend. No. 203 (Nov. 1, 1989)** **USSG § 2P1.2** • Amended USSG § 2P1.2 (Providing or Possessing Contraband in Prison) to add a cross-reference to USSG § 2D1.1 for persons sentenced under 21 U.S.C. § 1791(b)(1). For such defendants, the guideline adds two levels to the offense with a minimum of 26, just as Congress directed.

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				(2) in no event less than level 26.	
4 SD	11/18/88	100-690 Anti-Drug Abuse Act of 1988, sec. 6482(c).	Drug Common carrier operation under the influence of alcohol or drugs.	Directs the Commission to promulgate guidelines, or amend existing guidelines, to provide that – (A) a defendant convicted of violating section 342 of title 18, United States Code [Operation of a common carrier under the influence of alcohol or drugs], under circumstances in which death results, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is not less than level 26; and (B) a defendant convicted of violating section 342 of title 18, United States Code [Operation of a common carrier under the influence of alcohol or drugs], under circumstances in which serious bodily injury results, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is not less than level 21. **Note:** Under subsection (b) of § 6482 of this Act, Congress increased the statutory maximum for violations of 18 U.S.C. § 342 from 5 years to 15 years.	**Amend. No. 141 (Nov. 1, 1989)** **USSG § 2D2.3** • Amended USSG § 2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs) to increase the base offense level of 8 to a base offense level of 26 if death resulted and 21 if serious bodily injury resulted, or 13 otherwise. • Also added a special instruction to apply Chapter Three, Part D (Multiple Counts) if the person was convicted of only one count involving death or serious bodily injury but more than one person died or suffered serious bodily injury, "as if the defendant had been convicted of a separate count for each such victim." **Note**: The directive does not mention anything about punishing defendants for multiple counts when s/he has not been convicted of multiple counts. • In new background commentary, the Commission explained that the section "implements the direction to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988." The Commission explained that the increase in the base offense level from 8 to 13 was "to reflect the seriousness of the offense." It does not mention any empirical data or public comment indicating that sentences for

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					offenses that do not involve serious bodily injury or death are not high enough, nor does it refer to the Act's increase to the statutory maximum under 18 U.S.C. § 342 from 5 to 15 years. • Also in the new background commentary, the Commission explains that the offense levels "assume" that the offense involved a common carrier carrying a number of passengers and invites a downward departure if "no or only a few passengers were placed at risk."
5 SD	11/19/88	100-700 Major Fraud Act of 1988, sec. 2(b).	Economic Fraud involving risk of serious personal injury	Promulgate guidelines, or amend existing guidelines, to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred. Consider the appropriateness of assigning to such a defendant an offense level under Chapter Two of the sentencing guidelines that is at least two levels greater than the level that would have been assigned had conscious or reckless risk of serious personal injury not resulted from the fraud."	**Amend. No. 156 (Nov. 1, 1989)** **USSG §§ 2F1.1, 2B1.1** • Amended USSG § 2F1.1 [now § 2B1.1] to provide a two-level enhancement "if the offense involved the conscious or reckless risk of serious bodily injury." The Commission also set a minimum offense level of 13. • The Commission explained that the amendment was intended "to reflect the instruction to the Commission in Section 2(b) of the Major Fraud Act of 1988." The Commission did not set forth any description of its consideration or analysis of the directive, but stated simply that it "has concluded that a 2-level enhancement with a minimum offense level of 13 should apply to all fraud cases involving a conscious or reckless risk of serious bodily injury." It is therefore unknown how or

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					even why the Commission selected a minimum level of 13, since the directive did not address minimum offense levels.
6 GD	8/09/89	101-73 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, sec. 961(m).	Economic Bank fraud, bribery, and embezzlement	Promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215 [receipt of commissions or gifts for procuring loans], 656 [theft, embezzlement, or misapplication by bank officer or employee], 657 [embezzlement by employees and agents of lending, credit, and insurance institutions], 1005 [unauthorized bank entries, reports, and transactions], 1006 [fraudulent federal credit institution entries, reports and transactions], 1007 [improper influence of Federal Deposit Insurance Corporation transactions], 1014 [false statements in loan and credit applications and for crop insurance], 1341 [mail fraud], 1343 [wire fraud], or 1344 [bank fraud] of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution.	**Amend. No. 317 (Nov. 1, 1990)** **USSG §§ 2B1.1, 2B4.1 2F1.1** • Amended USSG §§ 2B1.1 [Theft], 2B4.1 [Bribery in Procurement of a Bank Loan], and 2F1.1 [Fraud and Deceit, now consolidated with § 2B1.1] to add to each a four-level enhancement "if the offense substantially jeopardized the safety and soundness of a financial institution." Note that the directive referred only to "federally insured financial institution[s]." • Defined "financial institution" in a new application note more broadly than the directive, as including any institution described and described in several statutes, as well as a long list of institutions such as registered brokers, union pension funds, or "any similar entity, whether or not insured by the federal government." • Also in an application note, defined the circumstances under which an offense is "deemed to have 'substantially jeopardized the safety and soundness of a financial institution,' as follows: *If as a consequence of the offense the institution became insolvent, substantially reduced benefits to*

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					pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations. USSG §§ 2B1.1 comment. (n.10), 2B4.1 comment. (n.4), 2F1.1 comment. (n.15) (1991). • The Commission explained that the amendment "implements, in a broader form the statutory directive in Section 961(m) of Public Law 101-73." It did not provide any reason for the broader form or any empirical or policy basis for its definitions.
7 SD	11/29/90	101-647 Crime Control Act of 1990, sec. 2507(a).	Economic Bank fraud	Promulgate guidelines, or amend existing guidelines, to provide that a defendant convicted of violating, or conspiring to violate, section 215 [receipt of commissions or gifts for procuring loans], 656 [theft, embezzlement, or misapplication by bank officer or employee], 657 [embezzlement by employees and agents of lending, credit, and insurance institutions], 1005 [unauthorized bank entries, reports, and transactions], 1006 [fraudulent federal credit institution entries, reports and transactions], 1007 [improper influence of Federal Deposit Insurance Corporation transactions], 1014 [false statements in loan and credit applications and for crop insurance], 1032 [concealment of	**Amend. No. 364 (Nov. 1, 1991)** **USSG §§ 2B1.1, 2B4.1, 2F1.1** • Amended USSG §§ 2B1.1, 2B4.1, and 2F1.1 [now consolidated with § 2B1.1] to set the minimum offense level at 24 if the "offense affected a financial institution and the defendant derived more than $1,000,000 in gross receipts." • The directive specifically defines "financial institution" as an institution defined under 18 U.S.C. § 20. The Commission defined the guideline term "financial institution" in Amendment 317, *see supra*, to cover a range of institutions far broader than the financial

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				assets], or 1344 [bank fraud] of title 18, United States Code, or section 1341 [mail fraud] or 1343 [wire fraud] affecting a financial institution (as defined in section 20 of title 18, United States Code), shall be assigned not less than offense level 24 under chapter 2 of the sentencing guidelines if the defendant derives more than $ 1,000,000 in gross receipts from the offense.	institutions covered by this directive. • The Commission did not give any reason for imposing a minimum level of 24 in those cases not involving a financial institution as defined in 18 U.S.C. § 20. It simply stated that the amendment "implements the instruction to the Commission in Section 2507 of the Crime Control Act of 1990 (Public Law 101-647)." • Also amended the guideline meaning of "substantially jeopardized the safety and soundness of a financial institution" in §§ 2B1.1, 2B4.1 and 2F1.1 to add "or was placed in substantial jeopardy of any of" the harms previously listed, (*see* Amendment 317, *supra*), so that the enhancement applies even if the harms did not occur. This amendment was not related to the directive and is not otherwise explained.
8 SD	11/29/90	101-647 Crime Control Act of 1990, sec. 2701.	Drug Methamphetamine	Instructs the Commission to amend the existing guidelines for offenses involving smokable crystal methamphetamine under section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) so that convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine.	**Amend. No. 370 (Nov. 1, 1991)** **USSG § 2D1.1** • Amended § 2D1.1 so that smokable crystal methamphetamine, or "Ice," is assigned the same offense levels as "pure methamphetamine." • At the time, "pure methamphetamine" was assigned an offense level *four to eight* levels higher than offenses involving just methamphetamine. [The guideline now refers to methamphetamine

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					(actual), and continues to assign an offense level four to eight levels higher than for Methamphetamine.] The directive instructs the Commission to assign an offense level two levels higher than the same offense involving other forms of methamphetamine. Instead, the Commission assigned offense levels *four to eight* levels higher than methamphetamine and *the same* as pure methamphetamine. The Commission explained that the amendment "implements the instruction to the Commission in section 2701 of the Crime Control Act of 1990 . . . in a form compatible with the structure of the guidelines." In its 1999 Meth Report, it explained that it reasoned that "it could best achieve the enhanced punishment purpose of the instruction in a manner consistent with the guidelines' structure by treating Ice, a form of methamphetamine that typically was 80 to 90 percent pure, as if it were 100 percent pure methamphetamine." *See* USSC, *Methamphetamine - Final Report of the Methamphetamine Policy Team* 9 (Nov. 1999) (final report of the Methamphetamine Policy Team regarding implementation of the Methamphetamine Trafficking Penalty Enhancement Act of 1998), http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf. Although the Commission did not implement the

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					directive exactly as Congress ordered, its approach "proved acceptable" to Congress, as it "took no action to modify or reject it." *Id.* at 10.
9 SD	11/29/90	101-647 Crime Control Act of 1990, sec. 401, codified at 18 U.S.C. § 1201(g)(2) (later repealed by the PROTECT Act, Pub. L. 108-21, sec. 104(b) (Apr. 30, 2003)).	Violent Kidnapping	(1) Section 1201 of title 18, United States Code, is amended by adding at the end the following new subsection: "(g) SPECIAL RULE FOR CERTAIN OFFENSES INVOLVING CHILDREN. -- "(1) TO WHOM APPLICABLE. -- If -- "(A) the victim of an offense under this section has not attained the age of eighteen years; and "(B) the offender -- "(i) has attained such age; and "(ii) is not -- "(I) a parent; "(II) a grandparent; "(III) a brother; "(IV) a sister; "(V) an aunt; "(VI) an uncle; or "(VII) an individual having legal custody of the victim; the sentence under this section for such offense shall be subject to paragraph (2) of this subsection. (2) The United States Sentencing Commission is directed to amend the existing guidelines	**Amend. No. 363 (Nov. 1, 1991)** **USSG § 2A4.1** • Amended USSG § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) to add special offense characteristics applicable to all defendants: (1) added a four-level enhancement to apply when a victim is sexually exploited and (2) added a three level enhancement if the victim was a minor and, "in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim." Contrary to the terms of the Act, the Commission did not limit these enhancements to the individuals specified in new 18 U.S.C. § 1201(g) (which was later repealed), but applied it to all defendants. • Did not add an enhancement for maltreatment, as separate Amendment 388 "clarifies that maltreatment to a life threatening degree constitutes life-threatening bodily injury," which was already subject to a four-level enhancement. • Added a cross-reference "if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.

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				for the offense of 'kidnapping, abduction, or unlawful restraint,' by including the following additional specific offense characteristics: If the victim was intentionally maltreated (i.e., denied either food or medical care) to a life-threatening degree, increase by 4 levels; if the victim was sexually exploited (i.e., abused, used involuntarily for pornographic purposes) increase by 3 levels; if the victim was placed in the care or custody of another person who does not have a legal right to such care or custody of the child either in exchange for money or other consideration, increase by 3 levels; if the defendant allowed the child to be subjected to any of the conduct specified in this section by another person, then increase by 2 levels.	• Explained that the amendment "implements the instructions in Section 401 of the Crime Control Act of 1990 [], in some cases with a broader scope, by adding specific offense characteristics." Did not give any reason for broadening the scope of the enhancements to apply to all defendants. • Amended the subsection "that addresses other offenses connected with kidnapping, abduction, or unlawful restraint in a manner that more appropriately reflects the combined seriousness of such offenses." Did not support the change with empirical data or other analysis. • Congress later repealed (through section 104(b) of the PROTECT Act) the directive instructing the Commission to establish special offense characteristics for the specific category of offenders listed in paragraph (a) of section 401 (replacing it with a mandatory minimum of 20 years for those offenders), but the special offense characteristics remain in § 2A1.4 and otherwise apply. Yet, in section 104(a) of the PROTECT Act, Congress directed the Commission to increase the SOC (added as part of the now-repealed directive) if a victim was sexually exploited from 3 to 6. *See infra*, Amend. No. 650.

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10 RPT	11/29/89	101-647 Crime Control Act of 1990, sec. 1703.	All Mandatory minimums	[R]eport, not less than six months after the date of enactment of this Act, to transmit to the respective Judiciary Committees of the Senate and House of Representatives a report on mandatory minimum sentencing provisions in Federal law. [Directs the Commission to include in the report]: (1) a compilation of all mandatory minimum sentencing provisions in Federal law; (2) an assessment of the effect of mandatory minimum sentencing provisions on the goal of eliminating unwarranted sentencing disparity; (3) a projection of the impact of mandatory minimum sentencing provisions on the Federal prison population; (4) an assessment of the compatibility of mandatory minimum sentencing provisions and the sentencing guidelines system established by the Sentencing Reform Act of 1984; (5) a description of the interaction between	United States Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm. • Showed that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.

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				mandatory minimum sentencing provisions and plea agreements; (6) a detailed empirical research study of the effect of mandatory minimum penalties in the Federal system; (7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can express itself with respect to sentencing policy, such as: (A)specific statutory instructions to the Sentencing Commission; (B) general statutory instructions to the Sentencing Commission; (C) increasing or decreasing the maximum sentence authorized for particular crimes; (D) Sense of Congress resolutions; and (8) any other information that the Commission would contribute to a thorough assessment of mandatory minimum sentencing provisions.	
11 GD	11/29/90	101-647 Crime Control Act of 1990, sec. 321.	Sex Against children	[A]mend existing guidelines for sentences involving sexual crimes against children, including offenses contained in chapter 109A of title 18, so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate.	**Amend. No. 372 (Nov. 1, 1991)** **USSG § 2G2.2, 2G2.4** • The Commission "insert[ed] an additional guideline at § 2G2.4 to address offenses involving receipt or possession of materials depicting a minor engaged in sexually explicit conduct, as distinguished from offenses involving trafficking in such material, which continue to be covered under § 2G2.2." The Commission set the base offense

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					level at 10, which was three levels lower than the base offense level for § 2G.2.2 at the time. *See* USSG § 2G2.2 (1990). [This would be short-lived, as Congress increased the base offense level to 13 before the effective date of this amendment. *See* Amend. No. 436, *infra*.] • It also included a cross reference to § 2G2.2 "if the offense involved trafficking in material involving the sexual exploitation of a minor." In other words, a defendant convicted only of possession or receipt could still be punished for trafficking. The Commission did not set forth any reason for this cross-reference. • Finally, in an application note, the Commission included an invited upward departure if the offense involved 50 or more prohibited items (books, magazines, periodicals, films, video tapes, or other items containing a visual depiction involving the sexual exploitation of a minor). It explained that the offense level "assumes that the offense involved a small number of prohibited items." • Notably, the Commission did not mention this particular directive or increase guideline ranges for sex offenses against children in express response to this directive. In October 1991, Congress itself directly amended the guidelines to increase ranges under new § 2G2.2 (Amend. 435, *infra*), § 2G2.4 (Amend. 436, *infra*), and § 2G3.1 (Amend. 437, *infra*), expressly superseding any Commission

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					action to the contrary. **Note:** Section 2G2.4 was later deleted by consolidation with § 2G2.2. *See* USSG App. C, Amend. 664 (Nov. 1, 2004).
12 SD	10/28/91	102-141 Treasury, Postal Service and General Government Appropriations Act, 1992, sec. 632(1)(A)-(B) & (2)(B)	Sex Abuse of minor Child pornography	[P]romulgate guidelines, or amend § 2G2.2 to provide a base offense level of not less than 15 and to provide at least a 5 level increase for offenders who have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. [A]mend § 2G2.4 to provide that such guideline shall apply only to offense conduct that involves the simple possession of materials proscribed by chapter 110 of title 18, United States Code and § 2G2.2 to provide that such guideline shall apply to offense conduct that involves receipt or trafficking (including, but not limited to transportation, distribution, or shipping). The provisions of section 944(x) of title 28, United States Code [relating to publication in the Federal Register and public hearing procedure], shall not apply to the promulgation or amendment of guidelines under this section.	**Amend. No. 435 (Nov. 27, 1991)** **USSG § 2G2.2, § 2G2.4** • Amended USSG § 2G2.2 by increasing the base offense level from 13 to 15; expanded its coverage to receipt offenses; added a specific offense characteristic requiring a 5-level increase "if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." • "This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992." • For the amendment related to § 2G2.4, see Amend. No. 436, *infra*.
13	10/28/91	102-141	Sex	[P]romulgate guidelines, or amend § 2G2.4 to	**Amend. No. 436 (Nov. 27, 1991)**

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SD		Treasury, Postal Service and General Government Appropriations Act, 1992, sec. 632(1)(C) & (2)(B)	Child pornography	provide a base offense level of not less than 13, and to provide at least a 2 level increase for possessing 10 or more books, magazines, periodicals, films, video tapes or other items containing a visual depiction involving the sexual exploitation of a minor. [A]mend § 2G2.4 to provide that such guideline shall apply only to offense conduct that involves the simple possession of materials proscribed by chapter 110 of title 18, United States Code and § 2G2.2 to provide that such guideline shall apply to offense conduct that involves receipt or trafficking (including, but not limited to transportation, distribution, or shipping). The provisions of section 944(x) of title 28, United States Code [relating to publication in the Federal Register and public hearing procedure], shall not apply to the promulgation or amendment of guidelines under this section.	**USSG §§ 2G2.2, 2G2.4** • Amended new USSG § 2G2.4 to remove "receipt" offenses from its coverage; increased the base offense level from 10 to 13; added a special offense characteristic adding a 2-level increase for "possession ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor"; deleted the application note inviting upward departure if the defendant possessed 50 or more prohibited items. • "This amendment implements the instructions to the Commission ins Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992." **Note:** § 2G2.4 was subsequently deleted by consolidation with § 2G2.2. *See* USSG App. C, Amend. 664 (Nov. 1, 2004).
14 SD	10/28/91	102-141 Treasury, Postal Service and General Government Appropriations Act, 1992, sec.	Other Obscenity	[P]romulgate guidelines, or amend existing or proposed guideline § 2G3.1 [Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor] to provide a base offense level of not less than 10. The provisions of section 944(x) of title 28,	**Amend. No. 437 (Nov. 27, 1991)** **USSG § 2G3.1** • Amended § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter) to increase the base offense level from 6 to 10.

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		632(1)(D) & (2)(B)		United States Code [relating to publication in the Federal Register and public hearing procedure], shall not apply to the promulgation or amendment of guidelines under this section.	• "This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992."
15 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 110501.	Gun Crime of violence or drug trafficking crime involving semi-automatic firearm	[A]mend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence (as defined in section 924(c)(3) of title 18, United States Code) or a drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code) if a semiautomatic firearm is involved. "[S]emiautomatic firearm" means any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge.	**Amend. No. 531 (Nov. 1, 1995)** **USSG § 2K2.1, 5K2.17** • Inserted a policy statement at USSG § 5K2.17 (High-Capacity, Semiautomatic Firearms), which read as follows: If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'high-capacity, semiautomatic firearm' means a semiautomatic firearm that has a magazine capacity of more than ten cartridges. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case. *See* USSG § 5K2.17 (1995). • In explaining its decision to add an upward departure provision to implement the directive, the Commission stated that it reviewed data and found

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					that "semiautomatic firearms are used in 50-70 percent of offenses involving a firearm," thus representing the "typical or 'heartland'" case under the guidelines." It also explained that the dangerousness of semiautomatic firearms "varies substantially with caliber and magazine capacity." Further, harm resulting such as death or bodily injury is generally taken directly into account by the guidelines. "The Commission determined that the most appropriate approach at this time was to provide a specific basis for an upward departure when a high-capacity semiautomatic firearm is possessed in connection with a crime of violence or drug trafficking offense, thereby allowing the courts the flexibility to take this factor into account as appropriate in the circumstances of the particular case." • In an application note not mentioned in the Reason for Amendment, the Commission defined "crime of violence" and "controlled substance offense" as it is more broadly defined in USSG § 4B1.2, **not** as expressly defined by Congress in the directive (limited to statutory definitions under 18 U.S.C. § 924(c)(2), (3)). The Commission did not explain why it chose its broader definitions over Congress's express direction otherwise. [For a thorough account of the expanded definitions under § 4B1.2 as they had developed by 1995, see Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 Charlotte Law Review 39 (2010),

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					also available as updated at www.fd.org.] • The Act also created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B). Aside from the directive regarding crimes of violence and drug trafficking offenses, Congress required no action relating to this new offense. But the Commission amended § 2K2.1 to require the same enhancements for semiautomatic assault weapons as defined in § 921(a)(30) as those described in 26 U.S.C. § 5845 (sawed-off shotguns, machine guns, bombs, silencers) in calculating the guideline range under § 2K2.1(a)(1), (3), (4) and (5) when the firearm was *not* connected with a crime of violence or drug trafficking offense. USSG, App. C, Amend. 522 (Nov. 1, 1995). The Commission gave no reason for these enhancements, which were grouped with another set of amendments and may have been inspired by another unrelated directive regarding § 922(g) offenses. *See infra*, Amend. No. 522. • The assault weapons ban was repealed by the terms of the Act on September 13, 2004, and Congress has taken no action to reinstate it. Despite public comment urging the Commission to remove the enhancements, the enhancements in § 2K2.1(a)(1), (3) and (4) (but not (5)) remain.

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					For a discussion of these and related actions regarding firearms, see Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker, at 44-45 (Aug. 2006), available at fd.org.
16 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 120004.	All International terrorism	[A]mend [the] sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.	**Amend. No. 526 (Nov. 1, 1995)** **USSG §§ 3A1.4, 5K2.15** • Deleted the upward departure provision at USSG § 5K2.15 and replaced it with an upward adjustment at USSG § 3A1.4, which was not set forth in Appendix C. This new upward adjustment provided for a 12-level increase with a minimum level of 32 if the offense involved or was intended to promote international terrorism, and required a criminal history category of Category VI regardless of actual criminal history. It also defined "international terrorism" as defined in 18 U.S.C. § 2331. For ease of reference, its full language is set forth here: **§ 3A1.4. International Terrorism** (a) If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32. (b) In each such case, the defendant's criminal

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					history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI. Commentary Application Notes 1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, international terrorism. "International terrorism" is defined at 18 U.S.C. § 2331. 2. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI. USSG § 3A1.4 (1995). • The Commission did not give any reason for selecting these particular offense levels or for imposing a criminal history category of VI in every case. In addition, Commission did not mention how (or even if) this adjustment addressed Congress's express limitation that the Commission was to provide for an enhancement in such cases "unless such involvement or intent is itself an element of the crime." • This adjustment was soon amended by

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					Congressional directive to apply more broadly to "Federal crimes of terrorism" as defined in 18 U.S.C. 2332b(g). *See* USSG, App. C, Amend. 539 (Nov. 1, 1996) (set forth, *infra*.)
17 SD	9/13/94	103-322 Drug Free Truck Stop Act, sec. 180201(c) of the Violent Crime Control and Law Enforcement Act of 1994.	Drug Truck stops and rest areas	[P]romulgate guidelines, or [] amend existing guidelines, to provide an appropriate enhancement of punishment for a defendant convicted of violating section 409 of the Controlled Substances Act. **Note:** The Act created a new offense at 21 U.S.C. § 849 – distributing or possessing controlled substances with intent to distribute a controlled substance in or on, or within 1,000 feet of, a truck stop or safety rest area.	**Amend. No. 534 (Nov. 1, 1995)** **USSG § 2D1.2** • Added 21 U.S.C. § 849 to Appendix A (Statutory Index) and referred those offenses to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), which provides for a 2-level enhancement for drug offenses involving a protected location. • Although seemingly straightforward on the surface, see the column *supra* for Amend. No. 135, which sets forth the policy underlying the 2-level enhancement under § 2D1.2 relating to protected locations – *i.e.*, Congress's intent to protect minors from drug trafficking. Thus, the 2-level enhancement now applying to trafficking within 1,000 feet of a truck stop or safety rest area is ultimately driven by a congressional policy related to *minors*. The Commission did not explain how it independently determined that a 2-level enhancement was appropriate for drug offenses at truck stops or safety rest areas.
18	9/13/94	103-322	All	(a)(1) [P]romulgate guidelines or amend	**Amend. No. 527 (Nov. 1, 1995)**

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SD		Violent Crime Control and Law Enforcement Act of 1994, sec. 140008.	Involving minors	existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense. (2) Provide that the guideline enhancement promulgated pursuant to paragraph (1) shall apply for any offense in relation to which the defendant has solicited, procured, recruited, counseled, encouraged, trained, directed, commanded, intimidated, or otherwise used or attempted to use any person less than 18 years of age with the intent that the minor would commit a Federal offense. (b) Relevant Considerations.--In implementing the directive in subsection (a), the Sentencing Commission shall consider-- (1) the severity of the crime that the defendant intended the minor to commit; (2) the number of minors that the defendant used or attempted to use in relation to the offense; (3) the fact that involving a minor in a crime of violence is frequently of even greater seriousness than involving a minor in a drug trafficking offense, for which the guidelines	**USSG § 3B1.4** • Created new Chapter 3 adjustment at § 3B1.4 (which had previously addressed role in the offense and was deemed unnecessary). • As originally promulgated, § 3B1.4 read as follows: **§ 3B1.4. Using a Minor To Commit a Crime** If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels. Commentary Application Note 1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, processing, recruiting, or soliciting. 2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. 3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.

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				already provide a two-level enhancement; and (4) the possible relevance of the proximity in age between the offender and the minor(s) involved in the offense.	USSG § 3B1.4 (1995). • The provision applied more broadly than the directive in that it did not limit its application to defendants 21 years of age or older. The Commission acknowledged that the provision was "in slightly broader form" than the directive, but otherwise gave no reason for any aspect of the amendment. Only one of the considerations, the number of minors used, is addressed by the guideline. The guideline and the Commission were otherwise silent regarding the other considerations. • For a discussion of § 3B1.4 and the Commission's failure to follow the directive, see *United States v. Butler*, 207 F.3d 839 (6th Cir. 2000) (recognizing that the Commission's action authorizing an enhancement for using or attempting to use a minor in the offense regardless of defendant's age was contrary to statute directing that the defendant be at least twenty-one).
19 GD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 240002.	Violent Elderly victims	(a) [E]nsure that the applicable guideline range for a defendant convicted of a crime of violence against an elderly victim is sufficiently stringent to deter such a crime, to protect the public from additional crimes of such a defendant, and to adequately reflect the heinous nature of such an offense. (b) Criteria.--In carrying out subsection (a), the United States Sentencing Commission	**Amend. No. 521 (Nov. 1, 1995)** **USSG § 3A1.1** • Deleted the provision at USSG § 3A1.1 (Vulnerable Victim) and replaced it with a new version of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim), which moved to new subsection (b) but otherwise left unchanged the language providing for a 2-level enhancement "if

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				shall ensure that— (1) the guidelines provide for increasingly severe punishment for a defendant commensurate with the degree of physical harm caused to the elderly victim; (2) the guidelines take appropriate account of the vulnerability of the victim; and (3) the guidelines provide enhanced punishment for a defendant convicted of a crime of violence against an elderly victim who has previously been convicted of a crime of violence against an elderly victim, regardless of whether the conviction occurred in Federal or State court. (c) Definitions.—In this section— "crime of violence" means an offense under section 113 [assault], 114 [maiming], 1111 [murder], 1112 [manslaughter], 1113 [attempted murder or manslaughter], 1117 [conspiracy to murder], 2241 [aggravated sexual abuse], 2242 [sexual abuse], or 2244 [abusive sexual contact] of title 18, United States Code. "elderly victim" means a victim who is 65 years of age or older at the time of an offense.	the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct." • Although the Commission did not amend the guidelines in response to this directive, it added an application note inviting an upward departure "[i]f an enhancement from subsection (b) [relating to vulnerable victims] applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted." This change appears to have been prompted by the third consideration in the directive, but far exceeds it both in terms of the victims covered (any vulnerable victim, not just persons 65 years or older) and the offenses covered (not just the crimes of violence specified in the directive). • The Commission explained that "upon review of the guidelines, the Commission determined that the penalties currently provided generally appear appropriate; however, this amendment strengthens the Commentary to § 3A1.1 in one area by expressly providing a basis for an upward departure if both the current offense and a prior offense involved a vulnerable victim (including an elderly victim), regardless of the type of offense." The Commission gave no reason or

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					any empirical basis for this action.
20 GD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 40111.	Sex Repeat offenders	(a) In General.—Chapter 109A of title 18, United States Code, is amended by adding at the end the following new section: "Sec. 2247. Repeat offenders "Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized.". (b) Amendment of Sentencing Guidelines.—The Sentencing Commission shall implement the amendment made by subsection (a) by promulgating amendments, if appropriate, in the sentencing guidelines applicable to chapter 109A offenses.	**Amend. No. 511 (Nov. 1, 1995)** **USSG §§ 2A3.1, 2A3.2, 2A3.3, 2A3.4** • Added an application note to §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4 to provide that "[i]f the defendant's criminal history included a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted." • Explained that Chapter Four already includes a "determination of the seriousness of the defendant's criminal record based upon prior convictions" (§ 4A1.1); provides for enhanced penalties for career offenders who have engaged in crimes of violence, which includes forcible sex offenses (§ 4B1.1); and provides for an upward departure if "reliable information indicates that the criminal history category does not reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."
21 GD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994,	Sex Aggravated sex abuse	(a) [R]eview and amend, where necessary, its sentencing guidelines on aggravated sexual abuse under section 2241 of title 18, United States Code, or sexual abuse under section 2242 of title 18, United States Code, as follows:	**Amend. No. 511 (Nov. 1, 1995)** **USSG § 2A3.1** • Prepared a report to Congress "analyzing federal rape sentences and obtaining comment from

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		sec. 40112.		(1) [R]eview and promulgate amendments to the guidelines, if appropriate, to enhance penalties if more than 1 offender is involved in the offense. (2) [R]eview and promulgate amendments to the guidelines, if appropriate, to reduce unwarranted disparities between the sentences for sex offenders who are known to the victim and sentences for sex offenders who are not known to the victim. (3) [R]eview and promulgate amendments to the guidelines to enhance penalties, if appropriate, to render Federal penalties on Federal territory commensurate with penalties for similar offenses in the States. (4) [R]eview and promulgate amendments to the guidelines, if appropriate, to account for the general problem of recidivism in cases of sex offenses, the severity of the offense, and its devastating effects on survivors. (b) Report. –Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission shall review and submit to Congress a report containing an analysis of Federal rape sentencing, accompanied by comment from independent experts in the field, describing –	independent experts." For the full report, see USSC, *Report to Congress: Analysis of Penalties for Federal Rape Cases* (Mar. 13, 1995), avail. at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199503_Federal_Rape_Cases.PDF. **The Commission summarized its findings as follows:** F]ederal rape cases involving multiple assailants are rare. Only five such cases were sentenced during fy 1993 and each involved two assailants. Approximately 15 percent of federal sexual assault defendants had a prior conviction for sexual misconduct. Average sentences for these defendants are approximately 85 months longer than defendants without prior sex offense convictions. The longer sentences result from both a higher criminal history score as well as differences in the statute of conviction. The guidelines do not distinguish between defendants known or unknown by victims. Commission data indicate that this factor is associated with differences in sentence length, with known defendants receiving, on average, shorter sentences. In 1992, the Commission amended the guidelines to better ensure that defendants whose actual offense conduct, as opposed to charged conduct, involves rape receive sentences according to

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				(1) comparative Federal sentences for cases in which the rape victim is known to the defendant and cases in which the rape victim is not known to the defendant; (2) comparative Federal sentences for cases on Federal territory and sentences in surrounding States; and (3) an analysis of the effect of rape sentences on populations residing primarily on Federal territory relative to the impact of other Federal offenses in which the existence of Federal jurisdiction depends upon the offense's being committed on Federal territory.	the severity of their actual conduct. While too early to assess fully this amendment's impact, preliminary analysis indicates that differences in length of sentence between defendants known versus unknown to the victim are likely to diminish. Comparison of current federal rape sentences with state sentences indicates that federal offenders can expect to serve a longer period of prison confinement. The average federal sentence imposed during FY 1993 for rape conduct was higher than the average sentences imposed for robbery or assault cases, but lower than cases involving murder. Expert comment received to date has indicated that sentence length should be determined by the severity of the attack and the extent of the injury to the victim regardless of whether the assailant was known or unknown to the victim. Additionally, comment indicates that there appears to be no justification to increase federal sentences for rape and other sex offenses above current levels. *Id.* at 1-2. **Note:** The report also sets forth the Commission's public request for comment from experts. Rather than increase guideline ranges, the Commission "strengthen[ed] § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual

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					Abuse) by expressly listing as a basis for an upward departure the fact that a victim was sexually abused by more than one participant." *See* Reason for Amendment.
22 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 110513.	Gun Enhanced penalties for firearms possession by violent felons and serious drug offenders	[A]mend [the] sentencing guidelines to – (1) appropriately enhance penalties in cases in which a defendant convicted under section 922(g) of title 18, United States Code, has 1 prior conviction by any court referred to in section 922(g)(1) of title 18 for a violent felony (as defined in section 924(e)(2)(B) of that title) or a serious drug offense (as defined in section 924(e)(2)(A) of that title); and (2) appropriately enhance penalties in cases in which such a defendant has 2 prior convictions for a violent felony (as so defined) or a serious drug offense (as so defined).	**Amend. No. 522 (Nov. 1, 1995)** **USSG § 2K2.1** • At the time of this directive, USSG § 2K2.1 already included enhancements for defendants convicted of §922(g) and previously convicted of a "crime of violence" or "controlled substance offense." *See* USSG § 2K2.1(a)(2), (3) & (4)(a) (1994). "Crime of violence" and "controlled substance offense" were defined as in § 4B1.2, which by 1995 were both defined by the Commission more broadly than the definitions specified in this directive. *See id.* § 2K2.1 comment. (n.5) (1995); *id.* § 4B1.2 (1995). [For a thorough account of the expanded definitions under § 4B1.2 as they had developed by 1995, see Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 Charlotte Law Review 39 (2010), also available at fd.org.] • The Act also created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B). Although Congress did not direct the Commission to do so in this directive (or in any other), it amended § 2K2.1 to require the same

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					enhancements based on prior offenses for semiautomatic assault weapons as defined in § 921(a)(30) as those described in 26 U.S.C. § 5845 (sawed-off shotguns, machine guns, bombs, silencers) in calculating the guideline range under § 2K2.1(a)(1), (3), (4) and (5). The Commission gave no reason for these enhancements. • The assault weapons ban was repealed by the terms of the Act on September 13, 2004, and Congress has taken no action to reinstate it. Despite public comment urging the Commission to remove the enhancements, the enhancements in § 2K2.1(a)(1), (3) and (4) (but not (5)) remain. For a discussion of these and related actions regarding firearms, see Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker, at 44-45 (Aug. 2006), available at fd.org.
23 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 110502.	Other Fire or explosives / repeat offenders	Promulgate amendments to the sentencing guidelines to appropriately enhance penalties in a case in which a defendant convicted under section 844(h) of title 18, United States Code [using fire or explosives, or carrying explosives, to commit a felony], has previously been convicted under that section.	**[No amendment.]** • Convictions under 18 U.S.C. § 844(h), which at the time set forth a mandatory minimum sentence of ten years for a second offense (now twenty years), are governed by § 2K2.4, which provided that the "guideline sentence is that required by statute." USSG § 2K2.4 (1995). Thus, the guidelines already provided for enhanced penalties for a second or subsequent offense under § 844(h).

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24 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 110512.	Economic Counterfeiting and forgery	Amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of a felony under chapter 25 of title 18, United States Code [counterfeiting and forgery], if the defendant used or carried a firearm (as defined in section 921(a)(3) of title 18, United States Code) during and in relation to the felony.	**Amend. No. 513 (Nov. 1, 1995)** **USSG § 2B1.1, 2B5.1, 2F1.1** • Amended USSG § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to add a 2-level increase with a minimum offense level of 13 "[i]f a dangerous weapon (including a firearm) was possessed in connection with the offense. • Amended USSG § 2F1.1 (Fraud and Deceit; Forgery; Counterfeit Instruments Other than Bearer Obligations of the United States) (now consolidated with § 2B1.1) to add a 2-level increase with a minimum offense level of 13 "[i]f the offense involved "possession of a dangerous weapon (including a firearm) in connection with the offense." • As set forth in the directive, Congress instructed the Commission to provide for enhanced penalties if the defendant was convicted of a felony under chapter 25 of title 18 [counterfeiting and forgery] and "used or carried a firearm." Instead, the Commission added enhancements for merely possessing any dangerous weapon to guidelines that applied to far more offenses than just those under chapter 25 of title 18. *See* USSG §§ 2B5.1, 2F1.1 (1995). With the later consolidation of § 2F1.1 with § 2B1.1, *see* USSG App. C, Amend. 617 (Nov. 1, 2001), the scope of these

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					enhancements broadened even further. • The Commission acknowledged that "this amendment implements this directive in broader form," but otherwise provided no reason or other empirical support for it.
25 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 90103(b).	Drug In federal prisons	(a) Declaration of Policy. –It is the policy of the Federal Government that the use or distribution of illegal drugs in the Nation's Federal prisons will not be tolerated and that such crimes shall be prosecuted to the fullest extent of the law. (b) Sentencing Guidelines. – Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall amend its sentencing guidelines to appropriately enhance the penalty for a person convicted of an offense – (1) under section 404 of the Controlled Substances Act involving simple possession of a controlled substance within a Federal prison or other Federal detention facility; or (2) under section 401(b) of the Controlled Substances Act involving the smuggling of a controlled substance into a Federal prison or other Federal detention facility or the distribution or intended distribution of a controlled substance within a Federal prison	**Amend. No. 514 (Nov. 1, 1995)** **USSG § 2D1.1** • At the time of this directive, the guideline covering violations of 18 U.S.C. 1791 already contained a cross-reference to § 2D1.1 and a minimum offense level of 26 for offenses involving distribution, which represented an enhanced penalty in any case for which the offense level under 2D1.1 would have been below 26. USSG § 2P1.2 (1995) (Providing or Possessing Contraband in Prison). • Rather than address convictions under 18 U.S.C. § 1791, as directed by Congress, the Commission added a 2-level enhancement to the generally applicable USSG § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) "[i]f the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility." Nor was the enhancement limited to offenses occurring in Federal prison facilities, as directed by Congress. • The Commission did not give a particular reason

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				or other Federal detention facility. (c) No Probation.—Notwithstanding any other law, the court shall not sentence a person convicted of an offense described in subsection (b) to probation.	for this amendment, except to say that it is "similar to the enhancement provided for drug distribution in other protected locations" at § 2D1.2. As noted in this column *supra* regarding Amend. No. 135, however, the policy underlying the 2-level enhancement at § 2D1.2 relates to protecting *minors* from drug trafficking. Thus, in addition to going beyond what Congress directed here, the Commission links this amendment to a guideline founded on entirely different policy considerations. • Also amended USSG § 2D2.1 to add a cross-reference to § 2P1.2 (Providing or Possessing Contraband in Prison) "if the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility." This had the effect of increasing the guideline range for possession from 8 (heroin or any Schedule I or II opiate, an analogue of these, or cocaine base) or 6 (cocaine, LSD, or PCP) to **13** for "LSD, PCP, methamphetamine, or a narcotic drug," which includes opium, opiates, derivatives of opium, and cocaine in any form. USSG § 2P1.2(1995); 21 U.S.C. § 802(17). The Commission gave no reason or empirical basis for choosing these new offense levels.
26 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement	Drug Safety-valve	(1) (i) [S]hall promulgate guidelines, or amendments to guidelines, to carry out the purposes of this section and the amendment made by this section [adding safety valve provision at 18 U.S.C. 3553(f)]; and	**Amend. No. 515 (Nov. 1, 1995)** **USSG § 5C1.2** • Repromulgated, with minor editorial changes, the

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		Act of 1994, sec. 80001(b).		(ii) may promulgate policy statements, or amendments to policy statements, to assist in the application of this section and that amendment. (B) In the case of a defendant for whom the statutorily required minimum sentence is 5 years, such guidelines and amendments to guidelines issued under subparagraph (A) shall call for a guideline range in which the lowest term of imprisonment is at least 24 months. (2) [Emergency Authority] If the Commission determines that it is necessary to do so in order that the amendments made under paragraph (1) may take effect on the effective date of the amendment made by subsection (a), the Commission may promulgate the amendments made under paragraph (1) in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired.*	new safety valve provision previously promulgated at § 5C1.2 as a temporary amendment on September 23, 1994. It set forth verbatim the five factors in new 18 U.S.C. § 3553(f) (1995). • Added a new subsection to § 2D1.1 "to implement this provision by providing a two-level decrease in offense level for cases meeting the criteria set forth in § 5C1.2(1)-(5)." **Note:** The Commission implemented this directive first as a temporary, emergency amendment. The Commission's explanation, set forth in the Federal Register, does not appear in Appendix C in its Reason for Amendment. It is reproduced here for ease of reference. ********** In carrying out this Congressional directive, the Commission was required to construe and implement the specific language of section 80001(b)(1)(B). That provision instructs the Commission to provide that a defendant with a five-year mandatory minimum sentence who meets the criteria for an exemption from such mandatory minimum sentence will receive a guideline range that has a minimum of at least 24 months of imprisonment. (Note that this instruction to the Commission does not prohibit a court from granting a downward departure from this guideline if the court finds sufficient mitigating circumstances.) In general, under the guidelines currently in effect, the

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				*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	guideline range for the least culpable category of affected defendant will be at least 30-37 months. (A Chapter Two offense level of at least 26, minus 4 levels for a minimal role and 3 levels for acceptance of responsibility, results in a minimum offense level of 19. For Criminal History Category I, the applicable guideline range is 30-37 months.) The Commission is aware that there may be rare exceptions in which such a defendant may receive an offense level that results in a guideline range with a minimum of less than 24 months. For example, if the defendant's offense involves LSD on a carrier medium, the court will apply the Commission's provision that each LSD dose is to be treated as equivalent to 0.4 milligram per dose for guideline calculations. If the court uses the entire weight of the carrier medium for the purposes of determining the applicability of the mandatory minimum sentence and the defendant nevertheless qualifies under 18 U.S.C. 3553(f) and § 5C1.2 of the sentencing guidelines for an exemption from such mandatory minimum, the situation could arise in which the defendant is subject to a guideline range with a minimum of less than 24 months. The Commission believes that it has the authority to authorize such minor variations from the literal language of the Congressional instruction to ensure consistency with the guidelines as a whole. In the Conference Report accompanying this legislation, the Congress expressly noted that the Commission should interpret Congressional instructions to the Commission in a manner that 'shall assure reasonable

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					consistency with other guidelines' and 'take into account any mitigating circumstances which might justify exceptions.' H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 388 (title IX) (1994); *see also id.*, sec. 280003 at 312 (directing Commission to carry out a specific instruction regarding sentencing enhancements for hate crimes in a manner to ensure reasonable consistency with other guidelines). The Commission similarly believes its interpretation of section 80001(b)(1)(B), within the overall context of a clearly ameliorative sentencing provision for qualified defendants, is consistent with past Congressional directives to the Commission and Congress's rationale for employing such directives as a more flexible means of effecting sentencing policy in particular situations. . . . [T]he Commission has sought to implement the Congressional instruction in section 80001(b)(1)(B) in a manner that best 'assure[s] reasonable consistency with other guidelines * * * and take[s] into account * * * mitigating circumstances which might justify exceptions.' H.R. Conf. Rep. No. 711, *supra*." 59 Fed. Reg. 52,210, 52,212 (Oct. 14, 1994). ********** • The Commission later amended § 5C1.2 in 2001 to establish a minimum offense level of 17 (corresponding to a minimum term of imprisonment of 24 months) for those for whom the statutorily required minimum sentence is at

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					least five years. The Commission explained that the amendment was "in order to comply more strictly with the directive to the Commission at section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322." *See* USSG, App. C, Amend. No. 624 (Nov. 1, 2001). The Commission did not mention its previous analysis.
27 RPT	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 40503(c).	Other Intentional transmission of HIV	Not later than 6 months after the date of enactment of this Act, [c]onduct a study and prepare and submit to the committees on the Judiciary of the Senate and the House of Representatives a report concerning recommendations for the revision of sentencing guidelines that relate to offenses in which an HIV infected individual engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV.	USSC, *Report to Congress: Adequacy of Penalties for the Intentional Exposure of Others through Sexual Activity to the Human Immunodeficiency Virus* (Mar. 1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199503_RtC_HIV.PDF **The Commission's summary of findings**: Based on its empirical analysis of sentencing data and review of relevant case law, the Commission has the following observations and preliminary conclusions: Current federal law does not specifically criminalize the knowing, intentional exposure of others to HIV (human immunodeficiency virus) through sexual activity; however, if such conduct occurs within federal jurisdiction and is determined to constitute aggravated assault or attempted murder, or occurs during the course of another crime such as sexual assault, it may be punishable under current law.

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					A review of 235 federal sexual abuse cases sentenced in fiscal year 1993 reveals that intentional exposure of others to HIV presently does not pose a significant problem in such offenses. It may, however, present a potential concern in the future, particularly within the context of predatory sexual attacks within the federal prison system. During the current guideline amendment cycle, which culminates in the submission to Congress by May 1, 1995, of proposed guideline amendments, the Commission will review public comment (not all of which will have been received by the submission date of this Report) and determine whether specific enhancements should be added in the assault and sexual abuse guidelines to address this conduct. Preliminarily, based on the apparent relative infrequency of intentional exposure of others to HIV through sexual activity, a discretionary upward departure from the guideline range may be the preferred way of accounting for this conduct. The Commission invited comment on the issue as presented by Congress, in addition to the following: Whether the infectious bodily fluid of a person should be defined expressly as a “dangerous weapon.” Whether the definitions relating to serious bodily injury and permanent or life-threatening bodily injury

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					should be amended to expressly include infection by HIV-infected bodily fluid. Whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing behavior. 60 Fed. Reg. 2,430 (Jan. 9, 1995).
28 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 90102.	Drug Drug-free zones	[A]mend its sentencing guidelines to provide an appropriate enhancement for a defendant convicted of violating section 419 of the Controlled Substances Act (21 U.S.C. 860) [distribution or manufacturing in or near schools or colleges].	**[No amendment.]** **USSG § 2D1.2** • *See* Amend. No. 135, *supra* (discussing the 2-level enhancement for distributing in protected locations, which already covered these offenses).
29 SD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 280003.	Other Hate crimes	(a) Definition.—In this section, "hate crime" means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. (b) [P]romulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall	**Amend. No. 521 (Nov. 1, 1995)** **USSG § 3A1.1** • Deleted and replaced § 3A1.1 with a new guideline, as follows: **§ 3A1.1. Hate Crime Motivation or Vulnerable Victim** (a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national

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				ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.	origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels. (b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels. (c) Special Instruction (1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) [involving civil rights offenses] applies. USSG, § 3A1.1 (1995). • Explained that the Commission "ma[de] the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendre plea, the court at sentencing determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, this amendment will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's general guideline promulgation authority, see 28 U.S.C. § 994, permits such a broadening of the enhancement."

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	10/28/09	111-84 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, sec. 4703(a), (b)(2).	Hate crimes Gender identity	In 2009, Congress amended this directive by expanding the definition of the term "hate crime" to include "gender identity" as follows: (a) Amendment.--Section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322; 108 Stat. 2096) is amended by inserting "gender identity," after "gender." It also set forth the definition of "hate crime" as having "the meaning given that term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322; 108 Stat. 2096), as amended by this Act."	**Amend. No. 743 (Nov. 1, 2010)** **USSG §§ 2H1.1, 3A1.1** • Amended Application Note 4 to § 2H1.1 (Offenses Involving Individual Rights) to add actual or perceived "gender identity" to the list of characteristics that can subject the defendant to the 3-level increase under § 3A1.1. • Amended § 3A1.1(a) (Hate Crime Motivation or Vulnerable Victim) to add "gender identity" to the list of characteristics that can subject the defendant to the 3-level enhancement. • Defined "gender identity," for purposes of § 3A1.1, as "actual or perceived gender-related characteristics. *See* 18 U.S.C. § 249(c)(4)." • Section 249(c)(4) defines "gender identity" as "gender-related characteristics."
28 GD	9/13/94	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 25003.	Economic Fraud victims over age 55	(a) Review.—The United States Sentencing Commission shall review and, if necessary, amend the sentencing guidelines to ensure that victim related adjustments for fraud offenses against older victims over the age of 55 are adequate. (b) Report.—Not later than 180 days after the date of enactment of this Act, the Sentencing	**Amend. No. 521 (Nov. 1, 1995)** **USSG § 3A1.1** • USSC, *Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims* (Mar. 1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Corpora

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				Commission shall report to Congress the result of its review under subsection (a).	te_Crime_and_Fraud/199803_RtC_Fraud_Elderly.PDF. • Explained in its Reason for Amendment that the Commission found that "the current guidelines generally provided adequate penalties in these cases, [but] noted some inconsistency in the application of § 3A1.1 (Vulnerable Victim) regarding whether this adjustment required proof that the defendant had 'targeted the victim on account of the victim's vulnerability.'" • Amended § 3A1.1 to revise the commentary to "clarify the application with respect to this issue." The former language in the commentary provided that "this adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." USSG § 3A1.1 (1994). The new language provided (and still provides) that the enhancement "applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." This new language simply restates the language in the guideline itself. [The examples given remain the same.] Although the Commission did not say so in its Reason for Amendment, this amendment in effect removed the suggestion that the enhancement required proof that the defendant targeted the victim on account of the victim's vulnerability.
29	9/13/94	103-322	Drug	[S]ubmit a report to Congress on issues	USSC, *Special Report to the Congress: Cocaine and*

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RPT		Violent Crime Control and Law Enforcement Act of 1994, sec. 28006.	Report on crack / powder cocaine	relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine. The report shall address the different penalty levels which apply to different forms of cocaine and include any recommendations the Commission may have for retention or modification of these differences in penalties.	*Federal Sentencing Policy* (Feb. 1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm. Below is a selection of significant conclusions and recommendations: The Commission concluded in the report "that the 100-to-1 quantity ratio that presently drives sentencing policy for cocaine trafficking offenses should be re-examined and revised." *Id.* at 197. "The Commission strongly recommends against a 100-to-1 quantity ratio. Having said that, the Commission is not prepared in this report to recommend a specific different ratio or a specific different structural approach to deal with the enhanced dangers believed to be presented by crack. Rather, as a priority matter, the Commission intends to develop a model or models for Congress to consider in determining whether to revise the current approach that it takes in the sentencing of crack offenses." *Id.* at 198. "[T]he Commission will attempt to identify all such harms frequently and substantially associated with crack offenses and seek to determine the extent to which they can be addressed in a guideline system. More specifically, the Commission will consider, to the extent relevant to congressional concern and the purposes of sentencing as set forth at 18 U.S.C.

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					3553(a)(2), the following: 1) the form of cocaine involved; 2) whether a firearm or other dangerous weapon was involved; 3) whether the offense resulted in serious bodily injury or death to another person; 4) the quantity of cocaine involved; 5) the extent to which the powder cocaine defendant knew the drug would be converted into crack; 6) the extent to which the offense involved systemic crime, that is, crime related to the drug's marketing, distribution, and control; 7) the extent to which the offense involved social harms, that is, harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behaviors; 8) whether the offense involved the use or employment of any person under the age of 18; 9) whether the defendant performed a managerial or leadership role in the offense; 10) the defendant's prior criminal record; and 11) any other aggravating or mitigating factors necessary to ensure adequate and appropriate punishment for defendants convicted of cocaine offenses." *Id.* at 199. In May 1995, the Commission promulgated an amendment that would have "equalize[d] sentences for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine. It also increase[d] punishment for all drug offenses that involve firearms or other dangerous weapons, and authorize[d] an upward departure for bodily injury." 60 Fed. Reg. 25,074, 25,076 (May 10, 1995).

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					Congress rejected this amendment the day before it was to go into effect. *See* Pub. L. No. 104-38, sec. 1 (Oct. 30, 1995). Congress directed the Commission to do another study and submit further recommendations. *See infra*.
30 RPT	10/30/95	104-38 [Sentencing Guidelines Disapproval], sec. 2.	Drug Report on crack / powder cocaine	[S]ubmit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations— (A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine; (B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;	USSC, *Special Report to Congress: Special Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf . The Commission summarized its recommendations as follows: "Based on this work, the Commission is unanimous in reiterating its original core finding, outlined in its February 1995 report to Congress that, although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified. The Commission is firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine. Therefore, for powder cocaine, the Commission recommends that Congress reduce the current 500-gram trigger for the five-year mandatory minimum sentence to a level between 125 and 375

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				(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and (D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection— (i) murders or causes serious bodily injury to an individual; (ii) uses a dangerous weapon; (iii) uses or possesses a firearm; (iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant; (v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities; (vi) knows, or should know, that he is involving an unusually vulnerable person; (vii) restrains a victim;	grams, and for crack cocaine, that Congress increase the current five gram trigger to between 25 and 75 grams." *Id.* at 2.

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				(viii) traffics in cocaine within 500 feet of a school; (ix) obstructs justice; (x) has a significant prior criminal record; or (xi) is an organizer or leader of drug trafficking activities involving five or more persons. (2) Ratio.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code. (b) Study. –No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money	

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				laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.	
31 RPT	12/23/95	104-71 Sex Crimes Against Children Prevention Act of 1995, sec. 6.	Sex Report on child pornography and other sex offenses against children	Not later than 180 days after the date of the enactment of this Act, the United States Sentencing Commission shall submit a report to Congress concerning offenses involving child pornography and other sex offenses against children. The Commission shall include in the report— (1) an analysis of the sentences imposed for offenses under sections 2251, 2252, and 2423 of title 18, United States Code, and recommendations regarding any modifications to the sentencing guidelines that may be appropriate with respect to those offenses; (2) an analysis of the sentences imposed for offenses under sections 2241, 2242, 2243, and 2244 of title 18, United States Code, in cases in which the victim was under the age of 18 years, and recommendations regarding any modifications to the sentencing guidelines that may be appropriate with respect to those offenses; (3) an analysis of the type of substantial assistance that courts have recognized as warranting a downward departure from the	USSC, *Report to the Congress: Sex Crimes Against Children*, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/SCAC_Executive_Summary.htm. From the Executive Summary: "Penalties for sex offenses against children have been increased several times in recent years and are quite severe. Nevertheless, the Commission's analysis indicates that some amendments may be appropriate to increase sentences for the most dangerous offenders, to ensure consistency in sentencing, and to clarify certain provisions that have been improperly interpreted and used. It appears that a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children and that those with such histories are at greater risk of recidivism. In order to ensure lengthy incarceration of repeat sex offenders who show the greatest risk of victimizing children, the Commission has significantly increased sentences for some child pornography offenses and is considering increases for other pornography and sexual abuse offenses. In addition, the Commission recommends

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				sentencing guidelines relating to offenses under section 2251 or 2252 of title 18, United States Code; (4) a survey of the recidivism rate for offenders convicted of committing sex crimes against children, an analysis of the impact on recidivism of sexual abuse treatment provided during or after incarceration or both, and an analysis of whether increased penalties would reduce recidivism for those crimes; and (5) such other recommendations with respect to the offenses described in this section as the Commission deems appropriate.	that Congress increase certain statutory maximum penalties so that the guideline amendments designed to increase sentences are allowed to operate to their full extent without being capped by existing statutory limits."
32 SD	12/23/95	104-71 Sex Crimes Against Children Prevention Act of 1995, secs. 2, 3.	Sex Sexual exploitation of children	Section 2: [I]ncrease the base offense level for an offense under section 2251 of title 18, United States Code, by at least 2 levels; and [I]increase the base offense level for an offense under section 2252 of title 18, United States Code, by at least 2 levels. Section 3: [A]mend the sentencing guidelines to increase	**Amend. No. 537 (Nov. 1, 1996)** **USSG §§ 2G2.1, 2G2.2, 2G2.4** • Increased base offense levels by 2 for each guideline. • Added a 2-level enhancement to § 2G2.2 "if a computer was used for the transmission of the material or a notice or advertisement of the material." • Added a 2-level enhancement to § 2G2.4 "if the

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				the base offense level by at least 2 levels for an offense committed under section 2251(c)(1)(A) [at the time, governing advertising for child pornography or for participation in conduct for the purpose of producing child pornography] or 2252(a) [transporting or shipping child pornography] of title 18, United States Code, if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction.	defendant's possession of the material resulted from the defendant's use of a computer." • Also added a 2-level enhancement under § 2G2.1 "if a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material." The Commission acknowledged that this was "in addition to the[] congressionally directed enhancements." The Commission gave no reason for this amendment, which was beyond the scope of the directive.
33 SD	12/23/95	104-71 Sex Crimes Against Children Prevention Act of 1995, sec. 4.	Sex Transportation of children	The United States Sentencing Commission shall amend the sentencing guidelines to increase the base offense level for an offense under section 2423(a) of title 18 [transportation of a minor with intent to engage in criminal sexual activity], United States Code, by at least 3 levels.	**Amend. No. 538 (Nov. 1, 1996)** **USSG § 2G1.1, 2G1.2** • Deleted USSG § 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct) and consolidated it with a new version of USSG § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). • Amended newly consolidated USSG § 2G1.1 to establish the 3-level increase in the offense levels for transportation offenses as required by Congress. However, as newly consolidated, § 2G1.1 applied

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					not only to offenses under § 2423(a), as specified by Congress's directive, but to other offenses as well. *See* USSG § 2G1.1 (1996) (applying to 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423(a)). Thus, the enhancements applied more broadly than directed. The Commission did not give any reason for this change.
34 GD	4/24/96	104-32 Mandatory Victims Restitution Act of 1996, secs. 205(a)(3) & 208 of the Antiterrorism and Effective Death Penalty Act of 1996, *codified in part at* 18 U.S.C. § 3663(c)(7)(A).	All Restitution	Sec. 205(a)(3): The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection [18 U.S.C. § 3663(c), relating to controlled substance offenses]. Sec. 208: [T]he United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to reflect this subtitle and the amendments made by this subtitle [the Mandatory Victims Restitution Act of 1996]. **Note:** 18 U.S.C. 3663(c)(2)(A) provides that "[a]n order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission."	**Amend. No. 571 (Nov. 1, 1997)** **USSG §§ 5E1.1, 8B1.1** • Replaced USSG §§ 5E1.1 (Restitution) and 8B1.1 (Restitution – Organizations) and its commentary with revised versions, which give the court broad discretion to order community restitution in certain drug cases but do not provide any particular guidance regarding the calculation of "public harm." With respect to Congress's instruction to the Commission in sec. 205 regarding guidance to courts for determining the amount of restitution under 18 U.S.C. § 3663(c) (relating to certain drug offenses for which there is no identifiable victim), the Commission explained: As a starting point, the Commission has elected to issue a guideline that permits broad court discretion to determine an amount of community restitution not exceeding the fine imposed. Over time, the Commission intends to evaluate and refine this guideline in light of sentencing

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					experience.
35 SD	4/24/96	104-132 Antiterrorism and Effective Death Penalty Act of 1996, sec. 730.	Other Terrorism	[F]orthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987,* as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	**Amend. No. 539 (Nov. 1, 1996)** **USSG § 3A1.4** • Amended § 3A1.4 by removing the reference to "international terrorism" and replacing it with "federal crime of terrorism." Also broadened its application to cover "Federal crimes of terrorism" as defined in 18 U.S.C. § 2332b(g), rather than to "international terrorism," as defined in 18 U.S.C. § 2331. • This enhancement was initially created in response to a directive, *see* Amend. No. 526, *supra*.
36 SD	4/24/96	104-132 Antiterrorism and Effective Death Penalty Act of 1996, sec. 807(h).	Economic International counterfeiting	[A]mend the sentencing guidelines prescribed by the Commission to provide an appropriate enhancement of the punishment for a defendant convicted under section 470 of title 18 of such Code [counterfeit acts committed outside the United States].	**Amend. No. 554 (Nov. 1, 1997)** **USSG § 2B5.1** • Amended USSG § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to add a 2-level upward enhancement "[i]f any part of the offense was committed outside the United States."

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					• "This amendment addresses [the directive], which requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470." The Commission provided no other explanation and did not provide any empirical or policy basis for selecting a 2-level upward enhancement.
37 SD	4/24/96	104-132 Antiterrorism and Effective Death Penalty Act of 1996, sec. 805.	Other Terrorist activity damaging a federal interest computer	(a) Not later than 60 calendar days after the date of enactment of this Act, . . . review the deterrent effect of existing guideline levels as they apply to paragraphs (4) and (5) of section 1030(a) of title 18, United States Code [fraud and related activity in connection with computers]. (b) [P]repare and transmit a report to the Congress on the findings under the study conducted under subsection (a). (c) [A]mend the sentencing guidelines to ensure any individual convicted of a violation of paragraph (4) or (5) of section 1030(a) of title 18, United States Code [fraud and related activity in connection with computers], is imprisoned for not less than 6 months. **Note:** At the time of the amendment to the guidelines, paragraphs (4) and (5) of 18 U.S.C. § 1030 read as follows:	**Amend. No. 551 (Nov. 1, 1997)** **USSG § 2B1.1, 2B1.3** • Though not directly tied to the directive, added commentary in Application Note 2 to § 2B1.1 providing that "[i]n an offense involving unlawfully accessing, or exceeding authorized access to, a 'protected computer' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." This definition is currently located at USSG § 1B1.1 comment. (n.3(A)(v)(III)) (2007). • Amended USSG § 2B1.3 to add a special instruction providing that "[if the defendant is convicted under 18 U.S.C. § 1030(a)(5), the minimum guideline sentence, notwithstanding any other adjustment, shall be sixth months' imprisonment."

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				(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $ 5,000 in any 1-year period; (5) (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; 18 USCS § 1030 (as amended Oct. 11, 1996)	*See* USSC, *Report to the Congress: Adequacy of Federal Sentencing Guideline Penalties for Computer Fraud and Vandalism Offenses* (June 1996), avail. at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Computer_Crime/199606_RtC_Computer_Fraud_and_Vandalism_Offenses.pdf. **Some of the Commission's findings and conclusion:** "Federal "computer crime" cases sentenced under the pertinent provisions of 18 U.S.C. § 1030 are relatively uncommon at present. An estimated 60 defendants have been successfully prosecuted and sentenced thereunder in the almost nine years since the guidelines came into existence." *Id.* at 2. "A review of the sentences imposed upon those who violated 18 U.S.C. § 1030 (a)(4) or (5) prior to the enactment of the Antiterrorism Act indicates that the guideline adjustments mandated by Congress generally will increase punishment for this class of defendant." *Id.* at 3. "[N]one of the 40 computer crime defendants who have been sentenced under the guidelines as a result of convictions under 18 U.S.C. § 1030 (a)(4) or (5) have been subsequently convicted of another federal crime." *Id.* at 8. **Conclusion: "**The limited empirical data available to

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					the Commission and other factors preclude a definitive assessment of the deterrent effect of existing guidelines for computer fraud and computer vandalism. The relatively few convictions under these provisions are insufficient to permit generalized conclusions about their deterrent effect. As convictions increase, the Com mission, in cooperation with the Department of Justice, will continue to analyze the operation of the guidelines in the computer crime context and expects to consider additional modifications in the current, 1996-97, amendment cycle to improve their operation and effectiveness." *Id* at 9.
38 GD	9/23/96	104-201 National Defense Authorization Act for Fiscal Year 1997, sec. 1423.	Other Importation and exportation of nuclear, biological, and chemical weapons.	Sense of Congress Concerning Inadequacy of Sentencing Guidelines.—It is the sense of Congress that the sentencing guidelines prescribed by the United States Sentencing Commission for the offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons materials constitute inadequate punishment for such offenses. (b) Urging of Revision to Guidelines.—Congress urges the United States Sentencing Commission to revise the relevant sentencing guidelines to provide for increased penalties for offenses relating to importation, attempted importation, exportation, and attempted exportation of nuclear, biological, or chemical weapons or related materials or technologies	**Amend. No. 633 (Nov. 1, 2001)** **USSG §§ 2M5.1, 2M5.2** • Amended USSG §§ 2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munition, or Military Equipment or Services Without a Required Validated Export License) to provide a four-level increase to the offense level for convictions addressed in the directive. • The Commission explained that this amendment "responds to a statutory provision expressing a sense of Congress." It further stated that this increase "serves to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M" of the guidelines.

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				under the following provisions of law: (1) Section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410). (2) Sections 38 and 40 of the Arms Export Control Act (22 U.S.C. 2778 and 2780). (3) The International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). (4) Section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 2156a(c)).	
39 SD	9/30/96	104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 334	Other Failure to depart, illegal reentry, and passport and visa fraud.	(a) [P]romptly promulgate . . . amendments to the sentencing guidelines to make appropriate increases in the base offense level for offenses under section 242(e) and 276(b) of the Immigration and Nationality Act (8 U.S.C. 1252(e) and 1326(b)) to reflect the amendments made by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994 [increasing the statutory maximum for those offenses]. (b) [P]romptly promulgate . . . amendments to the sentencing guidelines to make appropriate increases in the base offense level for offenses under chapter 75 of title 18, United States Code [Passports and Visas, 18 U.S.C. §§	**Amend. No. 562 (Nov. 1, 1997)** **USSG §§ 2L1.2, 2L2.1** • Amended USSG § 2L1.2 (Unlawfully Entering or Remaining in the United States) to add a 4-level enhancement for defendants violate 8 U.S.C. §1326 and who had been previously convicted of "three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses." This language tracked the language added to § 1326(b)(1) by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994, which increased the statutory maximum for such persons to 10 years, the same as for a prior felony other than an aggravated felony.

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				1541-1547], to reflect the amendments made by section 130009 of the Violent Crime Control and Law Enforcement Act of 1994 [increasing the statutory maximum for these offenses].	• The Commission gave no particular reason for establishing the same four-level increase for three prior misdemeanor convictions as for a felony conviction, nor did it set forth any empirical data to support it. For amendments to § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport [etc.]) and § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use [etc.]), see **Amend. Nos. 544 & 563**, *infra*.
40 GD	9/30/96	104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 333.	Drug Conspiracy with or assisting an alien to commit drug import offense.	(a) Not later than 6 months after the date of the enactment of this Act, . . . conduct a review of the guidelines applicable to an offender who conspires with, or aids or abets, a person who is not a citizen or national of the United States in committing any offense under section 1010 of the Controlled Substance Import and Export Act (21 U.S.C. 960). (b) Following such review, [p]romulgate sentencing guidelines or amend existing sentencing guidelines to ensure an appropriately stringent sentence for such offenders.	
41	9/30/96	104-208	Other	(b) [A]scertain whether there exists an	**Amend. No. 542 (May 1, 1997)**

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SD		Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 218(b)-(c)	Involuntary servitude, slave trade, peonage	unwarranted disparity— (1) between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnapping offenses in effect on the date of the enactment of this Act; and (2) between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for alien smuggling offenses in effect on the date of the enactment of this Act and after the amendment made by subsection (a). (c) (1) [R]eview its guidelines on sentencing for peonage, involuntary servitude, and slave trade offenses under sections 1581 through 1588 of title 18, United States Code, and shall amend such guidelines as necessary to— (A) reduce or eliminate any unwarranted disparity found under subsection (b) that exists between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnapping offenses and alien smuggling offenses; (B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses	**USSG § 2H4.1** • Amended USSG § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) to increase the base offense level from the greater of 15 (or 2 plus the offense level for any underlying offense for offenses involving other serious offenses) to **22**. • Added specific offense characteristics with enhancements for bodily injury (plus 2 or 4) and use of a dangerous weapon (plus 2) (both governed by the relevant conduct rules under § 1B1.1), as well as length of time held in a condition of peonage or servitude (plus 1, 2, or 3). Also included enhancement if "any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense." One method adds 2 levels to the offense level determined under § 2H4.1 (including the enhancements) and the other is similar to the former version, adding two levels to the offense level calculated under the guideline for the underlying offense. The court is to apply the greater of the two methods, but if the latter, then the offense level can "in no event [be] greater than 43." • In an application note, explained that "'any other felony offense' means any conduct that constitutes a felony offense under federal, state,

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				and adequately reflect the heinous nature of such offenses; and (C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve— (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude. (2) [Emergency authority] [P]romulgate the guidelines or amendments provided for under this subsection as soon as practicable in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28	or local law (other than offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under § 3D1.2(d) is to be used." • Deleted background commentary which read: "For purposes of deterrence and just punishment, the minimum base offense level is 15. However, these offenses frequently involve other serious offenses. In such cases, the offense level will be increased under § 2H4.1(a)(2)." • Explained that "[t]his amendment implements [this directive], which directs the Commission to review the guideline for peonage, involuntary servitude and slave trade offenses and amend the guideline pursuant to that review." The Commission did not describe the review process, the results of the review or any empirical data gathered, nor did it otherwise explain the amendment.

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				U.S.C. § 994 note.	
42 SD	9/23/96	104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 211(b). *See also id.* 334(b), *supra*.	Other Fraud involving government issued documents	(1) [P]romulgate sentencing guidelines or amend existing sentencing guidelines for offenders convicted of violating, or conspiring to violate, sections 1028(b)(1) [fraud in connection with identification documents], 1425 through 1427 [unlawful procurement of citizenship, reproduction of citizenship papers, sale of citizenship papers], 1541 through 1544 [offenses relating to visas and passports], and 1546(a) [visa fraud] of title 18, United States Code, in accordance with this subsection. (2) [I]n carrying out this subsection, the Commission shall, with respect to the offenses referred to in paragraph (1)— (A) increase the base offense level for such offenses at least 2 offense levels above the level in effect on the date of the enactment of this Act; (B) review the sentencing enhancement for number of documents or passports involved (U.S.S.G. 2L2.1(b)(2)), and increase the upward adjustment by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act; (C) impose an appropriate sentencing	**Amend. No. 544 (May 1, 1997)** **USSG § 2L2.1** • Increased base offense level under USSG § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport [etc.]) from 9 to 11. Revised the 3-level decrease if the defendant did not commit the offense for profit to read as follows: "If the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels. • In an application note, redefined "other than for profit." Under the old guideline, "for profit" meant "for financial gain or commercial advantage." USSG § 2L2.1 comment. (n.1) (1996). The Commission amended it the application note to provide: "'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens." • Increased the enhancements based on number of documents as follows:

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				enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; (D) impose an additional appropriate sentencing enhancement upon an offender with 2 or more prior felony convictions arising out of separate and prior prosecutions for offenses that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; and (E) consider whether any other aggravating or mitigating circumstances warrant upward or downward sentencing adjustments. (3) [Emergency authority] [P]romulgate the guidelines or amendments provided for under this subsection as soon as practicable in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987,* as though the authority under that Act had not expired.	Number of docs / Increase in Level 6-24 / ~~2~~ **3** 25-99 / ~~4~~ **6** 100 or more / ~~6~~ **9** • Added an upward enhancement for prior convictions: "If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels." In an application note, added that the prior convictions used to support this enhancement are also to be counted for purposes of counting criminal history points under Chapter Four. • Added an application note inviting upward departure "if the offense involved substantially more than 100 documents." **USSG § 2L2.2** • Amended USSG § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or legal Resident Status for their Own Use) to increase the base offense level from 6 to 8. • Added a specific offense characteristic: "If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony

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				Note: Also in section 334(b) of this same Act, *see supra*, Congress directed the Commission to promptly promulgate amendments to implement section 130009 of the Violent Crime Control Act of 1994, which increased penalties for offenses under 18 U.S.C. § 1541-1547, relating to passport and visa fraud. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels." • Added an application note to provide that "[p]rior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History." **Amend. No. 563 (Nov. 1, 1997)** **USSG § 2L2.1** • Amended the newly amended USSG § 2L2.1 to "narrow somewhat the class for cases that would qualify for the reduced offense level" under the provision that allowed for a 3-level decrease "[i]f the defendant committed the offense other than for profit." Instead, a 3-level reduction is authorized "if the offense was committed other than for profit."
43 SD	9/30/96	104-208 Illegal Immigration Reform and	Other Alien smuggling	(1) [P]romulgate sentencing guidelines or amend existing sentencing guidelines for offenders convicted of offenses related to smuggling, transporting, harboring, or inducing aliens in violation of section 274(a)	**Amend. No. 543 (May 1, 1997)** **USSG § 2L1.1** • Amended USSG § 2L1.1 (Smuggling, Transporting

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		Immigrant Responsibility Act of 1996, sec. 203(e).		(1)(A) or (2) of the Immigration and Nationality Act (8 U.S.C. 1324(a)(1)(A), (2)(B)) in accordance with this subsection. (2) In carrying out this subsection, the Commission shall, with respect to the offenses described in paragraph (1)— (A) increase the base offense level for such offenses at least 3 offense levels above the applicable level in effect on the date of the enactment of this Act; (B) review the sentencing enhancement for the number of aliens involved (U.S.S.G. 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act; (C) impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; (D) impose an additional appropriate sentencing enhancement upon an offender	or Harboring an Alien) to increase the base offense levels from 20 to 23 "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony" and from 9 to 12, otherwise. • Revised the 3-level decrease "if the defendant committed the offense other than for profit" to read as follows: "If (A) the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(2) [no prior conviction under 8 U.S.C. § 1327 for deportation after conviction for aggravated felony], decrease by 3 levels." • In the commentary, revised the meaning of "other than for profit. Previously, "for profit" was defined as "financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation." *See* USSG § 2L1.1 (1996). As amended, "other than for profit" means "there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens." Also deleted the application note providing that a mitigating role adjustment under § 3B1.2 does not apply to a defendant who "commits the offense solely in return for his own entry or

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				with 2 or more prior felony convictions arising out of separate and prior prosecutions for offenses that involved the same or similar underling conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; (E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection— (i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual; (ii) uses or brandishes a firearm or other dangerous weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury; (F) consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child; and (G) consider whether any other aggravating or mitigating circumstances	transportation." As the note had previously explained, the 3-level reduction under § 2L1.1 for committing the offense "other than for profit" applied to such a defendant. This would no longer be the case. • Increased the enhancements based on number of unlawful aliens smuggled, transported, or harbored as follows: Number of aliens — Increase in Level 6-24 — ~~2~~ **3** 25-99 — ~~4~~ **6** 100 or more — ~~6~~ **9** • Deleted the minimum offense level of 8 "if the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense." Replaced it with a new provision: "If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels." In commentary, added that "[p]rior felony conviction(s) resulting in [this] adjustment . . . are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History)."

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				warrant upward or downward sentencing adjustments. (3) [Emergency Authority] [P]romulgate the guidelines or amendments provided for under this subsection as soon as practicable in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987,* as though the authority under that Act had not expired. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	• Added an upward enhancement if a firearm was discharged (add 6, minimum offense level of 22); if a firearm was brandished or otherwise used (add 4, minimum offense level of 20), or if a dangerous weapon (including a firearm) was possessed (add 2, minimum offense level of 18). • Added an upward enhancement "if the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person" (add 2, minimum offense level of 18). Illustrated "reckless conduct" in commentary, and provided that this adjustment does not apply if the defendant received an enhancement for a firearm or other dangerous weapon. • Added increases in the offense level for degree of bodily injury, from 2 (bodily injury), 4 (serious bodily injury), 6 (permanent or life threatening bodily injury) to 8 (death). • Added a cross reference to the murder guidelines in Chapter 1 "[i]f any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States."
44 SD	10/03/96	104-237 Comprehensive	Drug Methampheta	(a) Section 403(d) of the Controlled Substances Act (21 U.S.C. 843(d)) is amended—	**Amend. No. 558 (Nov. 1, 1997)** **USSG § 2D1.12**

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		Methamphetamine Control Act of 1996, sec. 203(a)-(b).	mine	. . . (2) by adding at the end the following: "(2) Any person who, with the intent to manufacture or to facilitate the manufacture of methamphetamine, violates paragraph (6) or (7) of subsection (a), shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $ 30,000, or both; except that if any person commits such a violation after one or more prior convictions of that person-- "(A) for a violation of paragraph (6) or (7) of subsection (a); "(B) for a felony under any other provision of this subchapter or subchapter II of this chapter; or "(C) under any other law of the United States or any State relating to controlled substances or listed chemicals, has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $ 60,000, or both.". (b) [The Sentencing Commission shall] amend the sentencing guidelines to ensure that the manufacture of methamphetamine in violation of section 403(d)(2) of the	• Amended § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) to add a specific offense characteristic: If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited equipment was to be used to manufacture methamphetamine, increase by 2 levels. • Reason for Amendment: "This amendment implements [this] directive . . . to ensure that possession of equipment used to make methamphetamine is treated as a significant violation."

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				Controlled Substances Act, as added by subsection (a), is treated as a significant violation.	
45 GD	10/03/96	104-237 Comprehensive Methamphetamine Control Act of 1996, sec. 303.	Drug Dangerous handling	(a) [D]etermine whether the Sentencing Guidelines adequately punish the offenses described in subsection (b) and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense. (b) Offense.—The offense referred to in subsection (a) is a violation of section 401(d), 401(g)(1), 403(a)(6), or 403(a)(7) of the Controlled Substances Act (21 U.S.C. 841(d), 841(g)(1), 843(a)(6), and 843(a)(7)), in cases in which in the commission of the offense the defendant violated— (1) subsection (d) or (e) of section 3008 of the Solid Waste Disposal Act (relating to handling hazardous waste in a manner inconsistent with Federal or applicable State law); (2) section 103(b) of the Comprehensive Environmental Response, Compensation and Liability Act (relating to failure to notify as to the release of a reportable quantity of a hazardous substance into the environment);	**Amend. No. 555 (Nov. 1, 1997)** **USSG § 2D1.1** • Amended USSG § 2D1.1 to provide for a two-level upward adjustment "if the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste." • In an application note, provided that the enhancement applies "if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6938(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b)." • Invited upward departure in cases where "the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law

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				(3) section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act (relating to the unlawful discharge of pollutants or hazardous substances, the operation of a source in violation of a pretreatment standard, and the failure to notify as to the release of a reportable quantity of a hazardous substance into the water); or (4) section 5124 of title 49, United States Code (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material).	enforcement and cleanup personnel). • Also in commentary, added that "any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of supervision . . . ." • Note that Congress did not direct the Commission to amend the guidelines for offenses under § 841(a) (sentenced under §2D1.1). Yet, the Commission explained that this amendment was "in response to the directive in section 303 of the Act . . . , [providing] an enhancement of two levels, with an invited upward departure in more extreme cases, for environmental violations occurring in association with an illicit manufacturing or other drug trafficking offense." The Commission otherwise provided no independent analysis or empirical study of the incidence or harm created by such uncharged conduct, nor did it discuss the constitutionality of punishment for uncharged conduct, or whether sentences for these offenses were inadequate. • Later further explained, in amending §§ 2D1.11 and 2D1.12 in similar fashion in 2000, that "[a]lthough the directive did not address manufacturing offenses under 21 U.S.C. § 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. § 994(a) to

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					ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly." *See* Amend. No. 605, *infra*.
46 SD	10/03/96	104-237 Comprehensive Methamphetamine Control Act of 1996, sec. 301.	Drug Methamphetamine	(a) [R]eview and amend its guidelines and its policy statements to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine, and other similar offenses, including unlawful possession with intent to commit any of those offenses, and attempt and conspiracy to commit any of those offenses. The Commission shall submit to Congress explanations therefor and any additional policy recommendations for combating methamphetamine offenses. (b) In General.—In carrying out this section, the Commission shall ensure that the sentencing guidelines and policy statements for offenders convicted of offenses described in subsection (a) and any recommendations submitted under such subsection reflect the heinous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine, including— (1) the rapidly growing incidence of methamphetamine abuse and the threat to	**Amend. No. 555 (Nov. 1, 1997)** **USSG § 2D1.1** • Increased penalties for methamphetamine drug trafficking offenses by reducing by one-half the quantity of a mixture or substance containing methamphetamine. As a result, the quantity of methamphetamine mixture needed to trigger a guideline range corresponding to the statutory mandatory minimum sentences was 50 grams for five years (compared to 100 grams under the statute) and 500 grams for ten years (compared to 1000 grams in the statute). Through this amendment, guideline penalties for methamphetamine mixtures stood as the single exception to the guideline structure for drug offenses, which otherwise anchored guideline ranges to the mandatory minimum penalties. • The Commission did **not** increase penalties for methamphetamine (actual) or "Ice" methamphetamine. The Commission explained that it decided on these particular amendments after careful analysis of recent sentencing data, including its own intensive study of

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				public safety such abuse poses; (2) the high risk of methamphetamine addiction; (3) the increased risk of violence associated with methamphetamine trafficking and abuse; and (4) the recent increase in the illegal importation of methamphetamine and precursor chemicals.	methamphetamine offenses, information provided by the Strategic Intelligence Section of the Drug Enforcement Administration concerning recent methamphetamine trafficking levels, dosage unit size, price, and drug quantity, and a variety of other information. • The Commission's later report on methamphetamine offenses provides a more detailed background and context for the above amendment, and analyzes whether it should likewise increase the guideline penalties for methamphetamine (actual) and "Ice" to comport with statutory increases in the penalties for methamphetamine offenses that ("coincidentally") aligned with this amendment. *See* USSC, *Methamphetamine - Final Report of the Methamphetamine Policy Team*, at 10-12, 17-18 (Nov. 1999) (final report of the Methamphetamine Policy Team regarding implementation of the Methamphetamine Trafficking Penalty Enhancement Act of 1998), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/SCAC_Executive_Summary.htm. **Amend. No. 594 (Nov. 1, 2000)**

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					• The Commission ultimately "conform[ed] the methamphetamine (actual) penalties .. . to the more stringent mandatory minimums established by the Act." In taking this action, the Commission follows the approach set forth in the original guidelines for the other principle controlled substances for which mandatory minimum penalties have been established by Congress. *Id.* In its report, the Commission suggested that its later action was politically motivated, and that Congress lowered the quantities triggering the mandatory minimums because this amendment, Amend. No. 555, had been inadequate: The Commission is not required by the legislation to amend the guidelines. Should no action be taken, the mandatory minimums established by Congress will trump the guidelines at sentencing but the impact of the Congressional increase will not be felt throughout the remainder of the Drug Quantity Table. A sentencing "benefit" to an offender of a decision to make no change in the guidelines would occur but would be limited to meth-actual and Ice offenders who are not exposed to a mandatory minimum sentence or who have drug quantities sufficiently above the

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					minimum thresholds that the sentence exceeds the revised statutory minimum. However, un-linking the Drug Quantity Table from the mandatory minimum quantities established by Congress in a manner that reduces sentences would vary from past practice of the Commission and may prove politically unwise. *See Methamphetamine Report*, supra, at 18 & n.50.
47 SD	10/03/96	104-237 Comprehensive Methamphetamine Control Act of 1996, sec. 302.	Drug List I chemicals	(1) In general.—The United States Sentencing Commission shall, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987,* as though the authority of that section had not expired, amend the sentencing guidelines to increase by at least two levels the offense level for offenses involving list I chemicals under— (A) section 401(d) (1) and (2) of the Controlled Substances Act (21 U.S.C 841(d) (1) and (2)); and (B) section 1010(d) (1) and (3) of the Controlled Substance Import and Export Act (21 U.S.C. 960(d) (1) and (3)). (2) Requirement.—In carrying out this subsection, the Commission shall ensure that the offense levels for offenses referred to in paragraph (1) are calculated proportionally on	**Amend. No. 557 (Nov. 1, 1997)** **USSG § 2D1.11** • Repromulgated as permanent a temporary amendment effective May 1, 1997 [Amend. No. 541], explained by the Commission as follows: This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996. That section raises the statutory maximum penalties under 21 U.S.C. 841(d) and 960(d) from ten to twenty years' imprisonment. The Act also instructs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. 841(d) (1) and (2) and 960(d) (1) and (3). These offenses involve the possession and importation of listed chemicals knowing, or having reasonable cause to believe, the

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				the basis of the quantity of controlled substance that reasonably could have been manufactured in a clandestine setting using the quantity of the list I chemical possessed, distributed, imported, or exported. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	chemicals will be used to unlawfully manufacture a controlled substance. The Act requires that the offense levels be calculated proportionately on the basis of the quantity of controlled substance that reasonably could be manufactured in a clandestine setting using the quantity of list I chemical possessed, distributed, imported, or exported. The amendment raises the penalties for list I chemicals by two levels. The top of the Chemical Quantity Table for list I chemicals will now be at level 30. The offense level for list II chemicals remains the same. With the new statutory maximum of 20 years, the guidelines will now be able to better take into account aggravating adjustments such as those for role in the offense. Additionally, the increased statutory maximum will allow for higher sentences for cases convicted under this statute that involve the actual manufacture of a controlled substance. 62 Fed. Reg. 8,487, 8,488 (Feb. 25, 1997).
N/A	10/03/96	104-237 Comprehensive Methamphetamine Control Act of 1996, sec. 303.	Drugs Dangerous handling Environmental damage	[See section 303, set forth above.]	**Amend. No. 605 (Nov. 1, 2000)** **USSG §§ 2D1.11, 2D1.12** • Corrected an omission during its final deliberations in 1997 of the amendments in response to this directive [see Amend. No. 555, *supra*].

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					• Added 2-level SOC to both § 2D1.11 (Unlawfully Distributing, Importing, or Possessing a Listed Chemical) and § 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation of Prohibited Flask, Equipment, Chemical, Product, or Material) if "the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste." • "Although the directive did not address manufacturing offenses under 21 U.S.C. § 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. § 994(a) to ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly." *See* Amend. No. 555, *supra*.
49 GD	10/13/96	104-294 Economic Espionage Act of 1996, sec. 501.	All Use of technology to facilitate criminal conduct	(a) Information.—The Administrative Office of the United States courts shall establish policies and procedures for the inclusion in all presentence reports of information that specifically identifies and describes any use of encryption or scrambling technology that would be relevant to an enhancement under section 3C1.1 (dealing with Obstructing or Impeding the Administration of Justice) of the Sentencing Guidelines or to offense conduct	

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				under the Sentencing Guidelines. (b) Compiling and Report.—The United States Sentencing Commission shall— (1) compile and analyze any information contained in documentation described in subsection (a) relating to the use of encryption or scrambling technology to facilitate or conceal criminal conduct; and (2) based on the information compiled and analyzed under paragraph (1), annually report to the Congress on the nature and extent of the use of encryption or scrambling technology to facilitate or conceal criminal conduct.	
50 GD	10/13/96	104-305 Drug-Induced Rape Prevention and Punishment Act of 1996, sec. 2(b)(3).	Drug Flunitrazepam (Date-rape drug)	(A) [T]he United States Sentencing Commission shall review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam. (B) The United States Sentencing Commission shall submit to the Congress— (i) a summary of its review under subparagraph (A); and (ii) an explanation for any amendment to the sentencing guidelines made under subparagraph (A).	**Amend. No. 556 (Nov. 1, 1997)** **USSG § 2D1.1** • Amended USSG § 2D1.1 to instruct courts to apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) "[i]f the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence) . . . in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined" under § 2D1.1. While the directive instructed the Commission to review only offenses involving flunitrazepam, this amendment covers all

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				(C) In carrying out this paragraph, the United States Sentencing Commission shall ensure that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses.	drugs. • Amended the Drug Quantity Table at USSG § 2D1.1(c) to make penalties for trafficking in flunitrazepam similar to those for trafficking in Schedule I depressants. Also made penalties for simple possession of flunitrazepam the same as those for the simple possession of powder cocaine, LSD, or PCP. The Commission explained that the amendment was designed to "to reflect the serious nature of offenses involving flunitrazepam. This amendment reflects the increases in statutory maximum penalties for offenses involving trafficking and simple possession, respectively, of flunitrazepam." The Commission did not explain the offense levels this amendment assigned to flunitrazepam or provide empirical data to support the penalties. • With respect to the new cross-reference for all offenses under § 841(b)(7) (distributing a controlled substance with intent to commit a crime of violence), the Commission did not provide any particular reason for it or an analysis of such offenses. • In a press release, the Commission described the amendment as follows: The Commission substantially increased penalties for possession and trafficking of flunitrazepam, the so-called "date-rape"

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					drug, and for distributing any controlled substance with the intent to commit a crime of violence. "We believe that using drugs to commit a rape, sexual assault, or other violent crime is among the most serious offenses and must be punished severely," said Judge Richard P. Conaboy, Commission Chairman. http://www.ussc.gov/press/daterape.htm
51 SD	11/19/97	105-101 Veterans' Cemetery Protection Act of 1997	Other National cemeteries	(a) [R]eview and amend the Federal sentencing guidelines to provide a sentencing enhancement of not less than 2 levels for any offense against the property of a national cemetery. (b) In carrying out subsection (a), . . . ensure that the sentences, guidelines, and policy statements for offenders convicted of an offense described in that subsection are— (1) appropriately severe; and (2) reasonably consistent with other relevant directives and with other Federal sentencing guidelines. (c) Definition of National Cemetery.—In this section, the term "national cemetery" means a cemetery—	**Amend. No. 576 (Nov. 1, 1998)** **USSG §§ 2B1.1, 2B1.3, 2K1.4** • Amended USSG § 2B1.1 (Theft) to add a specific offense characteristic: "If the offense involved theft of property from a national cemetery, increase by 2 levels." • Amended § 2B1.3 (Property Damage or Destruction) (now consolidated with § 2B1.1) to add a 2-level increase "[i]f property of a national cemetery was damaged or destroyed." • Amended § 2K1.4 (Arson) to add a special offense characteristic: "If the base offense level is not determined under (a)(4) [2 plus the offense level from § 2B1.1], and the offense occurred on a national cemetery, increase by two levels."

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				(1) in the National Cemetery System established under section 2400 of title 38, United States Code; or (2) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.	• For each guideline, defined "national cemetery" as "a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Sectary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior." • Reason for Amendment: "The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment implements the directive to the Commission in the Veterans' Cemetery Protection Act of 1997 . . . . This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§ 2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). 'National cemetery' is defined in the same way as that term is defined in the statute."
52 GD	12/16/97	105-147 No Electronic Theft (NET) Act, sec. 2(g).	Economic Intellectual property	Under the authority of the Sentencing Reform Act of 1984 (Public Law 98-473; 98 Stat. 1987) and section 21 of the Sentencing Act of 1987 (Public Law 100-182; 101 Stat. 1271; 18 U.S.C. 994 note) (including the authority to amend the sentencing guidelines and policy statements),* the United States Sentencing Commission shall ensure that the applicable	**Amend. No. 590 (May 1, 2000)** *See* Pub. L. 106-160, Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, sec. 3, *infra*.

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				guideline range for a defendant convicted of a crime against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime and to adequately reflect the [following] additional considerations: [E]nsure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	
53 GD	4/24/98	105-172 Wireless Telephone Protection Act, sec. 2(e).	Economic Cloning of wireless telephones	[R]eview and amend the Federal sentencing guidelines and the policy statements of the Commission, if appropriate, to provide an appropriate penalty for offenses involving the cloning of wireless telephones (including offenses involving an attempt or conspiracy to clone a wireless telephone)." [I]n carrying out this subsection, the Commission shall consider [the following	**Amend. No. 596 (Nov. 1, 2000)** **USSG §§ 2B1.1, 2F1.1** • Amended § 2F1.1 (Fraud and Deceit) to provide a two-level enhancement, with a minimum offense level of 12, if the offense involved "the possession or use of any device-making equipment [or] the production or trafficking of any unauthorized access device or counterfeit access device."

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				factors]: (A) the range of conduct covered by the offenses; (B) the existing sentences for the offenses; (C) the extent to which the value of the loss caused by the offenses (as defined in the Federal sentencing guidelines) is an adequate measure for establishing penalties under the Federal sentencing guidelines; (D) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court's authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offenses; (E) the extent to which the Federal sentencing guideline sentences for the offenses have been constrained by statutory maximum penalties; (F) the extent to which Federal sentencing guidelines for the offenses adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; (G) the relationship of Federal sentencing	• Defined "counterfeit access device" as having the meaning given the term in 18 U.S.C. § 1029(e)(2), and adding that the term also includes "a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service." • Defined "device-making equipment" as it is defined in 18 U.S.C. § 1029(e)(6), and adding that the term includes "any hardware or software that has been configured as described in [§ 1029(a)(9), and] a scanning receiver referred to in 18 U.S.C. § 1029(a)(8)." Defined "scanning receiver" as defined by the same statute in subsection (e)(8). • Defined "unauthorized access device" as in 18 U.S.C. § 1029(e)(3). • Explained that "[a]lthough cloned telephones may be possessed and used in connection with a variety of offenses, the Commission determined that the possession or use of a cloned phone does not necessarily increase the seriousness of the under lying offense. However, the Commission decided that offenders who manufacture or distribute cloned telephones are more culpable than offenders who only possess them. Accordingly, the new enhancements at [§ 2F1.1] recognize that such offenders warrant greater punishment. However, to ensure that the guidelines apply consistently to similarly serious conduct regardless of the

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				guidelines for the offenses to the Federal sentencing guidelines for other offenses of comparable seriousness; and (H) any other factor that the Commission considers to be appropriate.	technology employed, this amendment provides for a broader enhancement that applies to the manufacture or distribution of any access device, including a cloned telephone." • Added a minimum loss rule in § 2F1.1 (as in § 2B1.1) that extends to all access devices, not just cloned telephones. Then increased the minimum loss rule from $100 to $500 per access device. Explained that "the Commission's research and data supported increasing the minimum loss amount" to $500, though "the data were insufficient to support using the increased amount in cases that involve only the possession, and not the use, of means of telecommunications access that identify a specific telecommunications instrument or account." For such cases, "the Commission decided the minimum loss amount should be $ 100 per unused means." The Commission's published a working group report setting forth its findings. USSC, *Cellular Telephone Cloning* (2000), http://www.ussc.gov/Research/Working_Group_Reports/Intellectual_Property_and_Tech/20000125_Cell_Phone_Cloning/cloning.PDF
54 SD	6/23/98	105-184 Telemarketing Fraud Prevention Act	Economic Telemarketing (Origins of	(b) (1) [P]romulgate Federal sentencing guidelines or amend existing sentencing guidelines (and policy statements, if appropriate) to provide for substantially increased penalties for persons convicted of	**Amend. No. 587 (Nov. 1, 1998)** **USSG §§ 2B1.1, 2F1.1, 3A1.1** • Explained that this amendment "[i]mplements in a

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		of 1998, sec. 6.	sophisticated means in § 2B1.1).	offenses described in section 2326 of title 18, United States Code, as amended by this Act, in connection with the conduct of telemarketing; and (2) submit to Congress an explanation of each action taken under paragraph (1) and any additional policy recommendations for combating the offenses described in that paragraph. (c) In carrying out this section,— (1) ensure that the guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) and any recommendations submitted thereunder reflect the serious nature of the offenses; (2) provide an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States; (3) provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims described in section 2326(2) of title 18, United States Code, are affected by a fraudulent scheme or schemes;	broader form, the directives" in section 6 of the Act. • Amended USSG § 2F1.1 (Fraud and Deceit) (Now consolidated in § 2B1.1) to build on the amendments to § 2F1.1 in Amend. No. 577. • Defined the specific offense characteristic added there for "mass marketing" to cover telemarketing as well as forms of mass marketing: "a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit." • Broadened the "sophisticated concealment" enhancement to cover not only efforts to conceal, but all "sophisticated means." Defined "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." Provided examples: "[I]n a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means." For the enhancement to apply, the conduct

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				(4) ensure that guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) are reasonably consistent with other relevant statutory directives to the Commission and with other guidelines; (5) account for any aggravating or mitigating circumstances that might justify upward or downward departures; (6) ensure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; and (7) take any other action the Commission considers necessary to carry out this section. (d) Emergency Authority .--The Commission shall promulgate the guidelines or amendments provided for under this subsection as soon as practicable, and in any event not later than 120 days after the date of the enactment of the Telemarketing Fraud Prevention Act of 1998, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that authority had not expired,* except that the Commission shall submit to Congress the emergency guidelines or amendments promulgated under this	must be "significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning." **Note:** This definition of "sophisticated means" drew on the definition of sophisticated means that previously appeared in the tax guidelines, § 2T1.4 and § 2T3.1, before they were changed in 1998 to the narrower "sophisticated concealment" in Amend. No. 577 (and then changed back in 2001 to "sophisticated means" in Amend. No. 617). • Increased the two-level enhancement for vulnerable victims under § 3A1.1 to four levels "if the offense involved a large number of vulnerable victims." • The Commission acknowledged in its Reason for Amendment that the amendment "may apply more broadly than the Act's above-stated directives minimally require." It explained that "the Commission acts consistently with other directives in the Act (*e.g.*, section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (*e.g.*, 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants))."

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				section, and shall set an effective date for those guidelines or amendments not earlier than 30 days after their submission to Congress. **Note:** Defines the term "telemarketing" as having the meaning given that term in 18 U.S.C. § 2326. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	
55 SD	10/30/98	105-314 Protection of Children from Sexual Predators Act of 1998, title V, sec. 506.	Sex crimes Definition of "distribution of pornography"	(1) [R]eview the Federal Sentencing Guidelines relating to the distribution of pornography covered under chapter 110 of title 18, United States Code, relating to the sexual exploitation and other abuse of children; and (2) upon completion of the review under paragraph (1), promulgate such amendments to the Federal Sentencing Guidelines as are necessary to clarify that the term "distribution of pornography" applies to the distribution of pornography--	**Amend. No. 592 (Nov. 1, 2000)** **USSG §§ 2G2.2, 2G3.1** • Modified the enhancement in § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) and § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter), relating to distribution of these materials, to define "distribution" to mean "any act, including production, transportation, and possession with intent to distribute" regardless whether the distribution was related to pecuniary gain.

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				(A) for monetary remuneration; or (B) for a nonpecuniary interest.	**Note:** Before the amendment, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) defined "distribution" to "include[] any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." *See* U.S.S.G. § 2G2.2, app. note 1 (1999). • Provided varying levels of enhancement depending on the purpose and recipient of the distribution. Explains that "these varying levels are intended to respond to increased congressional concerns, as indicated in the legislative history of the Act, that pedophiles, including those who use the Internet, are using child pornographic and obscene material to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity." **Note:** The legislative history recounting these congressional concerns is not otherwise documented. • If the distribution was for pecuniary gain, then "increase by the number of levels from the [loss] table in § 2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but not less than 5 levels." Defined "distribution for pecuniary gain" to mean "distribution for profit." • If the distribution was for "the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels." This was

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					defined as meaning "any transaction including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration." Specified that a "thing of value" is "child pornography material received in exchange for other child pornographic material bartered in consideration for the material received." • Provided a 5-level increase if the offense involved distribution to a minor, and a 7-level increase if the distribution to a minor was intended to "persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct." **USSG §§ 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1, 2G2.2, and 2G3.1** • Defined "prohibited sexual conduct" in new Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse): "(A) any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography." This new definition was also added to §§ 2A3.2, 2A3.3, 2A3.4, 2G1.1, 2G2.2, and 2G3.1. **USSG § 2G2.2, 2G2.2** • Clarified the term "item" for purposes of the two-level enhancement in (b)(2) of § 2G2.4 (possession

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					of child pornography where the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor) to mean that one "item" is "a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic or other storage medium or device." Explained that the amendment "adopts the holding of all circuits that have addressed the matter that a computer file qualifies as an item for purposes of the enhancement." **Note**: Section 2G2.4 was later consolidated with § 2G2.2, *see infra* Amend. No. 664. • Invited upward departure "if the offense involved a large number of visual depictions, . . . regardless of whether subsection (b)(2) applies."
56 SD	10/30/98	105-314 Protection of Children from Sexual Predators Act of 1998, title V, sec. 502.	Sex crimes Transportation	[R]eview and amend the Federal Sentencing Guidelines to provide a sentencing enhancement for offenses under chapter 117 of title 18, United States Code [transportation for illegal sexual activity and related crimes]. [E]nsure that the sentences, guidelines, and policy statements for offenders convicted of offenses described above are appropriately severe and reasonably consistent with other	**Amend. No. 592 (Nov. 1, 2000)** **USSG §§ 2A3.2, 2G1.1** • "Initiated a comprehensive examination" of §§ 2A3.2 (Statutory Rape) and 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). • Provided enhancements for chapter 117 offenses if the offense involved misrepresentation of the

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				relevant directives and with other Federal Sentencing Guidelines. **Note:** The Act increased the statutory maximum penalties for these transportation offenses from ten to fifteen years. *See* Pub. L. 105-314, sec. 103.	identity of a "participant" or a computer, *see infra*. • Provided an additional enhancement in § 2A3.2 and 2G1.1 if "a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct." This was based on "Commission data indicat[ing] that many of the cases sentenced under §2A3.2, directly or via cross reference from § 2G1.1, involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person." Also created "a rebuttable presumption that the offense involved undue influence if a participant was at least 10 years older than the victim. Data reviewed by the Commission suggested that such a presumption is appropriate because persons who are much older than a minor are frequently in a position to manipulate the minor due to increased knowledge, influence, and resources." **Note:** This presumption did not appear in the guideline itself, but was embedded in Note 5. • Defined "participant" as having the meaning given in Application Note of § 3B1.1 (Aggravating Role), which states that "a 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant." • Provided an alternative base offense level of 18 (up

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					from 15) under § 2A3.2 "if the offense involved a violation of chapter 117." Explained that this "more fully implements a directive in the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71," which directed the Commission to amend the sentencing guidelines to increase the base offense level for an offense under section 2423(a) of title 18, United States Code, by at least 3 levels." **Note:** For a description of the previous amendments in response to that directive, which included a 3-level enhancement added to § 2G1.1 (Promoting Prostitution), *see supra*. • Also provided a 3-level decrease under § 2A3.2 if the defendant receives this higher alternative base offense level but none of certain listed aggravating conduct was involved. Explained that "this reduction recognizes that not all defendants convicted under chapter 117 have necessarily engaged in a more aggravated form of statutory rape conduct." • Defined "victim" under § 2A3.2 to include "an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years." Explained that "this change was made to ensure that offenders who are apprehended in an undercover operation are appropriately punished." • Clarified that the cross reference to § 2A3.1 (Criminal Sexual Abuse) "shall apply" if the

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					offense involved criminal sexual abuse as defined by § 2241 or § 2242, if the victim had not attained the age of 12 years, "regardless of the 'consent' of the victim." Explains that "Commission data" indicated that the cross-reference was not being applied in many cases "in which the conduct suggests it should." The Commission provided no further details provided regarding this data. **Amend. No. 615 (Nov. 1, 2001)** **USSG § 2A3.2** • Increased the offense levels in § 2A3.2 (Statutory Rape), for offenses involving a violation of chapter 117, distinguishing between offenses that involved a sexual act or sexual contact and those that did not. The base offense level is increased from 18 to 24 for offenses involving a sexual act or sexual contact, 21 for offense that did not involve a sexual act or sexual contact. • Also provided a three-level increase in the base offense level (from 15 to 18) for other offenses sentenced under § 2A3.2, such as statutory rape unaccompanied by any aggravating conduct. Explained that "the amendment reflects the seriousness accorded criminal sexual abuse offenses by Congress, which provided the statutory maximum penalties of 15 years' imprisonment (or 30 years' imprisonment with a prior conviction for

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					a sex crime)." Explained also that "this increase also maintains the proportionality between §§ 2A3.2 and 2G2.2 [trafficking in child pornography]." **Note:** In effect, the decrease in the base offense level to level 15 when there was no aggravating conduct, *see supra*, Amend. No. 592, was short-lived.
57 GD	10/30/98	105-314 Protection of Children from Sexual Predators Act of 1998, title V, sec. 507.	All crimes Consistency	[I]n carrying out the directives in title V of the Protection of Children from Sexual Predators Act of 1998: (1) with respect to any action relating to the Federal Sentencing Guidelines subject to this title, ensure reasonable consistency with other guidelines of the Federal Sentencing Guidelines; and (2) with respect to an offense subject to the Federal Sentencing Guidelines, avoid duplicative punishment under the Federal Sentencing Guidelines for substantially the same offense.	
58 SD	10/30/98	105-314 Protection of Children from Sexual Predators Act of 1998, sec. 504.	Sex crimes Misrepresentation of identity	(1) [R]eview the Federal Sentencing Guidelines on aggravated sexual abuse under section 2241 of title 18, United States Code, sexual abuse under section 2242 of title 18, United States Code, sexual abuse of a minor or ward under section 2243 of title 18, United States Code, coercion and enticement of a minor under section 2422(b) of title 18,	**Amend. No. 592 (Nov. 1. 2000)** **USSG §§ 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1** • Provided a cumulative two-level enhancement in §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal

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				United States Code, contacting a minor under section 2422(c) of title 18, United States Code, and transportation of minors and travel under section 2423 of title 18, United States Code; and (2) upon completion of the review under paragraph (1), promulgate amendments to the Federal Sentencing Guidelines to provide appropriate enhancement if the defendant knowingly misrepresented the actual identity of the defendant with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the applicable provision of law referred to in paragraph (1) to engage in a prohibited sexual activity.	Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), and in §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) if the offense involved the "knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct." Explained that the Commission "has determined that, for offenses sentenced under these guidelines, the use of a computer or Internet-access device and the misrepresentation of identity represent separate, additional harms and increase the culpability of a defendant or criminal participant who engages, or attempts to engage, in such conduct." **Note:** None of the statutes listed in the directive is covered by § 2G1.1. • Provided the same two-level enhancement under § 2A3.1 (Criminal Sexual Abuse) and § 2G2.1, but it is not cumulative. Explained that "in these guidelines, the substantially higher base offense level and other specific offense characteristics provide alternative guideline mechanisms to account, at least in part, for these harms and the defendant's increased culpability. Accordingly, the Commission determined that, in these guidelines, a single, two-level increase for the use of a computer or misrepresentation adequately addresses the increased seriousness of these offenses."

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					• Defined "participant" as having the meaning given in Application Note of § 3B1.1 (Aggravating Role), which states that "a 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant." • **Note:** The directive instructs the Commission to include an enhancement for misrepresentation if the "*defendant* knowingly misrepresented the actual identity of the *defendant* with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child." The amendment is broader in that the enhancement applies only if the offense "involved" misrepresentation of the identity of any participant.
59 SD	10/30/98	105-314 Protection of Children from Sexual Predators Act of 1998, sec. 503.	Sex crimes Use of computer	(1) [R]eview the Federal Sentencing Guidelines for-- (A) aggravated sexual abuse under section 2241 of title 18, United States Code; (B) sexual abuse under section 2242 of title 18, United States Code; (C) sexual abuse of a minor or ward under	**Amend. No. 592 (Nov. 1, 2000)** **USSG §§ 2A3.1, 2A3.2, 2A3.4, 2G1.1, 2G2.1** • Amended §§ 2A3.2 (Statutory Rape), 2A3.4 (Abusive Sexual Contact), and 2G1.1 (Promoting Prostitution or Prohibited Sexual Contact) to provide a two-level enhancement (cumulative to the new enhancement for misrepresentation of identity, *see supra*) "[i]f a computer or an Internet-

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				section 2243 of title 18, United States Code; and (D) coercion and enticement of a minor under section 2422(b) of title 18, United States Code, contacting a minor under section 2422(c) of title 18, United States Code, and transportation of minors and travel under section 2423 of title 18, United States Code; and (2) upon completion of the review under paragraph (1), promulgate amendments to the Federal Sentencing Guidelines to provide appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the applicable provision of law referred to in paragraph (1) to engage in any prohibited sexual activity.	access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct." Explained that "the Commission has determined that, for offenses sentenced under these guidelines, the use of a computer or Internet-access device and the misrepresentation of identity represent separate, additional harms and increase the culpability of a defendant or criminal participant who engages, or attempts to engage, in such conduct." • Amended §§ 2A3.1 (Criminal Sexual Abuse) and 2G2.1 (Sexually Exploiting A Minor by Production of Sexually Explicit Visual or Printed Material) to provide an alternative two-level enhancement if "a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant." [**Note:** Section 2G2.1 does not apply to convictions under the statutes referred to in the directive. In addition, the Commission implemented this directive far more broadly than required.] Explained that the amendment is not cumulative to the misrepresentation of identity enhancement, as it is for the three others listed above, because "in these guidelines, the substantially higher base offense levels and other specific offense characteristics provide alternative guideline mechanisms to account, at least in part,

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					for these harms and the defendant's increased culpability. Accordingly, the Commission determined that, in these guidelines, a single, two-level increase for the use of a computer or misrepresentation adequately addresses the increased seriousness of these offenses." • Stated that "[t]he legislative history of the Act indicates congressional intent to ensure that persons who misrepresent themselves to a minor, or use computers or Internet-access devices to locate and gain access to a minor, are severely punished." The Commission did not otherwise provide details or sources for this history. • Defined "participant" as having the meaning given in Application Note of § 3B1.1 (Aggravating Role), which states that "a 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant." • **Note:** The directive only refers to an enhancement when the "defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child." Again, the amendment is far broader than the directive.
60	10/30/98	105-314	Sex crimes	(1) [R]eview the Federal Sentencing Guidelines on aggravated sexual abuse under	**Amend. No. 615 (Nov. 1, 2001)**

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SD		Protection of Children from Sexual Predators Act of 1998, sec. 505.	Pattern of activity	[18 U.S.C. § 2241], sexual abuse under [18 U.S.C. § 2242], sexual abuse of a minor or ward under [18 U.S.C. § 2243], coercion and enticement of a minor under [18 U.S.C. § 2422(b)], contacting a minor under [18 U.S.C. § 2422(c)], and transportation of minors and travel under [18 U.S.C. § 2423]; and (2) upon completion of the review under paragraph (1), promulgate amendments to the Federal Sentencing Guidelines to increase penalties applicable to the offenses referred to in paragraph (1) in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."	**USSG §§ 4B1.5, 5D1.2** • Created a new guideline, § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), designed to work "in a coordinated manner with § 4B1.1 (Career Offender) and created "a tiered approach to punishing repeat child sex offenders." • First, provided a special table for offenders whose instant offense is a "covered sex offense" and has "at least one" prior felony conviction for a "sex offense conviction" involving a minor, but the career offender guideline does not apply. Like the career offender guideline, the table bases the applicable offense level on the statutory maximum and subjects the defendant to an enhanced criminal history category, in this case not less than Category V. **Note:** Congress did not define "pattern of activity." Also, the career offender provision requires at least *two* prior triggering convictions. • Defined "covered sex offense" for purposes of determining whether the defendant may be subject to the enhanced penalties in the special table, and does so more broadly than the directive requires. The directive is aimed at six specific listed offenses, whereas the guideline is aimed at *any* offense, perpetrated against a minor under all of chapters 109A, 110 (except "trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense), and 117 (except "transmitting information about a minor or filing a

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					factual statement about an alien individual). • Defined "sex offense conviction" for purposes of determining whether the defendant has a triggering prior felony as "any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor, except trafficking in, receipt of, or possession of child pornography." In turn, § 2426(b)(1)(A) and (B) describe offenses under chapter 109A, 110, and 117, or "under State law [] an offense consisting of conduct that would have been an offense" under those chapters "if the conduct had occurred within the special maritime and territorial jurisdiction of the United States" • **Note:** Although Congress did direct the Commission "increase penalties" it did not instruct the Commission to ensure that sentences for repeat sex offenses against minors are at or near the maximum, as it did with for career offenders in 28 U.S.C. § 994(h). The Commission did not explain its reasoning for this new provision except to say that it "effectuates the Commission's and Congress's intent to punish repeat child sex offenders severely." • As an alternative to the enhancement based on a prior conviction, provided a five-level increase for those whose instant offense is a "covered sex offense" (again, a category broader than the congressional directive requires) and who "engaged in a pattern of activity involving prohibited sexual

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					conduct" involving minors. No prior conviction is required. Defined "prohibited sexual conduct" and "pattern of activity" to include some child pornography offenses (production and repeat trafficking). Explained that this enhancement is similar to the enhancement for pattern of activity in child pornography cases in § 2G2.2 and "effectuates the Commission's and Congress's intent to punish more severely offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors." • As part of the amendment addressing this directive, modified § 5D1.2 (Term of Supervised Release) to provide that "if the instant offense is a sex offense, the statutory maximum term of supervised release is recommended." Also amended § 5B1.3 (Conditions of Probation) and § 5D1.3 (Conditions of Supervised Release) to recommend a condition "requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders." Explained that these amendments "effectuate the Commission's intent that offenders who commit sex crimes receive appropriate treatment and monitoring." **Note:** The Commission did not give any more information regarding the foundations of this intent, such as studies indicating that treatment and monitoring further the purposes of sentencing.
61	10/30/98	105-318	Economic	[R]eview and amend the Federal sentencing	**Amend. No. 596 (Nov. 1, 2000)**

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GD		Identity Theft and Assumption Deterrence Act of 1998, sec. 4.	Crimes Identity fraud (and adding new offense of identity theft)	guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate penalty for each offense under section 1028 of title 18 [identity fraud], United States Code, as amended by this Act." [C]onsider, with respect to each offense described in subsection (a)— (1) the extent to which the number of victims (as defined in 18 U.S.C. § 3663A(a)) involved in the offense, including harm to reputation, inconvenience, and other difficulties resulting from the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines; (2) the number of means of identification, identification documents, or false identification documents (as those terms are defined in section 18 U.S.C. §1028(d) as amended by this Act) involved in the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines; (3) the extent to which the value of the loss to any individual caused by the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines; (4) the range of conduct covered by the	**USSG §§ 2B1.1, 2F1.1** • Amended § 2F1.1 (now at § 2B1.1) to include an upward enhancement at (b)(5)(C), with a minimum offense level of 12, specifically directed at "breeding": if the offense involved "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification." • Explained that the enhancement for breeding was based on its research of identity theft, as defined by 18 U.S.C. § 1028, and the legislative history of the Identity Theft and Assumption Deterrence Act. "Identity theft . . . occurs along a continuum of conduct. . . .After analyzing the legislative history of the [Act] and Commission data, the Commission determined that the more aggravated and sophisticated forms of identity theft, about which Congress seemed particularly concerned, should be the focus of enhanced punishment under the guidelines." • Explained that breeding is "considered more sophisticated because of the additional steps the perpetrator takes to 'breed' additional means of identification in order to conceal and continue the

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				offense; (5) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court's authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense; (6) the extent to which Federal sentencing guidelines sentences for the offense have been constrained by statutory maximum penalties; (7) the extent to which Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; and (8) any other factor that the United States Sentencing Commission considers to be appropriate.	fraudulent conduct." [**Note:** Consider whether this reason suggests that the enhancement for "sophisticated means" should not apply if the breeding enhancement applies, as it is essentially double-counting.] Also explained that the minimum offense level of 12 "accounts for the non-monetary harm associated with identity theft (*e.g.* harm to reputation or credit rating, which typically are difficult to quantify." [**Note**: The enhancement thus presumes such harm, which does not always occur. The minimum offense level should not apply in those cases in which victim does not experience harm to credit rating or harm to reputation.] • Provided an encouraged upward departure in cases "in which the nature and scope of the harm to an individual victim is so egregious that the two-level enhancement and minimum offense level provide insufficient punishment."
62 --	12/09/99	106-160 Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, sec. 3.	Economic Crimes Intellectual property	[P]romulgate emergency guideline amendments to implement section 2(g) of the No Electronic Theft (NET) Act. **Note:** Section 2(g) of the No Electronic Theft Act, Pub. L. 105-147, directs the Commission to "ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property (including offenses set	**Amend. No. 590 (May 1, 2000)** **USSG § 2B5.3** • Struck § 2B5.3 (Criminal Infringement of Copyright or Trademark) in its entirety. That guideline set the base offense level at 6 and included one special offense characteristic providing for an increase corresponding to the loss table in former § 2F1.1 (Fraud and Deceit) "if the

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				forth at section 506(a) of title 17 [willful infringement of copyrighted work], United States Code, and sections 2319 [criminal infringement], 2319A [trafficking in unauthorized sound recordings and videos of live performances], and 2320 [trafficking in counterfeit goods] of title 18, United States Code) is sufficiently stringent to deter such a crime and to adequately reflect and provide for the retail value and quantity of the items with respect to which the crime against intellectual property was committed." Emergency authority: [I]n accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	retail value of the infringing items exceeded $2000." • In order to "respond[] to the directive" and provide "just and proportionate punishment while also seeking to achieve sufficient deterrence," replaced § 2B5.3 with the following (which does not appear in the Reason for Amendment): **§ 2B5.3 Criminal Infringement of Copyright or Trademark** (a) Base Offense Level: 8 (b) Specific Offense Characteristics (1) If the infringement amount exceeded $2,000, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to that amount. (2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12. (3) If the offense was not committed for commercial advantage or private financial gain, decrease by 2 levels, but the resulting offense level shall be not less than level 8. (4) If the offense involved (A) the conscious or

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					reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13. The amendment does the following: • Increased the base offense level from 6 to 8 to "bring[] the infringement guideline more in line with offense levels that would pertain under the fraud guideline, § 2F1.1, assuming applicability under that guideline of the two-level enhancement for more than minimal planning." Explained that, based on a review of cases sentenced under the infringement guideline, "the vast majority" of them involve "this kind of aggravating conduct." As a result, it was categorically incorporated into the base offense level, suggesting a good argument against the base offense level in a case that does not involve more than minimal planning. • Defined "infringement amount" as a general matter as "the retail value of the infringed item, multiplied by the number of infringing items." This was a significant change from the former guideline, by which the monetary calculation of pecuniary harm was on the retail value of the *infringing* item, not the item *infringed*. The Commission explained that "[u]se of that calculation is believed to provide a reasonable approximation for those classes of infringement cases in which it is highly likely that

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					the sale of an infringing item results in a displaced sale of the legitimate, infringed item. The Commission did not provide a statistical or empirical basis for this conclusion. • In fact, based on a review of cases sentenced under § 2B5.3 over two years, recognized that the new formulation of "infringement amount" will "overstate substantially" the pecuniary harm in some cases. Accordingly, for those cases in which the likelihood of a displaced sale is low, then Application Note 2 allows for the harm to be calculated as the retail value of the infringing item, multiplied by the number of items, which the Commission explained "provides a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, the pecuniary harm resulting from the offense." For all practical purposes, this change shifts the burden to the defendant to show that an infringing item did not likely displace a retail sale. • Provided an enhancement of two levels, and a minimum offense level of 12 "if the offense involved the manufacture, importation, or uploading of infringing items." Explained that "[t]he Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, enabling others to infringe the copyright or trademark." Noted that a review of cases indicates

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					that this enhancement will apply in "approximately two-thirds of the cases." • Provided a two-level downward adjustment, but no lower than level 8, "if the offense was not committed for commercial advantage or private financial gain," to "reflect[] the fact that the Act establishes lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain." (The Act provides a maximum of three years imprisonment for a first offense of this type, as compared to a five-year maximum otherwise). • Provided a two-level enhancement, with a minimum level of 13, "if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense." This was based on "testimony received by the Commission indicat[ing] that the conscious or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products." The enhancement is "consistent with an identical provision in the fraud guideline." The Commission did not provide any statistics based on a review of cases for the enhancement for risk of bodily injury or possession of a dangerous weapon. The testimony referred to is available on the Commission's website. *See* http://www.ussc.gov/AGENDAS/3_23_00/test03_00.

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					htm. However, it appears to be anecdotal only. In addition, the enhancement was likely included based on the Department of Justice's desire to "compel" a judge to increase the sentence, rather than provide discretion in the form or an upward departure. Below is some of the testimony received on the topic: Robert M. Kruger, Vice President of Enforcement at the Business Software Alliance (BSA), a trade association: "We have supported the inclusion of a special offense characteristic, such as that presently contained in Option 2 (as presented in both options papers made available to the public), that would increase the offense level where there is a risk of bodily injury to others. Such an adjustment might, for example, come into play where the offenders are using weapons in the course of their activities." David C. Quam General Counsel, International AntiCounterfeiting Coalition: "Health and Safety: Head and Shoulders shampoo and counterfeit-labeled infant formula, which represent serious public health and safety risks, were found in retail stores. Other examples of dangerous counterfeits include food products, pharmaceuticals, children's toys, airplane and automotive parts, and eyewear." Also supported "[i]ncreased levels for offenses involving conscious or reckless risk of serious

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					bodily injury or death. Cases involving products that pose health and safety risks warrant increased punishment." James K. Robinson, Assistant Attorney General, Criminal Division U.S. Department of Justice: "The second problem with Option 4 is its failure to include a specific offense characteristic for offenses that involve a reasonably foreseeable risk to public health or safety. A defendant who sells counterfeit airplane parts that pose such a risk commits a more serious offense than one who sells counterfeit T-shirts. Unlike Option 2, which provides a 2-level increase, Option 4 treats a similar factor (the conscious or reckless risk of serious bodily injury) simply as a basis for upward departure. This treatment is inadequate since it does not compel a judge to provide an adjustment. By contrast, the fraud guideline provides a 2-level increase and a floor of level 13 for offenses that involve the conscious or reckless risk of serious bodily injury. United States Sentencing Commission, Guidelines Manual § 2F1.1(b)(6) (1999). Thus, we recommend that if the Commission adopts Option 4, it include an enhancement for risk as proposed in Option 2." • Provided two encouraged upward departure provisions at Application Note 5: "If the offense level determined under this guideline substantially understates the seriousness of the

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					offense, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure may be warranted: (A) The offense involved substantial harm to the reputation of the copyright or trademark owner. (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise." The Commission explained that this was based on public comment indicating that (1) "infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation" and (2) "some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises." It does not define the relevant terms.
63 SD	10/17/00	106-310 Children's Health Act of 2000, title XXXVI, sec. 3612 [Methamphetamine Anti-Proliferation Act	Drug Crimes Amphetamine or Methamphetamine	[A]mend the Federal sentencing guidelines in accordance with [the requirements set forth below] with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine. In carrying out this directive, [requires the Commission to]:	**Amend. No. 608 (Dec. 16, 2000)** **USSG §§ 2D1.1, 2D1.10** • "Tracked the structure of the directive" to amend §§ 2D1.1 and 2D1.10 to provide a three-level increase and a minimum offense level of 27 if the offense involved the manufacture of amphetamine or methamphetamine and created a "substantial risk of harm" to human life other than a minor or

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		of 2000].		(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense— (i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or (ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or (B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense— (i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or (ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30. [Emergency authority] [P]romulgate amendments pursuant to this subsection as soon as practicable after the date of the enactment of this Act in accordance with the procedure set forth in section 21(a) of the	incompetent (or, for § 2D1.1, to the environment). Also provided a six-level enhancement and a minimum offense level of 30 if the offense created a substantial risk of harm to a minor or incompetent. • Provided commentary "setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm." Explained that it derived these factors not from the statute or directive, which do not define "substantial risk of harm," but from "an analysis of relevant case law that interpreted 'substantial risk of harm.'" The Commission not set forth the relevant case law or any examples. • Defined "incompetent" as "an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility." Explained that this definition was based on "several state statutes," but otherwise did not specify its provenance. • Defined "minor" as having the meaning given the term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse), and means "an individual who had not attained the age of 18 years." • The enhancement was cumulative to the environmental hazard enhancement, *see* Amend.

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				Sentencing Act of 1987 (Public Law 100-182), as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	No. 555, *supra*. **Amend. No. 620 (Nov. 1, 2001)** • Repromulgated the emergency amendment, with modifications, as permanent amendment. • Changed the substantial risk of harm enhancement from cumulative to an alternative to the enhancement for environmental violations. • Provided that the court "shall" (as opposed to "may") consider four factors listed to determine whether the offense created a substantial risk of harm. • Amended the commentary in 2D1.1 to provide that that the court "shall" consider costs of environmental cleanup and harm to individuals and property in cases involving the manufacture of methampetamine and amphetamine, and "should" consider such costs and harms in cases involving the manufacture of any other controlled substance, in determining restitution and in fashioning conditions of probation or supervised release. *See* Amend. 555, *supra*.
64 SD	10/12/00	106-310 Children's Health Act of 2000, title	Drug Crimes Ecstasy	[A]mend the Federal sentencing guidelines regarding any offense relating to the manufacture, importation, or exportation of, or trafficking in –	**Amend. No. 609 (May 1, 2001)** **USSG § 2D1.1** • Amended the Drug Equivalency Table at

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		XXXVI, secs. 3663, 3664 [Ecstasy Anti-Proliferation Act of 2000].		(1) 3,4-methylenedioxy methamphetamine; (2) 3,4-methylenedioxy amphetamine; (3) 3,4-methylenedioxy-N-ethylamphetamine; (4) paramethoxymethamphetamine (PMA); or (5) any other controlled substance, as determined by the Commission in consultation with the Attorney General, that is marketed as Ecstasy and that has either a chemical structure substantially similar to that of 3,4-methylenedioxy methamphetamine or an effect on the central nervous system substantially similar to or greater than that of 3,4-methylenedioxy methamphetamine, including an attempt or conspiracy to commit an offense described in paragraph (1), (2), (3), (4), or (5) in violation of the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. 1901 et seq.). [With respect to each offense described above,] (1) review and amend the Federal	Application Note 10 of § 2D1.1 to "increase substantially the marihuana equivalencies" for the controlled substances identified by the directive. The effect was to "substantially increase[e] the penalties for offenses involving Ecstasy, so that they are "gram for gram, [] more severe than those for powder cocaine." In fact, at 500 grams, the marihuana equivalency for Ecstasy is 2.5 times the rate for powder cocaine. • Explained that "much evidence received by the Commission indicated that Ecstasy: (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults." **Note:** The Commission did not explain in its Reason for Amendment the relative harms of Ecstasy compared to powder cocaine or marihuana, but did so in its Report to Congress, *see infra*. • Rejected a preliminary proposal setting the penalties for Ecstasy at the same level as for heroin (where 1 g of heroin is deemed equivalent to 1000 g of marihuana), "and decided that somewhat lesser penalties were appropriate for Ecstasy for a number of reasons: (1) the potential for addiction is greater with heroin; (2) heroin distribution often involves violence while, at this time, violence is not reported in Ecstasy markets; (3) because it is a narcotic and is often injected, the risk of death from overdose is much greater from heroin; and (4) because heroin is

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				sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of these offenses and the need to deter them; and (2) take any other action the Commission considers to be necessary to carry out this section. [E]nsure that the Federal sentencing guidelines for offenders convicted of offenses described above reflect: (1) the need for aggressive law enforcement action with respect to offenses involving Ecstasy; and (2) the dangers associated with unlawful activity involving such substances, including– (A) the rapidly growing incidence of abuse of Ecstasy and the threat to public safety that such abuse poses; (B) the recent increase in the illegal importation of Ecstasy; (C) the young age at which children are beginning to use Ecstasy; (D) the fact that Ecstasy is frequently marketed to youth;	often injected, there are more secondary health consequences, such as infections and the transmission of the human immunodeficiency virus (HIV) and hepatitis." **Note:** The Commission did not explain in its Reason for Amendment that this decision was the result of voluminous public comment, though it does so in its Report to Congress, *see infra*. • Explained that "[b]ased on information regarding Ecstasy trafficking patterns, the penalty levels chosen are appropriate and sufficient to target serious and high-level traffickers and to provide appropriate punishment, deterrence, and incentives for cooperation." • "Serious traffickers" described as "those whose relevant conduct involved at least 800 pills," and whose offense level corresponds to a five-year sentence of imprisonment. • "High-level traffickers" described as "those whose relevant conduct involved at least 8,000 pills," and whose offense level corresponds to ten year sentence of imprisonment. For more details, see USSC, *Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendments* (May 2001), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200105_RtC_MDMA_Drug_Offenses.PDF.

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				(E) the large number of doses per gram of Ecstasy; and (F) any other factor that the Commission determines to be appropriate. [Expressed] the sense of the Congress that: (1) the base offense levels for Ecstasy are too low, particularly for high-level traffickers, and should be increased, such that they are comparable to penalties for other drugs of abuse; and (2) based on the fact that importation of Ecstasy has surged in the past few years, the traffickers are targeting the Nation's youth, and the use of Ecstasy among youth in the United States is increasing even as other drug use among this population appears to be leveling off, the base offense levels for importing and trafficking the controlled substances described in subsection (a) should be increased. [N]ot later than 60 days after the amendments pursuant to this section have been promulgated, . . . prepare and submit to listed congressional committees a report describing the factors and information considered by the Commission in promulgating amendments	This report also contains an interesting description at pp. 3-4 of the Commission's activities and decision to publish a proposed amendment for public comment, even though it was not required to pursuant to the emergency authority: • "Immediately upon enactment of the Act, the Commission began reviewing the available scientific and popular literature on MDMA, engaging the Department of Justice through its *ex officio* Commissioner and his staff, and soliciting the input of interested agencies. The Commission invited representatives of the Drug Enforcement Agency to describe to the Commission the trafficking pattern of MDMA and the challenges faced by law enforcement. The Commission also invited representatives of the National Institute on Drug Abuse (NIDA) hazards associated with MDMA abuse." *Id.* at 3-4. • "The Commission also went to great lengths to solicit and properly consider public input. The Commission promulgated a temporary amendment pursuant to a special statutory grant of emergency amendment authority, which exempts the agency from its usual notice and comment requirements for purposes of the temporary amendment (although not for the subsequent permanent amendment). Nevertheless, *because the Commission values public input, the Commission traditionally attempts to solicit public comment*, even when not required

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				pursuant to this section Emergency authority: [Promulgate these amendments] as soon as practicable after the date of the enactment of this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (Public Law 100-182), as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	to do so. Accordingly, the Commission published a preliminary proposal with issues for comment in the Federal Register on January 26, 2001. This preliminary proposal would have set the penalties for MDMA trafficking equal to the penalties for heroin trafficking." *Id.* at 4 (emphasis added). • "The Commission chose a greater penalty structure for MDMA trafficking than for powder cocaine trafficking because (1) unlike MDMA, powder cocaine is not neurotoxic, (2) powder cocaine is not aggressively marketed to youth in the same manner as MDMA, and (3) powder cocaine is only a stimulant, but MDMA acts as both a stimulant and a hallucinogen. . . .The Commission believes a marijuana equivalency of 500 grams reflects the unique pharmacological and physiological harms of ecstasy, the fact that the drug is aggressively marketed to and used by our youth, and its importation and trafficking pattern." *Id.* at 5.
65 SD	10/17/00	106-310 The Children's Health Act of 2000, title XXXVI, sec. 3611 [Methamphetamine Anti-Proliferation Act	Drug Crimes Amphetamine	[A]mend [the guidelines] in accordance with this section with respect to any offense relating to the manufacture, importation, exportation, or trafficking in amphetamine (including an attempt or conspiracy to do any of the foregoing). In carrying out this directive and with respect to each offense described in subsection (a) relating to amphetamine []:	**Amend. No. 610 (May 1, 2001)** **USSG § 2D1.1** • Revised § 2D1.1 to include amphetamine in the Drug Quantity Table with a 1:1 ratio to methamphetamine. The ratio was chosen "because of the similarities of the two substances": "[A]mphetamine and methamphetamine (1) chemically are similar; (2) are produced by a

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		of 2000].		(1) review and amend its guidelines to provide for increased penalties such that those penalties are comparable to the base offense level for methamphetamine; and (2) take any other action the Commission considers necessary to carry out this subsection. [E]nsure that the sentencing guidelines for offenders convicted of offenses described above reflect the heinous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving amphetamines, including – (1) the rapidly growing incidence of amphetamine abuse and the threat to public safety that such abuse poses; (2) the high risk of amphetamine addiction; (3) the increased risk of violence associated with amphetamine trafficking and abuse; and (4) the recent increase in the illegal importation of amphetamine and precursor chemicals. Emergency authority: [Promulgate these	similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects." • Distinguished between pure amphetamine and amphetamine mixture in the same manner as pure and mixed methamphethamine. • Explained that the "amendment reflects the view that the 1:1 ratio is appropriate given the seriousness of these two controlled substances." **Amend. No. 622 (Nov. 1, 2001)** • Repromulgated as permanent the emergency amendment above, with some modifications. • Amended § 2D1.1 to make the enhancement for importation of methamphetamine applicable to amphetamine offenses as well.

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				amendments] as soon as practicable after the date of the enactment of this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (Public Law 100-182), as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	
66 SD	10/17/00	106-310 Children's Health Act of 2000, title XXXVI, sec. 3651 [Methamphetamine Anti-Proliferation Act of 2000].	Drug Crimes List I Chemicals	[A]mend the guidelines for offenses involving List I chemicals with respect to any violation of paragraph (1) or (2) of section 401(d) of the Controlled Substances Act (21 U.S.C. 841(d) [**Note:** Probably should read 21 U.S.C. § 841*(c)*, relating to offenses involving listed chemicals] and any violation of paragraph (1) or (3) of section 1010(d) of the Controlled Substance Import and Export Act (21 U.S.C. 960(d)). [W]ith respect to each offense described above involving ephedrine, phenylpropanolamine, or pseudoephedrine (including their salts, optical isomers, and salts of optical isomers), review and amend its guidelines to provide for increased penalties	**Amend. No. 611 (May 1, 2001)** **USSG §§ 2D1.1, 2D1.11** • Created a new chemical quantity table specifically for ephedrine, pseudoephedrine, and aphenylpropanolamine (PPA), tying the base offense levels to the base offense level for methamphetamine (actual) assuming a 50 percent yield. Assumed yield is "based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent." Also provided a maximum offense level of 38 (as opposed to 30 for other precursor chemicals) to "compl[y] with the directive to establish penalties for these precursors that 'correspond to the quantity

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				such that those penalties corresponded to the quantity of controlled substance that could reasonably have been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed. [For purposes of amending the guidelines to increase penalties for possession or distribution of ephedrine, phenylpropanolamine, or pseudoephedrine,] "establish a table of manufacturing conversion ratios for determining the quantity of controlled substance that could reasonably have been manufactured, which must be based on scientific, law enforcement, and other data the Sentencing Commission considers appropriate. [With respect to each offense described above involving any list I chemical other than ephedrine, phenylpropanolamine, or pseudoephedrine,] review and amend its guidelines to provide for increased penalties such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine, including – (1) the rapidly growing incidence of	of controlled substance that could have reasonably been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed.'" In addition, for offenses involving these three precursors, eliminated the 6-level distinction between offenses involving intent to manufacture methamphetamine and attempt to manufacture methamphetamine. • Eliminated the Ephedrine Equivalency Table in § 2D1.11 to provide instead "an instruction for the court to determine the base offense level in cases involving multiple precursors (other than ephedrine, pseudoephedrine, or PPA) by using the quantity of the single chemical resulting in the greatest offense level. Also provided for an upward departure when "the offense level does not adequately address the seriousness of the offense." • Provided an exception for the three primary precursors, so that where two or more of these chemicals are involved, the offense level is determined by using the total quantity of these chemicals involved. This exception was based on "studies conducted by the DEA indicat[ing] that because the manufacturing process for amphetamine and methamphetamine is identical, there are cases in which the different precursors are included in the same batch of drugs." • Added a conversion table at § 2D1.1 for the three primary precursor chemicals providing for a 50%

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				controlled substance manufacturing; (2) the extreme danger inherent in manufacturing controlled substances; (3) the threat to public safety posed by manufacturing controlled substances; and (4) the recent increase in the importation, possession, and distribution of list I chemicals for the purpose of manufacturing controlled substances. Emergency amendment authority: [Promulgate these amendments] as soon as practicable after the date of the enactment of this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (Public Law 100-182), as though the authority under that Act had not expired.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	conversion ratio, "based on data from the DEA that the actual yield from ephedrine, pseudoephedrine, or PPA typically is in the range of 50 to 75 percent." • Increased the base offense level for the five other precursor chemicals, tying them to an assumed 50 percent yield of methamphetamine (actual) and retaining the cap at level 30. This represented a change from their previous link to penalties to methamphetamine (mixture) and a significant increase in offense levels. Explained that the change was based on studies "conducted by the DEA" that indicate that "[t]he manufacture of methamphetamine or amphetamine from the five additional List I chemicals is a more complex process which requires a heightened level of expertise." For example, before the amendment, an offense involving between 107 grams and 142 grams of Benzaldehyde was assigned a base offense level of 16. After the amendment, only 5.3 grams will trigger a base offense level of 16, and 142 grams gets a base offense level of 26. *United States v. Martin*, 438 F.3d 621 (6th Cir. 2006) (finding that the USSC was required to follow the statute's directive to use scientific data in establishing a conversion ratio for pseudophedrine to meth, but the defendant had failed to show that it did not do so). **Amend. No. 625 (Nov. 1, 2001)** **USSG § 2D1.1, 2D1.11**

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					• Repromulgated the emergency amendments promulgated with Amend. No. 611, *supra*. • Added to the emergency amendments to amend the Chemical Quantity Table at 2D1.11 to include gamma-butyrolactone (GBL), a precursor for gamma hydroxybotyric acid (GHB), as a List I chemical. "This change is in response to the Hillory J. Farias and Samantha Reid Date Rape Prohibition Act of 2000, Pub. L. 106-172, which added GBL to the list of List I chemicals." • Added iodine to the Chemical Quantity Table in § 2D1.11(e) "in response to a recent classification of iodine as a List II chemical." Explained that "[i]iodine is used to produce hydrogen iodide, which, in the presence of water, becomes hydriodic acid, a List I chemical that is a reagent used in the production of amphetamine and methamphetamine. The penalties for iodine were established based upon its conversion to hydriodic acid."
67 GD	10/28/00	106-386 Victims of Trafficking and Violence Prevention Act of 2000, sec. 1107(b)(2) [Violence Against Women	Other Crimes Interstate stalking by mail	[A]mend the guidelines to reflect amendments made in [sec. 1107(b)]. [**Note:** The amendments made in § 1107(b) of the Violence Against Women Act of 2000 broadened the category of persons protected to include intimate partners of the person stalked and created a new offense at 18 U.S.C. § 2261A(2) that prohibits the use of the mail or any facility of interstate or foreign	**Amend. No. 616 (Nov. 1, 2001)** **USSG § 2A6.2** • Referred the new "stalking by mail" offense to § 2A6.2 (Stalking or Domestic Violence), rather than to § 2A6.1 (Threatening or Harassing Communications) to "reflect the policy judgment" that a defendant who has engaged in stalking by mail resulting in bodily injury "should receive

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		Act of 2000]		commerce to commit a stalking offense.] Consider the following: (i) whether the Federal Sentencing Guidelines relating to stalking offenses should be modified in light of the amendment made by this subsection; and (ii) whether any changes the Commission may make to the Federal Sentencing Guidelines pursuant to clause (i) should also be made with respect to offenses under chapter 110A of title 18, United States Code [Domestic Violence and Stalking].	punishment equal to, or perhaps greater than, that received by" a defendant who has engaged in threatening or harassing communications evidencing an intent to carry out the threat. • Increased the base offense level in § 2A6.2 (Stalking or Domestic Violence) applicable to all stalking from 14 to 18 to "ensure[] that these offenses are sentenced at or above the offense levels for offenses involving threatening or harassing communications." • "[C]onforms the definition of 'stalking' in Application Note 1 of § 2A6.2 to the statutory changes made by the Act." **Note**: This is only partially accurate. With respect to "stalking by mail," the Commission removed the element of *intent* from the definition.
68 GD	10/28/00	106-386 Victims of Trafficking and Violence Prevention Act of 2000, sec. 112(b).		[R]eview and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of offenses involving the trafficking of persons including component or related crimes of peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural	**Amend. No. 627 (Nov. 1, 2001)** **USSG § 2G1.1, 2G2.1, 2H4.1, 2H4.2** • Repromulgated Amend. No. 612 with minor changes. • Referred the new offense of sex trafficking of children by force, fraud or coercion at 18 U.S.C. § 1591 to § 2G1.1 (Promoting Prostitution or

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				Worker Protection Act. In carrying out this directive []: (A) take all appropriate measures to ensure that these sentencing guidelines and policy statements applicable to the offenses described above are sufficiently stringent to deter and adequately reflect the heinous nature of such offenses; (B) consider conforming the sentencing guidelines applicable to offenses involving trafficking in persons to the guidelines applicable to peonage, involuntary servitude, and slave trade offenses; and (C) consider providing sentencing enhancements for those convicted of the offenses described above that-- (i) involve a large number of victims; (ii) involve a pattern of continued and flagrant violations; (iii) involve the use or threatened use of a dangerous weapon; or (iv) result in the death or bodily injury of any person.	Prohibited Sexual Conduct) with alternative base offense levels of 19 and 17, with an alternative reference to § 2G2.1 (Sexually Exploiting a Minor . . .) "in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography." Explained that the latter will be more serious offenses, involving both harm to an individual and a commercial purpose, which is better reflected by the higher base offense level (27) in § 2G2.1. • Added an encouraged upward departure in § 2G2.1 if the "defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years" or "the offense involved more than 10 victims." • Determined that § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) "continues to be an appropriate tool" for determining sentences for violations of 18 U.S.C. §§ 1581 (peonage), 1583 (enticement into slavery), and 1584 (sale into involuntary servitude). Referred three new statutory provisions, 18 U.S.C. §§ 1589 (forced labor), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), and 1592 (unlawful conduct with respect to documents in furtherance of the above offenses) to § 2H4.1. • Retained the base offense level of 22 in § 2H4.1, adding an alternative, lower base offense level of

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				Authorizes the Commission to promulgate the guidelines or amendments under this subsection in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987,* as though the authority under that Act had not expired. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	18 for those whose peonage offense involves only unlawful conduct with respect to documents under § 1592. • Expanded § 2H4.1 to provide a four-level increase if a dangerous weapon was used (up from a two-level enhancement), and a two-level increase if a dangerous weapon was brandished or its use was threatened. Although the Commission referred to the directive to "consider an enhancement for the use or threatened use of a dangerous weapon," it did not explain why it required or suggests an increase from 2 to 4 if a dangerous weapon was used. • Also amended § 2H4.1 to "clarify that the threatened use of a weapon applies regardless of whether a dangerous weapon was actually present." • Created a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Worker Protection Act), "in response to the directive to amend the guidelines applicable to such offenses." Establishes enhancements for bodily injury and for defendants who have "previously sustain[ed] a civil penalty for similar misconduct . . . to respond to the directive that the Commission consider sentencing enhancements for these offense characteristics." Further explained that "[t]his section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications."

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					• Explained that the various sentencing enhancements and upward departure provision address "areas of concern identified by Congress" and provide "for more severe sentences for perpetrators of human trafficking offenses in keeping with the conclusion that the offenses covered by this amendment are both heinous in nature and being committed with rapidly increasing frequency."
69 SD	11/01/00	106-420 College Scholarship Fraud Prevention Act of 2000, sec. 3.	Economic Crimes Education loan fraud	[A]mend the Federal sentencing guidelines in order to provide for enhanced penalties for any offense involving fraud or misrepresentation in connection with the obtaining or providing of, or the furnishing of information to a consumer on, any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education, such that those penalties are comparable to the base offense level for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.	**Amend. No. 617 (Nov. 1, 2001)** **USSG § 2B1.1** • Provided a 2-level enhancement with a minimum offense level of 10 "if the offense involves the misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education." Explained that the enhancement "targets the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation." This enhancement was the same as the enhancement for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government charity.
70	10/26/01	107-56	Economic	[A]mend the Federal sentencing guidelines to	**Amend. No. 637 (Nov. 1, 2002)**

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SD		Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, sec. 814(f).	Crimes Computer fraud	ensure that any individual convicted of a violation of [18 U.S.C. § 1030 (computer fraud)] can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment.	• Amended § 2B1.1 to delete the special instruction that required a mandatory minimum of six months' imprisonment for violations of 18 U.S.C. § 1030(a)(4) or (5). **Note:** This special instruction was originally added in response to a congressional directive. *See* Amend. No. 551, *supra*.
71 SD	03/27/02	107-155 Bipartisan Campaign Reform Act of 2002, sec. 314.	Public Integrity	(1) [P]romulgate a guideline, or amend an existing guideline under section 994 of title 28, United States Code, in accordance with paragraph (2), for penalties for violations of the Federal Election Campaign Act of 1971 and related election laws; and (2) submit to Congress an explanation of any guidelines promulgated under paragraph (1) and any legislative or administrative recommendations regarding enforcement of the Federal Election Campaign Act of 1971 and related election laws. [In doing so, take into account the following considerations:] (1) Ensure that the sentencing guidelines and	**Amend. No. 648 (Jan. 25, 2003)** **USSG § 2C1.8** • Added a new guideline at § 2C1.8 to cover violations of federal election campaign laws; set the base offense level at 8 with five upward enhancements. Referring to the increased statutory penalties for campaign finance crimes (formerly misdemeanors but now carrying a maximum terms of two to five years), explained that the Commission selected the base offense level two levels higher than the base offense level under § 2B1.1 for fraud to reflect "the fact that these offenses, while they are somewhat similar to fraud offenses . . . generally are more serious due to the additional harm, or the potential harm, of corrupting the elective process."

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				policy statements reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement action to prevent such violations. (2) Provide a sentencing enhancement for any person convicted of such violation if such violation involves-- (A) a contribution, donation, or expenditure from a foreign source; (B) a large number of illegal transactions; (C) a large aggregate amount of illegal contributions, donations, or expenditures; (D) the receipt or disbursement of governmental funds; and (E) an intent to achieve a benefit from the Federal Government. (3) Assure reasonable consistency with other relevant directives and guidelines of the Commission. (4) Account for aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements.	• Specific offense characteristic was referred to the fraud loss table in § 2B1.1 "to incrementally increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for 'a large aggregate amount of illegal contributions.'" • Provided alternative enhancements if the offense involved a foreign national or a foreign government to "respond to another specific directive in the [Act] and reflect the seriousness of foreign entities attempting to tamper with the United States' election processes." • Provided alternative enhancements when the offense "involves either 'government funds, . . . or an intent to derive a 'specific, identifiable non-monetary Federal benefit,' (*e.g.*, a presidential pardon)." These "respond[] to specific directives of the [Act]." • Provided a two-level enhancement "when the offender engages in '30 or more illegal transactions.'" This "responds to a specific directive in the [Act] to the effect that the Commission provide enhanced sentencing in cases involving a 'large number of illegal transactions.'" The number 30 was chosen after a "review of all

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				(5) Assure the guidelines adequately meet the purposes of sentencing under section 3553(a)(2) of title 18, United States Code. [P]romulgate the guidelines referred to above not later than the later of under its Emergency Authority, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987,* as though the authority under such Act has not expired. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	campaign finance cases in the Commission's datafile," with "30 transactions as the number best illustrative of a 'large number' in that context." • Provided a four-level enhancement if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." This "responds to information received from the Federal Election Commission and the Public Integrity Section of the Department of Justice which characterizes offenses of this type as some of the most aggravated offenses committed under the [Act]." • Provided a cross-reference to either § 2C1.1 or § 2C1.2, "as appropriate, if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under § 2C1.8." • Included offenses covered by § 2C1.8 in § 3D1.2(d) (Groups of Closely Related Counts) as offenses for which the offense level "is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm." • Amended § 5E.12 (Fines for Individual Defendants) to "reflect the provisions unique to the [Federal Election Campaign Act of 1971]. • *See* United States Sentencing Comm'n, *Report to the Congress: Increased Penalties for Campaign*

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					Finance Offenses and Legislative Recommendation (May 2003), http://www.ussc.gov/r_congress/camp2003.pdf. This report detailed the amendment and the Commission's reasons for its provisions, and also made recommendations regarding increased penalties.
72 SD	07/30/02	107-204 Sarbanes-Oxley Act of 2002, title VIII, sec. 805(a) [White-Collar Crime Penalty Enhancement Act of 2002].	Economic Crimes Public Integrity Obstruction of justice Organizational criminal misconduct	**Section 805(a)**: [R]eview and amend, as appropriate**,** the Federal Sentencing Guidelines and related policy statements to ensure that— (1) the base offense level and existing enhancements contained in § 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity; (2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where— (A) the destruction, alteration, or fabrication of evidence involves— (i) a large amount of evidence, a large number of participants, or is otherwise extensive; (ii) the selection of evidence that is particularly probative or essential to the investigation; or	**Amend. No. 647 (Jan. 25, 2003)** **USSG §§ 2B1.1, 2J1.2, 2T4.1** • Increased the base offense level in USSG § 2J1.2 (Obstruction of Justice) from 12 to 14. Also added a two-level enhancement to § 2J1.2 if the offense "involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or was otherwise extensive in scope, planning, or preparation." The Commission did not explain how it determined that the guidelines were otherwise inadequate to account for such offenses. • Added six-level enhancement to USSG § 2B1.1 for a fraud offense involving 250 or more victims. "The Commission determined that an enhancement of this magnitude appropriately responds to the pertinent directive and reflects the extensive nature of, and the large scale victimization caused by, such offenses."

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				(iii) more than minimal planning; or (B) the offense involved abuse of a special skill or a position of trust; (3) the guideline offense levels and enhancements for violations of section 1519 [destruction or falsification of records in federal investigations and bankruptcy] or 1520 [destruction of corporate audit accounts] of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity; (4) a specific offense characteristic enhancing sentencing is provided under § 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims; and (5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct [*see* Amend. No. 673, *infra*]. (b) Emergency Authority and Deadline for Commission Action.--The United States Sentencing Commission is requested to promulgate the guidelines or amendments	• Added two additional prongs to § 2B1.1(b)(12)(B). First, the amendment increased by four levels offenses that substantially endangered the solvency or financial security of an organization that was a publicly traded company or had 1,000 or more employees. This prong "reflects the Commission's determination that such an offense undermines the public's confidence in the banking system" and serves as a proxy for determining solvency or financial security of an assumed substantial number of individual victims. The second prong added a four-level increase 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." Pointing to the directive in section 805(a)(4), the Commission explained that this enhancement "shall apply cumulatively with the enhancement" based solely on the number of victims, "to reflect the particularly acute harm suffered by victims of offenses for which" this new prong applies." • Added an application note for § 2B1.1(b)(12)(B) to set forth a non-exhaustive list of factors for the court to consider in determining whether an offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. • Potentially broadened the application note for §

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				provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired. * * *	2B1.1(b)(12)(B) for the previously existing financial institutions enhancement so that it is also triggered by non-exhaustive list, rather than a specified list. However, also removed the factor allowing the enhancement if the financial institution "was placed in substantial jeopardy of any of the [other listed factors]." The Commission explains that this was done "to be consistent structurally with the new prongs of the enhancement."
73 GD		Sarbanes-Oxley Act of 2002, title IX, sec. 905.	Mail and wire fraud; ERISA violations	**Section 905:** [R]eview and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of the White Collar Crime Penalty Enhancement Act of 2002, which increased the maximum penalties for certain white collar offenses [mail and wire fraud, ERISA violations under 29 U.S.C. § 1131]. In carrying out the above directive, the Sentencing Commission shall— (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in [the White-Collar Penalty Enhancement Act of 2002], the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;	• Added a four-level enhancement at USSG § 2B1.1(b)(13) if "the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company." "The Commission concluded" that the enhancement "appropriately reflects that 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." Through this wholesale factual finding, the enhancement effectively doubled the increase for abuse of position of trust for an officer or director of a publicly traded company and now without requiring any particular finding. • Amended the application note for the new four-level enhancement under USSG § 2B1.1(b)(13) applying to an officer or director of a publicly traded company to "expressly provide that the enhancement would apply regardless of whether

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				(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by [the White-Collar Crime Penalty Enforcement Act] are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act; (3) assure reasonable consistency with other relevant directives and sentencing guidelines; (4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (5) make any necessary conforming changes to the sentencing guidelines; and (6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code. Requests that the Commission promulgate any such guidelines or amendments as soon as practicable, and in any event not later than 180 days after the date of enactment of this	the defendant was convicted under a specific securities fraud statute." As a result, if the offense of conviction was under a general fraud statute but the judge finds by a preponderance of the evidence that it "involved a violation of 'securities law' as defined in the application note," the enhancement applies. • Expanded the loss table at USSG § 2B1.1(b)(1) "to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, such as the serious corporate scandals that gave rise to several portions of the Act" (not specified). Added two additional loss amount categories: a 28-level increase for loss over $200 million, and a 30-level increase for loss over $400 million. These new levels "address congressional concern regarding particularly extensive and serious fraud offenses, and more fully effectuate increases in statutory maximum penalties provided by the Act." • Modified the tax table in USSG § 2T4.1 "in a similar manner to maintain the longstanding proportional relationship between the loss table in § 2B1.1 and the tax table." • Added "the reduction in the value of securities or other corporate assets" to the general enumerated factors that the court may consider in determining the amount of loss under § 2B1.1(b)(1).

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				Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired. * * *	• *See* U.S. Sentencing Comm'n, *Report to Congress: Increased Penalties Under the Sarbanes Oxley Act of 2002* (Jan. 2003), http://www.ussc.gov/r_congress/S-Oreport.pdf. This report contains a more detailed explanation for these amendments.
74 GD		Sarbanes-Oxley Act, title XI, sec. 1104 [Corporate Fraud Accountability Act of 2002].	Fraud related to securities and publicly traded corporations	**Section 1104**: (1) [P]romptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses; (2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and (3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and any additional policy recommendations the Sentencing Commission may have for combating offenses described in paragraph (1). [Review the following considerations in carrying out the above requests]: (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of	

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				securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses; (2) assure reasonable consistency with other relevant directives and with other guidelines; (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements; (4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated; (5) ensure that the guideline offense levels and enhancements under § 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; (6) make any necessary conforming changes to the sentencing guidelines; and (7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States	

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				Code. [P]romulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures sent forth in section 21(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired. **Note:** Section 903 increased the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	
75 GD	07/30/02	107-204 Sarbanes-Oxley Act of 2002, title VIII, sec. 805(a)(5) [Corporate and Criminal Fraud Accountability Act of 2002]	Economic Crimes Organizational criminal misconduct	**Section 805(a)(5)**: [R]eview and amend, as appropriate**,** the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct. (b) Emergency Authority and Deadline for	**Amend. No. 673 (Nov. 1, 2004)** • "This amendment modifies existing provisions of Chapter Eight and provides a new guideline at § 8B2.1 (Effective Compliance and Ethics Program). Most notably, § 8B2.1 strengthens the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing

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				Commission Action.--The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired. *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	culpability for an offense. This amendment is the culmination of a multi-year review of the organizational guidelines, implements several recommendations issued on October 7, 2003, by the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines . . . and responds to [the directive] to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct." • Also made numerous other changes to Chapter Eight **NOTE:** This amendment earned an extraordinarily long and detailed Statement of Reasons. It is also the one of the few amendments to assert that it is the result of any sort of review or to reference an "Ad Hoc Advisory Group" of any sort. *See* U.S. Sentencing Comm'n, *Report to Congress: Increased Penalties Under the Sarbanes Oxley Act of 2002* (Jan. 2003), http://www.ussc.gov/r_congress/S-Oreport.pdf. This report contains a more detailed explanation for these amendments.
76 SD	11/02/02	107-273 James Guelff and Chris	Other crimes Body armor	"[R]eview and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate sentencing enhancement for any	**Amend. No. 659 (Nov. 1, 2003)** **USSG § 3B1.5**

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		McCurley Body Armor Act of 2002, div. C, title, sec. 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act.		crime of violence (as defined in section 16 of title 18, United States Code) or drug trafficking crime (as defined in section 924(c) of title 18, United States Code) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor." Expresses the "sense of Congress" that any sentencing enhancement under this subsection should be at least 2 levels. Adds a definition of "body armor" at 18 U.S.C. § 921(a)(35): The term 'body armor' means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.".	• Created a new Chapter 3 adjustment, § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). • Provided for the greater of: (1) two-level increase if the defendant was convicted of a crime of violence or a drug trafficking crime and "the offense involved the use of body armor" or (2) four-level increase if the defendant "used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense." • Defined "use" to mean "active employment in a manner to protect the person from gunfire" or "as a means of bartering." It "does not mean mere possession." • Limited the four-level enhancement to the defendant's own conduct or conduct aided or abetted. • Defined "drug trafficking" as defined under 18 U.S.C. § 924(e)(2), which includes any felony punishable under the Controlled Substances Act. The Commission recognized that this is "somewhat broader" than the definition used elsewhere in the guidelines, but otherwise provided no analysis. • Defined "crime of violence" as defined under 18 U.S.C. § 16, which the Commission described as "broader" than the definition used elsewhere in the

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					guidelines because it includes offenses that involve the use or attempted use of physical force against *property* as well as persons. Except to say that it the amendment "responds" to the directive, the Commission did not explain why the amendment is appropriate as a matter of policy or empirical study. The adjustment has been applied in such a small number of cases since its enactment that it amounts to 0.0% of the total number from 2005 through 2007.
77 GD	11/02/02	107-273 Federal Judiciary Protection Act of 2002, div. C, title, sec. 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act.	Other crimes Assaults against federal judges and certain other federal employees	[R]eview and amend the Federal sentencing guidelines and the policy statements of the commission, if appropriate**,** to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18, United States Code." [C]onsider the following factors in carrying out the above directive with respect to each offense described above – (A) any expression of congressional intent regarding the appropriate penalties for the offense; (B) the range of conduct covered by the	**Amend. No. 663 (Nov. 1, 2004)** **USSG §§ 2A2.2, 2A2.3, 2A2.4, 3A1.2** • Added a "new specific offense characteristic in USSG § 2A2.2 (Aggravated Assault) to provide a two-level increase if the defendant was convicted under 18 US.C. § 111(b) or § 115, which was made cumulative to the adjustment in § 3A1.2 for official victim "in order to address adequately the directive in [§ 11008(e)(2)(D)]," which is "to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense." This amounts to an automatic seven-level increase for aggravated assault involving an official victim but without bodily injury. • Decreased the base offense level from 15 to 14 to better reflect the seriousness of aggravated assault

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				offense; (C) the existing sentences for the offense; (D) the extent to which sentencing enhancements within the Federal sentencing guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense; (E) the extent to which the Federal sentencing guideline sentences for the offense have been constrained by statutory maximum penalties; (F) the extent to which the Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (G) the relationship of the Federal sentencing guidelines for the offense to the Federal sentencing guidelines for other offenses of comparable seriousness; and (H) any other factors that the Commission considers to be appropriate.	as indicated by state sentences, but then increased the specific offense characteristics for degrees of bodily injury by one level each. • Increased the alternative base offense levels under USSG § 2A2.3 (Minor Assault), and added a two-level enhancement if the victim sustained bodily injury, along with a cross-reference to § 2A2.2 "if the conduct constituted aggravated assault." • Increased the base offense level in USSG § 2A2.4 (Obstructing or Impeding Officers) from 6 to 10 and added a two-level enhancement if the victim sustained bodily injury. • Restructured the Chapter 3 adjustment for Official Victim under § 3A1.2 so that it provides the same three-level enhancement when the offense is motivated by the status of the official victim, "but adds an additional three levels if the defendant's offense guideline was from Chapter 2, Part A (Offenses Against the Person). This six-level enhancement "also applies to assaultive conduct against law enforcement officers or prison officials if the defendant committed the assault in a manner creating a substantial risk of serious bodily injury." Explained that the increase "comports with the directive to 'ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense' for offenses against federal officers, officials and employees."

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					There was no mention that the Commission considered, as directed, the "existing sentences for the offense."
78 GD	11/25/02	107-296 Cyber Security Enhancement Act of 2002, title II, sec. 225(b), (c) of the Homeland Security Act of 2002.	Other crimes Computers	[R]eview and, if appropriate, amend its guidelines and its policy statements applicable to persons convicted of an offense under 18 U.S.C. § 1030 [computer fraud and related activity]. In carrying out the directive above, [] ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described [above], the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses." [C]onsider the following factors and the extent to which the guidelines may or may not account for them— (i) the potential and actual loss resulting from the offense; (ii) the level of sophistication and planning involved in the offense; (iii) whether the offense was committed for purposes of commercial advantage or private financial benefit;	**Amend. No. 654 (Nov. 1, 2003)** • Made several changes "designed to supplement existing guidelines and policy statements and thereby ensure that offenses under 18 U.S.C. § 1030 are adequately addressed and punished." **USSG § 2B1.1:** • Added a new specific offense characteristics at USSG § 2B1.1(b)(13): A 2-level increase for convictions that involve 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 "an intent to obtain private personal information"; a 4-level increase for a conviction under § 1030(a)(5)(A)(i), which involves intentionally inflicted damage to a protected computer; and a 6-level increase, with a minimum offense level of 24, if the offense "resulted in a substantial disruption of a critical infrastructure." Explained that "the graduated levels ensure incremental punishment for increasingly serious conduct, and were chosen in recognition of the fact that conduct supporting application of a more serious enhancement frequently will encompass behavior relevant to a lesser enhancement as well."

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				(iv) whether the defendant acted with malicious intent to cause harm in committing the offense; (v) the extent to which the offense violated the privacy rights of individuals harmed; (vi) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice; (vii) whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and (viii) whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person." [A]ssure reasonable consistency with other relevant directives and with other sentencing guidelines; to account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; make any necessary conforming changes to the sentencing guidelines; and assure that the guidelines adequately meet the purposes of sentencing as set forth in 18 U.S.C. §	• Explained that the minimum offense level of 24 for "substantial disruption of a critical infrastructure" was "chosen to maintain parity with the minimum offense level that applies to an offense that substantially jeopardized the safety and soundness of a financial institution" at USSG § 2B1.1(b)(12). Also explained that the enhancement "reflects the fact that some offenders to whom the enhancement may apply will be subject to a statutory maximum penalty of five years' imprisonment." **Note:** For these offenders, the offense level with this enhancement will straddle the statutory maximum. • Provided an encouraged upward departure "for cases in which the disruption of the critical infrastructure has a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters." • Defined "critical infrastructure" (a term that does not appear as an element of any offense under § 1030) by drawing "in part" from the definition of "critical infrastructure" in the PATRIOT Act, but modifying it "to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope." • "Modifie[d] the rule of construction relating to the calculation of loss in protected computer cases . . .

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				3553(a)(2). [S]ubmit a brief report to Congress, no later than May 1, 2003, that explains any actions taken by the Sentencing Commission in response to this section and includes any recommendations the Commission may have regarding statutory penalties for offenses under 18 U.S.C. § 1030.	to incorporate more fully the statutory definition of loss at 18 U.S.C. § 1030(e)(11)," which was added as part of the PATRIOT Act, and to "clarify its application to all 18 U.S.C. § 1030 offenses sentenced under § 2B1.1." **Note:** This statutory definition of loss for § 1030 offenses is somewhat different from the "rule of construction" in the guideline. Before the amendment, the rule stated that actual loss included "pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable." This language remained, despite that it does not appear in the statutory definition. • Expanded the upward departure note relating to non-monetary or physical harm to add "a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. §1030 involving damage to a protected computer that results in death." **USSG §§ 2B2.3, 2B3.2** • Modified USSG § 2B2.3 (Trespass) and §2B3.2 (Extortion by Force or Threat) to expand the scope of existing enhancements. Provided a 2-level enhancement under § 2B2.3 if the trespass involved a computer system used to operate a critical infrastructure or by or for a government entity in furtherance of the administration of justice,

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					national defense or national security." Provided a 3-level increase under § 2B3.2 if the extortion involves damage to such computers. Explained that these amendments were intended "to ensure that trespasses and extortions involving these types of important computer systems are addressed." In its Report to Congress, the Commission described in greater detail its reasoning regarding the amendments and referred to a study of 116 cases as support for the amendments. *See Report to the Congress*: *Increased Penalties for Cyber Security Offenses* (May 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Computer_Crime/200304_RtC_Increased_Penalties_Cyber_Security.pdf. This is a useful resource for challenging these amendments. **Note:** Recommended in the Report that Congress increase the penalties for violations of 18 U.S.C. § 1030(a)(1) (accessing and dissemination of national defense or restricted information with reason to believe that such information could be used to the injury of the United States or to the advantage of a foreign nation.), which currently has a statutory maximum of ten years in prison. Recognized that the guidelines treat that offense far more seriously than Congress, assigning a base offense level of 35 at CHC I for an advisory sentencing range of 168-210 months. Congress has not increased the penalty.

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79 SD	4/30/03	108-21 PROTECT Act, title I, sec. 104(a).	Violent crimes Kidnapping	[A]mend the Sentencing Guidelines, to take effect 30 days after the enactment of the PROTECT Act – (1) so that the base offense level for kidnapping in section 2A4.1(a) is increased from level 24 to level 32; (2) so as to delete section 2A4.1(b)(4)(C); [providing for 2-level decrease for release of a victim within 24 hours] and (3) so that the increase provided by section 2A4.1(b)(5) [sexual exploitation of a victim] is 6 levels instead of 3.	**Amend. No. 650 (May 30, 2003)** **USSG § 2A4.1** • Amended § 2A4.1, effective May 30, 2003, to increase the base offense level to 32, to increase the enhancement "if the victim was sexually exploited" from 3 to 6 levels, and to delete the provision allowing a 2-level decrease if the victim was released within 24 hours. • "This amendment implements the directive to the Commission in section 104 of the PROTECT Act, Pub. L. 108-21."
80 SD	4/30/03	108-21 PROTECT Act, title IV, sec. 401(i).	Sex crimes Involving minors	**§ 4B1.5 (Repeat and Dangerous Sex Offender against Minor):** Amended Application Note 4(b)(i) to read as follows: "(i) In general.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.". **§ 2G2.4(b) (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct):** Amended the guideline by adding at the end the following:	**Amend. No. 649 (Apr. 30, 2003)** **USSG §§ 2G2.2, 2G2.4, 4B1.5** • Implemented the congressional amendments made directly by this section of the PROTECT Act. **Note:** Section 2G2.4 was later deleted by consolidation with § 2G2.2. See USSG App. C, Amend. No. 664 (Nov. 1, 2004).

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				"(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels. "(5) If the offense involved— "(A) at least 10 images, but fewer than 150, increase by 2 levels; "(B) at least 150 images, but fewer than 300, increase by 3 levels; "(C) at least 300 images, but fewer than 600, increase by 4 levels; and "(D) 600 or more images, increase by 5 levels.". (C) Section 2G2.2(b) is amended by adding at the end the following: "(6) If the offense involved-- "(A) at least 10 images, but fewer than 150, increase by 2 levels; "(B) at least 150 images, but fewer than 300, increase by 3 levels; "(C) at least 300 images, but fewer than	

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				600, increase by 4 levels; and "(D) 600 or more images, increase by 5 levels.". [E]nsure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b), 2244(a)(4), and 2244(b) of title 18, United States Code."	
81 SD	4/30/03	108-21 PROTECT Act, title IV, sec. 401(m).	All crimes	Directed the Commission to do the following within 180 days of the enactment of the PROTECT Act: (1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and (2) (A) promulgate appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced; (B) promulgate a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the	**Amend. No. 651 (Oct. 27, 2003)** **USSG Ch. 1, Parts A & H, §§ 1A1.1, 1B1.1, 2A4.1, 4A1.1, 4A1.3, 5C1.2, 5H1.4, 5H1.6, 5H1.7, 5H1.8, 5K2.0, 5K2.10, 5K2.12, 5K2.13, 5K2.20, 5K3.1** This multipart amendment is the subject of an extensive report to Congress. USSC, *Downward Departures from the Federal Sentencing Guidelines* (Oct. 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Departures/200310_RtC_Downward_Departures/index.htm. The report is worth reading in its entirety, and is summarized by the Commission as follows: In preparing this report, the Commission: (1) considered the legislative history of the Sentencing Reform Act of 1984 and other sentencing legislation, with particular emphasis on the role of departures

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				Attorney General and the United States Attorney; and (C) promulgate any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.	(see Appendix B); (2) identified particular concerns regarding downward departures as raised by Congress in the PROTECT Act; (3) conducted an extensive empirical study of frequently cited reasons for downward departures during fiscal year 2001; (4) reviewed departure case law and literature; (5) solicited and weighed public comment; and (6) held two public hearings at which the Commission received testimony from the Department of Justice, judges, federal defenders and prosecutors, and experts in the criminal law on downward departures generally and early disposition or "fast track" programs specifically. Using this information and data, the Commission: (1) considered the general purposes of sentencing identified by Congress in the Sentencing Reform Act (see 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding departure decisions; and (3) evaluated departure provisions throughout the Guidelines Manual in light of those general and specific concerns. On October 8, 2003, the Commission unanimously adopted an emergency amendment effective October 27, 2003, implementing the PROTECT Act directives. The emergency amendment is discussed in more detail in Chapter 5 and is set forth in its entirety in Appendix A of this report. The amendment prohibits several factors as grounds for departure, restricts the availability of certain other departures, clarifies when certain departures are appropriate, and

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					limits the extent of departure permissible for certain offenders. Among the newly forbidden grounds for departure are: • the defendant's acceptance of responsibility for the offense; • the defendant's aggravating or mitigating role in the offense; • the defendant's decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; • the defendant's fulfillment of restitution obligations only to the extent required by law, including the guidelines; • the defendant's addiction to gambling; • the defendant's aberrant behavior if the defendant has any significant prior criminal behavior, even if the prior conduct was not a federal or state felony conviction; • the defendant's aberrant behavior if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the "safety valve" criteria at §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases); • the overrepresentation by the defendant's criminal history category of the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, if the defendant is an

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					armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and • the overrepresentation by the defendant's criminal history category of the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, if the defendant is a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The amendment also imposes increased restrictions on the availability of departures based on: • multiple circumstances (previously referred to as a combination of factors); • the defendant's family ties and responsibilities, particularly if the basis for consideration is financial or caretaking responsibilities; • victim's conduct; • coercion and duress; and • diminished capacity. In addition, the amendment impacts sentencing courts' authority in more general ways by restructuring departure authority throughout the Guidelines Manual, particularly in §5K2.0 (Grounds for Departure), to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.

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					The Commission also added a new policy statement regarding early disposition programs, §5K3.1 (Early Disposition Programs), that restates the language contained in the directive at section 401(m)(2)(B) of the PROTECT Act. The new policy statement provides that, upon motion of the Government, the court may depart downward not more than four offense 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. The Commission determined that implementing the directive in this unfettered manner is appropriate at this time, notwithstanding several concerns discussed in Chapter 4 and pending further study and monitoring of the implementation of such programs. The Commission believes that the actions taken in this amendment will complement the many statutory and guideline changes enacted by the PROTECT Act, and the recent policies regarding appeals, fast track, and plea bargaining implemented by the Department of Justice, to substantially reduce the incidence of downward departures. The Commission worked diligently within the 180 day time frame established by the PROTECT Act to implement the directive, but its efforts in this area will continue.
82 SD	4/30/03	108-21 PROTECT Act,	Sex crimes Downward	Directly amended the guidelines as follows: (1) in section 5K2.0—	**Amend. No. 649 (April 30, 2003)** **USSG §§ 5H1.6, 5K2.0, 5K2.13, 5K2.22**

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		title IV, sec. 401(b).	departures	(A) by striking "Under" and inserting the following: "(a) Downward Departures in Criminal Cases Other Than Child Crimes and Sexual Offenses.—Under"; and (B) by adding at the end the following: "(b) Downward Departures in Child Crimes and Sexual Offenses.— "Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that— "(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress; "(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and "(3) should result in a sentence different from	The Commission implemented the amendments as directed by Congress.

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				that described. The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.". (2) At the end of part K of chapter 5, add the following: "Sec. 5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in child crimes and sexual offenses (Policy Statement)" In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §	

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				5H1.1." An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.4. Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines. (3) Section 5K2.20 is amended by striking "A" and inserting "Except where a defendant is convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, a". (4) Section 5H1.6 is amended by inserting after the first sentence the following: "In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.". (5) Section 5K2.13 is amended by— (A) striking "or" before "(3)"; and	

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				(B) replacing "public" with "public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code.".	
83 SD	4/30/03	108-21 PROTECT Act, title IV, sec. 401(j).	All crimes	(1) [D]istribute to all courts of the United States and to the United States Probation System the amendments made by subsections (b), (g), and (i) of the PROTECT Act to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. (2) [The Commission is prohibited from] promulgating, on or before May 1, 2005, any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that is inconsistent with the amendments made to the guidelines by the subsection 401(b) of the PROTECT Act or that adds any new grounds of downward departure to Part K of chapter 5. (3) With respect to cases covered by the amendments made by subsection 401(i) of the PROTECT Act [relating to sex offenses against minors and child pornography], [the Commission is authorized to] make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, except that the Commission shall not promulgate any	

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				amendments that, with respect to such cases, would result in sentencing ranges that are lower than those that would have applied under such subsection. **Note:** The Act also forever prohibits the Commission from promulgating any amendment that would alter or repeal the amendments made by subsection 401(g) of the PROTECT Act, which amends the guideline for acceptance of responsibility to require a government motion for the third point.	
84 GD	4/30/03	108-21 PROTECT Act, title V, sec. 504(c).	Sex crimes Obscene child pornography	Directs generally that "the applicable the category of offense be used in determining the sentencing range . . . with respect to any person convicted [of 18 U.S.C. § 1466A], shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines." Otherwise, the Commission "may promulgate guidelines specifically governing offenses [under § 1466A]," but only if the specific guidelines do not result in sentencing ranges that are lower than those that would have applied under § 2G2.2.	**[No amendment.]**
85 GD	4/30/03	108-21 PROTECT Act, title V, sec. 512.	Sex crimes Interstate travel	[R]eview and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that guideline penalties are adequate in cases that involve interstate	**Amend. No. 664 (Nov. 1, 2004)** **USSG § 2G1.3**

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				travel with the intent to engage in a sexual act with a juvenile in violation of [18 USC § 2423] to deter and punish such conduct. **Note:** The Act created a mandatory minimum term of 5 years for violations of 18 USC § 2423(a) and increased the statutory maximum to 30 years.	• Creates new guideline, § 2G1.3, "to specifically address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). "The creation of a new guideline for these cases is intended to address more appropriately the issues specific to these offenses" than § 2A3.2 (Statutory Rape), which applies by cross-reference. "The removal of these cases from § 2A3.2 will permit the Commission to more appropriately tailor that guideline to statutory rape , [and] travel and transportation cases have a different statutory penalty structure than [statutory rape]. • Set the base offense level at 24 "to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act." [The act created a five year mandatory minimum and 30-year stat max for §§ 2423(a) and 2422(a) offenses.] This is an increase from a base offense level of 21 for a chapter 117 violation with no sexual act (such as a sting case). • Provided several specific offense characteristics "to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases." These include enhancements for use of a computer, the commission of "a sex act or sexual contact," and an enhancement if the defendant was a relative or

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					legal guardian or otherwise had custody or care or supervisory control of the minor. • Provides three cross-references "to account for certain more serious sexual abuse conduct, including a cross reference if the offense involved conduct described in 18 U.S.C. § 2241 or § 2242." • Listed the statutory provisions to which the new guideline applies as 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2422(b), 2423, 2425. • In its reason for amendment, the Commission did not mention this directive (which by its terms applies only to § 2423 offenses). **USSG § 2G1.1** • Made changes to § 2G1.1 so that it will apply "primarily to adult prostitution cases because of the creation of § 2G1.3." • Included a special instruction that "if the offense involved more than one minor," the Chapter 3 adjustment for multiple counts shall be applied "as if the persuasion, enticement, coercion, travel, or transportation to engage in a

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					commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count." As explained in Application Note 6, this means that multiple counts involving more than one minor are not to be grouped together under § 3D1.2," and "if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction. **Note:** The Commission did not mention this change in its Reason for Amendment. • Invited an upward departure if the offense involves more than ten minors.
86 GD	4/30/03	108-21 PROTECT Act, title V, sec. 513(c)	Sex crimes Child pornography	[R]eview and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct" that involves a violation of [18 U.S.C. § 2252A(a)(3)(B) (distributing or soliciting child pornography) or (a)(6) (distributing or soliciting child pornography or distributing child pornography to a minor for purposes of inducing the minor to participate in any illegal	**Amend. No. 664 (Nov. 1, 2004)** **USSG § 2G2.2** • Consolidates §§ 2G2.2 and 2G2.4 into one guideline, § 2G2.2 to "address[] concerns raised by judges, probation officers, prosecutors, and defense attorneys regarding difficulties in determining the appropriate guideline [] for cases involving convictions of 18 U.S.C. § 2252 or §

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				activity)]. **Note:** the Act increased the statutory maximum for these offenses from 15 to 20 years. With respect to the guidelines for § 2252A(a)(3)(B) [distributing or soliciting child pornography], "consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such material."	2252A." • "As a result of the[] new statutory mandatory minimum penalties and the increases in the statutory maxima for these offenses [related to trafficking and receipt of child pornography]," provides alternative base offense levels, 18 for possession of child pornography and 22 for any other offense referenced in § 2G2.2, including distribution as referred to in this directive. This represented an increase to the base offense level for possession offenses from 15 to 18, "because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses. • Explained that the new base offense level of 22 for distribution and solicitation offenses (up from level 17) "is appropriate for trafficking offenses, because, when combined with several specific offense characteristics which are expected to apply in almost every case (*e.g.*, use of a computer material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations." • Provided a two-level decrease for a defendant whose base offense level is 22 but "whose conduct was limited to the receipt or solicitation

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					of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic in or distribute the material. "The Commission's review of these cases indicated the conduct involved in such 'simple receipt' cases in most instances was indistinguishable from 'simple possession' cases." The statutory penalties for 'simple receipt' cases, however, are the same as the statutory penalties for trafficking cases. Reconciling these competing concerns, the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was no intent to distribute the material." • Provided a "new, six-level enhancement at § 2G2.2(b)(3)(D) for offenses that involve distribution to a minor with intent to persuade, entice, or coerce the minor to engage in any illegal activity, other than sexual activity." • Added "several definitions, including definitions of 'computer,' 'image,' and 'interactive computer service' to provide greater guidance for these terms and uniformity in application of the guideline," so that the enhancement for "use of a computer" will apply in every case involving any type of internet or interactive computer service.
87 GD	4/30/03	108-21 PROTECT Act,	Drug GHB	(1) [R]eview the Federal sentencing guidelines with respect to offenses involving gamma hydroxybutyric acid (GHB);	**Amend. No. 667 (Nov. 1, 2004)** **USSG §§ 2D1.1, 2D1.11, 2D1.12**

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		title VI, sec. 608(e).		(2) consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them; (3) take any other action the Commission considers necessary to carry out this section**.**	• "[T]his amendment implements [the directive]. . . . The Commission identified several harms associated with GHB offenses and separately increased penalties for Internet trafficking and drug facilitated sexual assault, two harms associated with trafficking and use of this and other controlled substances. Specifically, the amendment modifies § 2D1.1 . . . to provide an approximate five-year term of imprisonment (equivalent to base offense level 26, Criminal History Category I) for distribution of three gallons of GHB. The Commission determined, based on information provided by the Drug Enforcement Administration, that this quantity typically reflects a mid-level distributor. The trigger for the ten-year penalty (base offense level 32) is set at 30 gallons, reflecting quantities associated with a high-level distributor." • "This amendment also increases the penalties under § 2D1.11 . . . for offenses involving gamma-butyrolactone (GBL), a precursor for GHB. The quantities in § 2D1.11 track the quantities used in § 2D1.1." Several additional changes were made to §§ 2D1.1, 2D1.11, and 2D1.12 that were not directed by the statute and were not based on new offenses created by the Act.
88	4/30/03	108-21	Other	[Directly amends the guideline related to	**Amend. No. 649 (Apr. 30, 2003)**

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SD		PROTECT Act, title IV, sec. 401(g).	Acceptance of responsibility	Acceptance of Responsibility as follows]: (1) in section 3E1.1(b)— (A) by inserting "upon motion of the government stating that" immediately before "the defendant has assisted authorities"; and (B) by striking "taking one or more" and all that follows through and including "additional level" and insert "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level"; (2) in the Application Notes to the Commentary to section 3E1.1, by amending Application Note 6— (A) by striking "one or both of"; and (B) by adding the following new sentence at the end: "Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing."; and	**USSG § 3E1.1** • Amended § 3E1.1(b) exactly as directed by Congress, so that both timely notification of a guilty plea and a government motion stating that the defendant has assisted authorities, is required before a defendant can receive the third point for acceptance of responsibility. Additions and deletions to § 3E1.1 are shown below: **§ 3E1.1 Acceptance of Responsibility** a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and **upon motion of the government stating that** the defendant has assisted authorities in the investigation or prosecution of his own misconduct by ~~taking one or more of the following steps:~~ ~~(1) timely providing complete information to the government concerning his own involvement in the offense; or~~ ~~(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,~~

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				(3) in the Background to section 3E1.1, by striking "one or more of".	~~decrease the offense level by 1 additional level~~ **timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.** • The Commission explained that this amendment "implements amendments to the guidelines made directly by the PROTECT Act."
89 GD	12/16/03	108-187 Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, sec. 4(b).	Other Fraud and related activity in connection with electronic mail	[R]eview and, as appropriate, amend the sentencing guidelines and policy statements to provide appropriate penalties for violations of [18 USC § 1037], United States Code, [e-mail fraud] as added by this section, and other offenses that may be facilitated by the sending of large quantities of unsolicited electronic mail. In carrying out the directive, . . .consider providing sentencing enhancements [for the following]: (A) those convicted under [18 USC § 1037] who— (i) obtained electronic mail addresses through improper means, including—	**Amend. No. 665 (Nov. 1, 2004)** **USSG § 2B1.1** • Referred violations of 18 USC § 1037 to § 2B1.1. "The Commission determined that reference to § 2B1.1 is appropriate because subsection 18 USC § 1037(a)(2) through (a)(5) involve deceit. • "Because each offense under 18 USC § 1037 contains as an element the transmission of multiple commercial electronic messages . . . the amendment provides in Application Note 4 that the mass-marketing enhancement in § 2B1.1(b)(2)(A)(ii) shall apply automatically to any defendant who is convicted under 18 USC § 1037 or who committed an offense involving conduct described in 18 USC § 1037. Broadening application of the mass marketing enhancement to

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				(I) harvesting electronic mail addresses of the users of a website, proprietary service, or other online public forum operated by another person, without the authorization of such person; and (II) randomly generating electronic mail addresses by computer; or (ii) knew that the commercial electronic mail messages involved in the offense contained or advertised an Internet domain for which the registrant of the domain had provided false registration information; and (B) those convicted of other offenses, including offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of electronic mail.	all defendants sentenced under § 2B1.1 whose offense involves conduct described in 18 USC § 1037, whether or not the defendant is convicted under 18 USC § 1037, responds specifically to that part of the directive concerning offenses that are facilitated by sending large volumes of electronic mail. **NOTE:** The other offenses listed as examples in Congress's directive seem geared toward particular crimes already associated with large quantities of email (fraud, identity theft, and certain sex offenses). Without any reason given by the Commission, the amendment expands the enhancement to apply to *any* offense under the guideline. • "Additionally, in response to the directive, a new specific offense characteristic in § 2B1.1(b)(7) provides for a two-level increase if the defendant is convicted under 18 USC § 1037 and the offense involved obtaining electronic mail addressed through improper means. A corresponding application note provides a definition of 'improper means.'" • "Finally, the Commission also responded to the directive concerning other offenses by making several modifications to other guidelines, as set forth in Amendment 2 of this document. For example, an amendment to the obscenity guideline, § 2G3.1 . . ., added a two-level enhancement if the offense involved the use of a computer or interactive computer service." *See* USSG App. C,

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					Amend. 664 (Nov. 1, 2004).
N/A	6/22/04	108-237 Antitrust Criminal Penalty Enhancement and Reform Act of 2004.	Economic Antitrust	**No directive.** Though Congress raised the statutory maximum for antitrust violations from three years to ten years, it did not direct the Commission to amend the guidelines to increase terms of imprisonment. Although early versions of the bill included such directives, they were not ultimately included in Act. A 2003 Senate bill, S. 1080, which was incorporated in amended form into the enacted H.R. 1086 contained the following directive: Sec. 2(d) Directive to the United States Sentencing Commission. (1) In general. Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend its guidelines and its policy statements to implement the provisions described in	**Amend. No. 678 (Nov. 1, 2005)** **USSG § 2R1.1** • Increased the base offense level for antitrust offenses under § 2R1.1(a) from 10 to 12 to "ensure[] that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under § 2B1.1 and recognizes congressional concern about the inherent seriousness of antitrust offenses. The penalties for sophisticated fraud have been increased incrementally due to a series of amendments to § 2B1.1, while no commensurate increases for antitrust offenses had occurred. Raising the base offense level of § 2R1.1 helps restore the historic proportionality in the treatment of antitrust offenses and sophisticated frauds." • Amended the "volume of commerce" table at § 2R1.1(b)(2) "to provide up to 16 additional offense levels for the defendant whose offense involves more than [$1.5 billion]," and raises the table's first threshold from $400,000 to $1 million. Also amends the upward adjustments corresponding to the "volume of commerce" table, raising them to a minimum of 2 and a maximum of 16 levels (up from a minimum of 1 and a maximum of 7 levels). The Commission explained that the volume of

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				paragraph (2). (2) Provisions described. The provisions described in this paragraph are the following: (A) Ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this section, the growing incidence of serious antitrust criminal offenses, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses. (B) Consider the following issues and the extent to which the guidelines and policy statements adequately address each of the following issues: (i) Whether the guideline offense levels and enhancements for antitrust criminal violations contained in sections 1, 2, and 3 of the Sherman Act	commerce table "(1) recognizes the depreciation in the value of the dollar since the table was last revised in 1991; (2) responds to data indicating that the financial magnitude of antitrust offenses has increased significantly; and (3) provides greater deterrence of large price-fixing crimes." • Amended Application Note 1 to § 2R1.1 regarding Chapter 3 adjustments for aggravating and mitigating roles. Revised the note from stating that such adjustments "*should be applied* as appropriate" to stating that they "*may be relevant* in determining the seriousness of the defendant's offense" and added a reference to § 3B1.3 (Abuse of a Position of Trust) and § 3C1.1 (Obstruction or Impeding the Administration of Justice) "to emphasize the potential relevance of such Chapter 3 enhancements as § 3B1.1 (Aggravating Role), § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and § 3C1.1 (Obstructing or Impeding the Administration of Justice) in determining the appropriate sentence for an antitrust offender. • Amended Application Note 2 in a technical manner only "to highlight the potential relevance of the defendant's role in the offense in determining the amount of fine to be imposed." • "Str[uck] outdated background commentary" stating that "[t]he Commission believes that the most effective method to deter individuals from committing this crime is through imposing short

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				(15 U.S.C. 1, 2, and 3), are sufficient to deter and punish such offenses, and are adequate in view of the increases in penalties contained in this section. (ii) Whether the guideline offense levels and enhancements for antitrust criminal violations contained in sections 1, 2, and 3 of the Sherman Act (15 U.S.C. 1, 2, and 3), are consistent with recent amendments to the sentencing guidelines and policy statements applicable to white collar offenses. (C) Ensure reasonable consistency with other relevant directives and with other sentencing guidelines. (D) Account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges.	prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence." **Note:** Other than to label it "outdated," the Commission offered no further explanation for striking this commentary. • Also amended the background commentary to state that "[a]bsent adjustments, the guidelines require some period of confinement" (at new base level 12, corresponding to at least 10 months in Zone C), whereas before these amendments, the background stated that an unadjusted guidelines sentence, at a base level 10 in Zone B, requires confinement of "six months or longer in the great majority of cases."

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				(E) Make any necessary conforming changes to the sentencing guidelines. (F) Ensure that the guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code. Another 2003 Senate bill, S. 1787, would have directly amended the Guidelines to increase the base offense level from 10 to 14 and amend the provision for upward adjustments for volume of commerce attributable to the defendant. On June 4, 2004, legislative history was submitted on behalf of the House Committee on the Judiciary jointly by Chairman Sensenbrenner and Ranking Member Conyers, which included the following reference in a section-by-section analysis of H.R. 1086, the bill that was enacted as Pub. L. 108-237: These increases reflect Congress' belief that criminal antitrust violations are serious white collar crimes that should be punished in a manner commensurate with	

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				other felonies. *This section will require the United States Sentencing Commission to revise the existing antitrust sentencing guidelines to increase terms of imprisonment for antitrust violations to reflect the new statutory maximum.* No revision in the existing guidelines is called for with respect to fines, as the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guideline levels without the need to engage in damages litigation during the criminal sentencing process. 150 Cong. Rec. H 3654, H 3658 (June 4, 2004) (emphasis added). No such requirements actually appear in the bill as enacted.	
90 SD	7/15/04	108-275 Identity Theft Penalty	Identity Theft Abuse of position of	[R]eview and amend its guidelines and its policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses	**Amend. No. 677 (Nov. 1, 2005)** **USSG § 3B1.3**

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		Enhancement Act, sec. 5	trust	involving an abuse of position." In carrying out the directive, the Commission shall do the following: (1) Amend U.S.S.G. section 3B1.3 (Abuse of Position of Trust of Use of Special Skill) to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification, as defined [in] section 1028(d)(4) of title 18, United States Code. (2) Ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutory provisions. (3) Make any necessary and conforming changes to the sentencing guidelines. (4) Ensure that the guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.	• Created Application Note 2 to § 3B1.3 "to include such defendants [who exceed or abuse the authority of their position to obtain unlawfully or use without authority any means of identification] within the scope of the guideline. The application note contains several examples to illustrate the types of conduct intended to be within the scope of the new provision." • **Note**: The examples given include an employee of a state motor vehicle department who knowingly issues a drivers license based on false, incomplete, or misleading information; a hospital orderly who obtains or misuses patient identification information from a patient's chart, and a volunteer at a charitable organization who obtains or misuses identification information from a donor's file. No explanation of the source of these examples.
91 GD	10/22/04	108-358 Anabolic Steroid Control Act of 2004, sec. 3	Drug Steroids	(1) [R]eview the Federal sentencing guidelines with respect to offenses involving anabolic steroids; (2) consider amending the Federal sentencing guidelines to provide for increased penalties with respect to offenses involving anabolic	**Amend. No. 681 (Mar. 27, 2006)** **USSG §§ 2D1.1, 3B1.3** • In a temporary amendment, "implements the directive by increasing the penalties for offenses involving anabolic steroids. It does so by changing

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				steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use; and (3) take such other action that the Commission considers necessary to carry out this section. **Note:** On 9/29/05, Congress enacted the U.S. Parole Commission Extension and Sentencing Commission Authority Act of 2005, P.L. 109-76. Section 3 of that Act directed that the Commission "amend the Federal sentencing guidelines, commentary, and policy statements to implement section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458)" pursuant to its emergency amendment authority.*	the manner in which anabolic steroids are treated under § 2D1.1 . . . . The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit." • Also "addresses two harms often associated with anabolic steroid offenses" by providing two-level enhancements in § 2D1.1(b)(6) [now (b)(7)] (if the offense involved the distribution of an anabolic steroid and a masking agent) and (b)(7) [now (b)(8)] (if the defendant distributed an anabolic steroid to an athlete). "Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use." • The amendment also added Application Notes for the SOCs defining both "masking agent" and "athlete," but those changes are not acknowledged or discussed in the Reasons for Amendment. • Also amends Application Note to provide that an

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				*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	adjustment under § 3B1.3 ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid. **Amend. No. 688 (Nov. 1, 2006)** • Repromulgated as permanent the temporary amendment.
92 SD	12/17/04	108-458 Intelligence Reform and Terrorism Prevention Act of 2004, sec. 6703	Terrorism False statements and obstruction	[Within 30 days] amend the Sentencing Guidelines to provide for an increased offense level for an offense under [18 USC §§ 1001(a) and 1505] if the offense involves international or domestic terrorism, as defined in [18 USC § 2331]. **Note:** On 9/29/05, Congress enacted the U.S. Parole Commission Extension and Sentencing Commission Authority Act of 2005, P.L. 109-76. Section 3 of that Act directed that the Commission "amend the Federal sentencing guidelines, commentary, and policy statements to implement section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458)" pursuant to its emergency amendment authority.*	**Amend. No. 676 (Oct. 24, 2005)** **USSG § 2J1.2** • Referenced convictions under § 1001 to § 2J1.2 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." • Also added a new SOC at § 2J1.2(b)(1)(B) providing for a 12-level increase for a defendant convicted under §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable. This 12-level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property . . . [and] is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism."

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				*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	• Added an Application Note defining "domestic terrorism" and "international terrorism" consistent with 18 USC §§ 2331(5) and (1), respectively. • Added an instruction in the Application Note that if § 3A1.4 applies, do not apply § 2J1.2(b)(1)(B). **Amend. No. 690 (Nov. 1, 2006)** • Repromulgated as permanent the temporary amendment.
93 SD	12/23/04	108-482 Intellectual Property Protection and Courts Amendment Act of 2004, sec. 204[1]	Internet Fraudulent domain name	[R]eview and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts. In carrying out this subsection, the Sentencing Commission shall provide sentencing enhancements for anyone convicted of any felony offense furthered through knowingly	**Amend. No. 689 (Nov. 1, 2006)** **USSG § 3C1.4** • Created § 3C1.4 (False Registration of Domain Name), which provides a two-level adjustment for cases in which a statutory enhancement under 18 USC § 3559(f)(1) applies. "Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive in a straightforward and uncomplicated manner."

[1] Note that in Amendment 689, the Commission incorrectly calls this Act the "Intellectual Property Protection and Courts *Administration* Act of 2004" (emphasis added). It also cites to P.L. 109-9, which is actually the public law number for the Family Entertainment and Copyright Act of 2005. *See also* note 2, *infra.*

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				providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation. For purposes of this subsection, the term "domain name" has the meaning given that term in section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946"; 15 U.S.C. 1127).	
94 GD	4/27/05	109-9 Family Entertainment and Copyright Act of 2005, sec. 105	Infringement	Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including any offense under" 17 USC §§ 506, 1201 or	**Amend. No. 675 (Oct. 24, 2005)** **USSG § 2B5.3** • Pre-Release Works. Provided "a two-level enhancement [to § 2B5.3] if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 USC § 506(a) (criminal infringement).

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				1202, or 18 USC §§ 2318, 2319, 2319A, 2319B, or 2320. (1) [T]ake all appropriate measures to ensure that the Federal sentencing guidelines and policy statements described in subsection (a) are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes; (2) determine whether to provide a sentencing enhancement for those convicted of the offenses described in subsection (a), if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format; (3) determine whether the scope of "uploading" set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and (4) determine whether the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.	• The enhancement actually goes well beyond the statute. 17 USC § 506(a)(1)(C) criminalizes only "the *distribution* of a work being prepared for commercial distribution, *by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution*." (emphases added to show differences). *Cf.* § 2B5.3(b)(2) (adding two levels "if the offense involved the *display, performance, publication, reproduction, or distribution* of a work being prepared for commercial distribution." • Pre-Release Works. Also amended the Application Note to explain that "in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The amendment addressed concerns that the distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline." • Uploading. "The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of 'uploading' to include making an infringing item available on the Internet by storing

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					an infringing item as an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline." **Note:** Be aware that the Application Note limits the exception in the last sentence to items stored on the defendant's "personal" computer. This limitation likely came from former Application Note 3, which also referenced the defendant's "personal" computer and was deleted by this amendment. • Indeterminate number. "The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items." • New offense. Refers violations under 18 USC § 2319B to § 2B5.3. **Amend. No. 687 (Nov. 1, 2006)**

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					• Repromulgated as permanent the temporary amendment.
95 GD	1/5/06	109-162 Violence Against Women and Department of Justice Reauthorization Act of 2005, sec. 1191(c)	Public Insignia Public employee insignia or uniform	[M]ake appropriate amendments to sentencing guidelines, policy statements, and official commentary to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of [18 USC § 716] reflects the gravity of this aggravating factor.	**Amend. No. 700 (Nov. 1, 2007)** **USSG § 2K2.24** "Implements [the] directive" by creating "a new policy statement at § 5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform) providing that an upward departure may be warranted if, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 USC § 716."
96 GD	3/9/06	109-177 USA Patriot Improvement and Reauthorization Act of 2005, sec. 307(c)	Embezzlement Interstate or foreign shipments by carrier	[R]eview the Federal Sentencing Guidelines to determine whether [a] sentencing enhancement is appropriate for any offense under [18 USC §§ 659 or 2311].	**Amend. No. 699 (Nov. 1, 2007)** **USSG § 2B1.1** "[R]esponds to the directive" by expanding § 2B1.1(b)(11) "to cover cargo theft and adds a reference to the receipt of stolen vehicles or goods to ensure application of the enhancement is consistent with the scope of 18 USC §§ 659 and 2313. The Commission determined that the two-level increase, and the minimum offense level of 14, appropriately responds to concerns regarding the increased instances of organized cargo theft operations." **Note:** The directive referred to § 2311, not § 2313. The guideline also refers to the receipt of stolen vehicle parts, which is not expressly covered by §

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					2313, even if the directive had referenced it.
97 GD	3/16/06	109-181 Stop Counterfeiting in Manufactured Goods Act, sec. 1(c)	Infringement Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging, or trafficking in counterfeit goods or services	[Within 180 days] review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code. In carrying out this subsection, the United States Sentencing Commission shall determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of [18 USC §§ 2318 or 2320] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996). Also authorized the Commission to use its emergency amendment procedures, which are "set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note) as though the authority under that section had not	**Amend. No. 682 (Sept. 12, 2006)** **USSG § 2B5.3** • Added Application Note to § 2B5.3 to provide that "the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation or packaging of any type or nature (i) that has not been affixed to, or does not enclose or accompany a good or service; and (ii) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service." **Amend. No. 704 (Nov. 1, 2007)** • Repromulgated as permanent the temporary amendment. • Also "respond[ed] to the directive" by expanding the sentencing enhancement in § 2B5.3(b)(3) to include convictions under 17 USC §§ 1201 and 1204 for trafficking in circumvention devices "to provide greater punishment for defendants who put infringing items into the stream of commerce in a

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				expired."* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	manner that enables others to infringe the copyright or trademark. The Commission determined that trafficking in circumvention devices similarly enables others to infringe a copyright and warrants greater punishment." **Note:** The directive said nothing about offenses under 17 USC §§ 1201 or 1204, and thus this expansion is unauthorized under the directive at issue.[2] • Also "responds to the directive" by adding an Application Note that in cases involving violations of "17 USC §§ 1201 & 1204 in which the defendant used a circumvention device and thus obtained unauthorized access to copyrighted work, . . . the 'retail value of the infringed item' is the price the user would have paid to access lawfully the copyrighted work, and the 'infringed item' is the accessed work. If the defendant violated 17 USC §§ 1201 or 1204 by conduct that did not include use of a circumvention device, Application Note 2(B) would apply by default. Thus . . . the infringement amount would be determined by reference to the value of the infringing item, which in these cases would be the circumvention device." **Note:** The directive said nothing about violations of 17 USC §§ 1201 or 1204.

[2] Interestingly, over two years before, section 105 of the Family Entertainment and Copyright Act of 2005 (4/27/05) had directed the Commission to use its emergency authority to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including any offense under" 17 USC § 1201 (but not § 1204). *See* Amend. 675 & 687, *supra.* It appears to be this directive to which the Commission was responding, at least in part, in Amendment 682.

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					• Although not mentioned in the Reason for Amendment, it also added an Application Note defining "circumvention devices" as "devices used to perform the activity in 17 USC §§ 1201(a)(3)(A) and 1201(b)(2)(A)."
98 GD	7/27/06	109-248 Adam Walsh Child Protection and Safety Act of 2006, sec. 141(b)	Sex Failure to register	"In promulgating guidelines for use of a sentencing court in determining the sentence to be imposed for the offense specified in subsection (a) [18 USC § 2250], the . . . Commission shall consider the following matters, in addition to the matters specified in section 994 of title 28, United States Code: (1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register. (2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register. (3) Whether the person voluntarily attempted to correct the failure to register. (4) The seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in	**Amend. No. 701 (Nov. 1, 2007)** **USSG §§ 2A3.5, 2A3.6** • Created § 2A3.5 (Failure to Register as a Sex Offender), which "provides three alternative base offense levels based on the tiered category of the sex offender" and "two specific offense characteristics," one creating a "tiered enhancement to address criminal conduct committed while the defendant is in a failure to register status," and the other allowing for a "three-level decrease if the defendant voluntarily corrected the failure to register or voluntarily attempted to register but was prevented from registering by uncontrollable circumstances, and the defendant did not contribute to the creation of those circumstances." • Also created § 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), which "implements the directive" in the Act pertaining to 18 USC § 2250(c) and also covers offenses under 18 USC § 2260A, which the directive did not reference. Section 2A3.6 "provides that for

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				section 111. (5) Whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.	offenses under section 2250(c), the guideline sentence is the minimum term of imprisonment required by statute" and that Chapters 3 and 4 do not apply. "This is consistent with how the guidelines treat other offenses that carry both a specified term of imprisonment and a requirement that such term be imposed consecutively." Also contains an Application Note on upward departures, which "may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor."
99 SD	10/4/06	109-295 Department of Homeland Security Appropriations Act of 2007, sec. 551	Border tunnels Border tunnels and passages	[P]romulgate or amend sentencing guidelines to provide for increased penalties for persons convicted of offenses described in [18 USC § 555], as added by subsection (a)." In carrying out the directive, . . . (A) ensure that the sentencing guidelines, policy statements, and official commentary reflect the serious nature of the offenses described in [18 USC § 555] and the need for aggressive and appropriate law enforcement action to prevent such offenses; (B) provide adequate base offense levels for offenses under such section; (C) account for any aggravating or mitigating circumstances that might justify exceptions, including--	**Amend. No. 700 (Nov. 1, 2007)** **USSG § 2X7.1** • Created a new guideline at § 2X7.1, with a BOL of 16, "which is commensurate with certain other offenses with statutory maximum terms of imprisonment of 20 years and ensures a sentence of imprisonment." Also added 4-level increase over the offense level applicable to the underlying smuggling offense for convictions under § 555(c), "which ensures that the seriousness of the underlying offense is the primary measure of offense severity, . . . satisfies the directive's instruction to account for the aggravating nature of the use of a tunnel or subterranean passage to breach the border to accomplish the smuggling offense and effectuates the statute's doubling of the statutory maximum penalty. A conviction under 18 USC § 554(b) receives a base offense level of 8,

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				(i) the use of a tunnel or passage described in subsection (a) of such section to facilitate other felonies; and (ii) the circumstances for which the sentencing guidelines currently provide applicable sentencing enhancements; (D) ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutes; (E) make any necessary and conforming changes to the sentencing guidelines and policy statements; and (F) ensure that the sentencing guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.	which reflects the less aggravated nature of this offense."
100 GD	1/12/07	109-476 Telephone Records and Privacy Protection Act of 2006, sec. 4	Privacy Fraud and related activity in connection with obtaining confidential phone records information of a covered	[R]eview and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code within 180 days. Also authorizes the Commission to use its emergency amendment procedures, which are "set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note) as though	**Amend. No. 697 (May 1, 2007)** **USSG § 2H3.1** • Referred § 1039 offenses to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Information) because "the Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced in this guideline."

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			entity	the authority under that section had not expired."* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, to expire unless made permanent during the regular amendment cycle), reprinted at 28 U.S.C. § 994 note.	• Referred to a pre-existing cross reference that says "if the purpose of the offense was to facilitate another offense, the guideline applicable to an attempt to commit the other offense should be applied, if the resulting offense level is higher. The Commission concluded that operation of the cross-reference would capture the harms associated with the aggravated form of this offense referenced at 18 USC § 1039(d) or (e)." **Note:** §§ 1039(d) & (e) merely increase the stat max from 10 years to 15 years for specified aggravated forms of the offense, whereas the cross-reference is not so limited and applies whenever the purpose of the offense was "to facilitate *any* other offense" (emphasis added). • Expanded the scope of the existing three-level enhancement in § 2H3.1 "to include cases in which the defendant is convicted under 18 USC § 1039(d) or (e). Thus, in a case in which the cross reference does not apply, application of the enhancement will capture the increased harms associated with the aggravated offenses." **Amend. No. 708 (Nov. 1, 2007)** • Repromulgated as permanent the temporary amendment. • Also expanded the upward departure note "to include tax return information of a substantial number of individuals." **Note:** § 1039 has nothing

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					to do with tax return information and thus this expansion is unauthorized under the directive at issue.
101 GD	1/7/08	110-177 Court Security Improvement Act of 2007, sec. 209	Intimidation Influencing, impeding, or retaliating against federal official by threatening or injuring a family member	[R]eview the Sentencing Guidelines as they apply to threats punishable under section 115 of title 18, United States Code 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. In conducting the study, the Commission shall take into consideration the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group. **Note:** The Act also added two new offenses at 18 U.S.C. § 1521 (relating to retaliation against a Federal judge or federal law enforcement officer by false claim or slander of title) and 18 U.S.C. § 119 (relating to publication of restricted information about certain persons performing official duties with the intent to threaten and intimidate).	**Amend. No. 729 (Nov. 1, 2009)** **USSG § 2A1.6** • Added a 2-level increase if the defendant (A) is conviction 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 § 115. The enhancement is not limited to threats "that occur over the Internet," which is the subject of the directive. • Explained that the amendment is broader than the directive because it "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 should be technologically neutral." [This was not required or even informed by national experience, as such offense conduct had apparently never happened at the time of the amendment]. • Made no change with respect to offenses involving multiple threats and multiple victims, as § 2A6.1 already "adequately accounts" for such offenses.

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					Amend. No. 718 (Nov. 1, 2008) [Although the Act did not direct the Commission to make any of the changes below, and the Commission does not say that these amendments are related to the directive, they are included in this chart because they may be collateral outgrowths of the directive.] **USSG § 2A6.1, 2H3.1** • Referred the new offense of retaliation against a judge by false liens or slander (18 U.S.C. § 1521) to § 2A6.1 (Threatening or Harassing Communications; Hoaxes); included a two-level enhancement "if the offense involved more than two false liens or encumbrances." • Also amended the upward departure provision in Application Note 3 of § 2A6.1 to read: "If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted." • Explained that "these modifications reflect the additional time and resources required to remove

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					multiple false liens or encumbrances and provide proportionality between such offenses and other offenses referenced to this guideline that involve more than two threats." For the upward departure provision if the offense involved substantial pecuniary harm, explained that it "reflects the increased seriousness of those offenses that result in substantial costs." • Referred the new offense of publishing restricted information (18 U.S.C. § 119) to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) and included a 2-level enhancement "if the offense involved the use of a computer or interactive computer service to make restricted personal information about a covered person publicly available." Explained that this enhancement "accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet."
102 SD	1/7/08	110-179 Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, sec. 5	Fraud In connection with major disaster or emergency benefits	[Sec. 2 of the Act created a new offense at 18 U.S.C. § 1040 (fraud in connection with a major disaster or emergency benefits).] (a)(1) [P]romulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under [42 U.S.C. § 5170] or an emergency	**Amend. No. 714 (Feb. 6, 2008)** **USSG § 2B1.1** • Added two-level enhancement at § 2B1.1(b)(16), stating that "[i]f the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by two levels."

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				declaration under [42 U.S.C. § 5191]; and (2) submit to the Committee on the Judiciary of the Senate and the House "an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph. (b) In carrying out this section, the Sentencing Commission shall— (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses; (2) assure reasonable consistency with other relevant directives and with other guidelines; (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements; (4) make any necessary conforming changes to the sentencing guidelines; and (5) assure that the guidelines adequately meet	• Added an Application Note stating that "[i]n a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable." • Defined the terms "emergency" and "major disaster" to have the same definition as in 42 USC § 5122. **Amend. No. 719 (Nov. 1, 2008)** Repromulgated the emergency amendment as permanent, but with several changes, as follows: • Deleted the amendments to § 2B1.1 made by Amend. No. 714. • Added a 2-level enhancement and a minimum offense level of 12 at § 2B1.1(b)(11) if the offense "involved conduct described in 18 U.S.C. § 1040." • Explained that "the Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not

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				the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **Note:** The Act also authorized the Commission to promulgate these amendments pursuant to its emergency authority.* *Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.	adequately account for the harm caused by the offense. The Commission studied a sample of disaster fraud cases and compared those cases to other cases of defrauding government programs. This analysis supported claims made in testimony to the Commission that the majority of the disaster fraud cases resulted in probationary sentences because the amount of loss calculated under subsection (b)(1) of §2B1.1 had little impact on the sentences. The Commission also received testimony and public comment identifying various harms unique to disaster fraud cases. For example, charitable institutions may have a more difficult time soliciting contributions because fraud in connection with disasters may erode public trust in these institutions. Moreover, the pool of funds available to aid legitimate disaster victims is adversely affected when fraud occurs. Further, the inherent tension between the imposition of fraud controls and the need to provide aid to disaster victims quickly makes it difficult for relief agencies and charitable institutions to prevent disaster fraud. All of these factors provide support for a minimum offense level." • Added a downward departure provision if defendant received the minimum offense level of 12 under the amended § 2B1.1(b)(11) and if the defendant "sustained damages, loss, hardship, or suffering cause by a major disaster o ran emergency as those terms are defined in 42 U.S.C. 5122 and . . . the benefits received illegally were

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					only an extension of overpayment of benefits received legitimately, a downward departure may be warranted. • Explained that the downward departure "provision recognizes that a defendant's legitimate status as a disaster victim may be a mitigating factor warranting a downward departure in certain cases involving relatively small amounts of loss." These amendments and their history are detailed at USSC, *Report to the Congress: Amendments to the Federal Sentencing Guidelines in Response to the Emergency Disaster Assistance Fraud Penalty Enhancement Act of 2007* (Sept. 2008), avail. at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Disaster_Fraud/200809_RtC_Disaster_Fraud/index.htm.
103 SD	09/26/08	110-326 Identity Theft Enforcement and Restitution Act of 2008, sec. 209.	Identity theft and computer crimes	(a) [] Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028 [fraud in connection with identification documents], 1028A [aggravated identity theft], 1030 [fraud in connection with computers], 2511 [illegal wiretap or	**Amend. No. 726 (Nov. 1, 2009)** **USSG §§ 2B1.1, 2H3.1, 3B1.3** • Inserted a new freestanding 2-level enhancement, at subsection (b)(15), if the defendant was convicted under 18 U.S.C. § 1030 [fraud in connection with computers] and the offense "involved an intent to obtain personal information."

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				disclosure], and 2701 [unlawful access to stored communications] 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. (b) Requirements. –In determining its guidelines and policy statements on the appropriate sentence for the crimes enumerated in subsection (a), the United States Sentencing Commission shall consider the extent to which the guidelines and policy statements may or may not account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data: (1) The level of sophistication and planning involved in such offense. (2) Whether such offense was committed for purpose of commercial advantage or private financial benefit. (3) The potential and actual loss resulting from the offense including – (A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information;	• The effect of this change for § 1030 offenses involving the intent to obtain personal information is that they will now be subject to a *cumulative* two-level enhancement. (The Commission moved the two-level enhancement for computer offenses under 18 U.S.C. § 1030 if the offense involved "intent to obtain personal information" to create this new, free-standing specific offense characteristic.) As a result, a defendant can be subject to enhancements for both "intent to obtain personal information" (two levels) under new subsection (b)(15) and any relevant enhancement relating to computer offenses (if the offense involved a computer system used to maintain or operate a critical infrastructure or government computer (two levels), involved intentional damage to such a computer (four levels), or caused substantial disruption of a critical infrastructure (six levels)) under subsection (b)(16). • As its reason, the Commission explained that "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 into a 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 Commission

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				and (B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information. (4) Whether the defendant acted with intent to cause either physical or property harm in committing the offense. (5) The extent to which the offense violated the privacy rights of individuals. (6) The effect of the offense upon the operations of an agency of the United States Government, or of a State or local government. (7) Whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice. (8) Whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure. (9) Whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person,	did not explain why the fact that these cases are "different" requires greater punishment. • Added a two-level enhancement applicable to all cases sentenced under § 2B1.1 (not just those addressed by this directive) "if the offense involved the unauthorized public dissemination of personal information." The Commission did not define "public dissemination." • Expanded the definition of "victim" under § 2B1.1 so that in a case involving means of identification (as defined at 18 U.S.C. § 1028(d)(7) and belonging to an actual person), a victim for purposes of the victim table at subsection (b)(2) includes "any individual whose means of identification was used unlawfully and without authority." As its reason, the Commission explained that an individual whose personal information is compromised "even if fully reimbursed, must often spend significant time resolving credit problems and related issues." This is contrary to the relevant data presented to the Commission, compiled by the Federal Trade Commission and demonstrating that the majority of individuals who know about the misuse of their identifying information spend minimal time resolving problems, with the median time spent of four hours. *See* Federal Trade Commission, 2006 Identity Theft Report (Nov. 2007), available at www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf

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				or causing death. (10) Whether the defendant purposefully involved a juvenile in the commission of the offense. (11) Whether the defendant's intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in USSG 2B1.1(b)(14). (12) Whether the term "victim" as used in USSG 2B1.1, should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a result of the offense. (13) Whether the defendant disclosed personal information obtained during the commission of the offense. (c) Additional Requirements.--In carrying out this section, the United States Sentencing Commission shall – (1) assure reasonable consistency with other relevant directives and with other sentencing guidelines; (2) account for any additional aggravating or	• The Commission also explained that it had "received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing." It does not explain why or how this evidence supports an increase in punishment by designating those who have not suffered pecuniary loss as "victims." (On a positive note, the Commission limited the new definition of "victim" to "cover only those individuals whose means of identification are *actually used*." (Emphasis added.)) • Amended the commentary at Application Note 3(C), which explains how to calculate estimated loss, to state that the estimate of loss may be based on the fair market value of property that is copied. Explained that "[t]his 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 change is intended to recognize that "a computer crime that does not deprive the owner of the information on the computer nonetheless may cause loss inasmuch as it reduces the value of the information." • Also amended the commentary to Application Note 3(C) to state that "in the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction in the

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				mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (3) make any conforming changes to the sentencing guidelines; and (4) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.	value of that information that resulted from the offense. Explains that it "responds to concerns that the guidelines did not adequately explain how to estimate loss." • Amended § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to add that an upward departure may be warranted in a case involving personal information or means of identification of a substantial number of people. • Amended Application Note 2(B) of § 3B1.3 (Abuse of Position of Trust) to clarify that it applies to "issuing" or "transferring" a means of identification as well as "obtaining" or "using" a means of identification. This change was apparently aimed at state motor vehicle department employees. • With respect to the factors listed in the directive that did not result in a guideline increase, the Commission stated that it "determined that certain factors listed in the directive are adequately accounted for by existing provisions in the *Guidelines Manual*." • For a full discussion of the directive and reasons why the Commission might have decided not to take any action, see Testimony of Jennifer N. Coffin Before the Commission Public Hearing on Proposed Amendments for 2009 Re: offenses involving computer crimes and the misuse of

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					identifying information (Mar. 17, 2009), avail. at www.fd.org/pdf_lib/id%20theft.pdf.
104 GD	12/23/08	110-457 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 222.	Human trafficking	[R]eview 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. Note that the Act also created new offenses at 18 U.S.C. § 1593A (benefiting financially from peonage, slavery and trafficking in persons), 18 U.S.C. § 1589(b) (benefiting financially from forced labor), and 18 U.S.C. § 1351 (fraud in foreign labor contracting), and amended existing statutes to include new obstruction offenses under 18 U.S.C. §§ 183, 1584, 1590, 1591, and 1592, and new conspiracy offenses under 18 U.S.C. § 1594.	**Amend. No. 730 (Nov. 1, 2009)** **USSG § 2L1.1** • Added an alternate prong to the enhancement at subsection (b)(8)(B), to apply either a two-level increase in a case where the defendant was convicted of alien harboring, the harboring was for the purpose of prostitution, and the defendant receives an adjustment under § 3B1.1, or a six-level increase in a case where those conditions are met and the alien engaging in the prostitution had not attained the age of 18 years. Subsection (b)(8) makes clear that new subparagraph (b)(8)(B) does not apply if the enhancement under (b)(8)(A) is greater. • Amended Application Note 6 to provide that an adjustment under § 3A1.3 for restraint of a victim does not apply in cases that receive an enhancement under subsection (b)(8)(A), meaning that a § 3A1.3 adjustment is available in cases that receive an enhancement under new subsection (b)(8)(B). • Referenced new 18 U.S.C. § 1351 (fraud in foreign labor contracting) to §2B1.1.

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					• Referenced new 18 U.S.C. § 1593A (benefiting financially from peonage, slavery, and trafficking in persons) to § 2H4.1. • Added a downward departure to § 2H4.1 in a case in which the defendant is convicted under 18 U.S.C. §§ 1589(b) or 1593A for participating in a venture described in those sections and the defendant acted in reckless disregard of the fact that the venture had engaged in the criminal activities described in those statutes, to "recognize[] 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."
N/A	10/15/08	110-425 Ryan Haight Online Pharmacy Consumer Protection Act of 2008, sec. 3(k)(2).	Schedule III drugs / hydrocodone	[The Act created two new offenses and increased the statutory maximum for all Schedule III and IV controlled substance offenses and for second and subsequent Schedule V controlled substances, and a new statutory maximum for Schedule III controlled substance offenses in cases in which "death or serious bodily injury results from the use of such substance" at 21 U.S.C § 841(b)(1)(E).] The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to	**Amend. No. 727 (Nov. 1, 2009)** **USSG § 2D1.1** • Addressing the statutory penalty enhancement, provided two new alternative base offense levels for offenses involving Schedule III controlled substances "if the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance," with a level 30 if the defendant committed the offense after one or more prior convictions for a similar offense, and a level 26 otherwise. Explained that this is comparable to similar provisions involving Schedule I and II

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				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.	substances and "reflect[s] the harms involved in these offenses and the criminal histories of repeat drug offenders." • Modified the Drug Quantity Table in § 2D1.1 to increase the maximum base offense level for all offenses involving Schedule III hydrocodone from level 20 to level 30. "The Commission determined that the 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." It does not explain how an increase in penalties will reduce these incidents. • Removed hydrocodone from Drug Equivalency Table for Schedule III substances. • For a full discussion of the statutory changes and the directive, and for reasons why these changes were not warranted and are contrary to the directive, see Written Statement of Jon Sands Chair, Federal Defender Sentencing Guidelines Committee Before the United States Sentencing Commission Public Hearing on Proposed Amendments for 2009 Re: Ryan Haight Online Pharmacy Consumer Protection Act of 2008

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					(March 17-18, 2009), available at www.fd.org/pdf_lib/online%20pharmacy%20act.pdf.
105 GD	10/13/08	110-407 Drug Trafficking Vessel Interdiction Act of 2008, sec. 103.	Submersible vessels	**New offense:** Operation of a submersible vessel or semi-submersible vessel without nationality," codified at 18 U.S.C. § 2285: (a) Offense. – Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.] **The directive:** (a) In General – Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall promulgate sentencing guidelines (including policy statements) or amend existing	**Amend. No. 728 (Nov. 1, 2009)** **USSG §§ 2D1.1, 2X7.2** • Added a two-level increase under § 2D1.1 "if the defendant imported or exported a controlled substance under circumstances in which . . . a submersible or semi-submersible vessel as described in 18 U.S.C. § 2285 was used." • Explained that it "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)." It does not specify the special risks and harms that would warrant the increase. • Created a new guideline, § 2X7.2, applying to § 2285 offenses, with a base offense level of 26, and an instruction to apply the greater of three upward enhancements of increasing severity for "failure to heave to when directed by law enforcement" (2 levels), an attempt to sink the vessel (4 levels), or sinking the vessel (8 levels).

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				sentencing guidelines (including policy statements) to provide adequate penalties for persons convicted of knowingly operating by any means or embarking in any submersible vessel or semi-submersible vessel in violation of section 2285 of title 18, United States Code. (b) Requirements. – In carrying out this section, the United States Sentencing Commission shall – (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offense described in section 2285 of title 18, United States Code, and the need for deterrence to prevent such offenses; (2) account for any aggravating or mitigating circumstances that might justify exceptions, including – (A) the use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies; (B) the repeated use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies, including whether such use is part of an ongoing criminal	• Also invited upward departure if the defendant "engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel" to facilitate other felonies or if the offense involved "use of the vessel as part of an ongoing criminal organization or enterprise." • Explained the relatively high base offense level for the simple offense of navigating a vessel without nationality by stating that "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) [] regardless of type or quantity of drug. 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." In other words, the guideline sentence for this offense is directly tied to an offense the defendant was not charged with or convicted of. The government does not need to prove that there were any drugs involved for the defendant to be sentenced as a drug trafficker. • Explained the relatively high base offense level for the simple offense of navigating a vessel without nationality by stating that "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) []

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				organization or enterprise; (C) whether the use of such a vessel involves a pattern of continued and flagrant violations of section 2285 of title 18, United States Code; (D) whether the persons operating or embarking in a submersible vessel or semi-submersible vessel willfully caused, attempted to cause, or permitted the destruction or damage of such vessel or failed to heave to when directed by law enforcement officers; and (E) circumstances for which the sentencing guidelines (and policy statements) provide sentencing enhancements; (3) ensure reasonable consistency with other relevant directives, other sentencing guidelines and policy statements, and statutory provisions; (4) make any necessary and conforming changes to the sentencing guidelines and policy statements; and (5) ensure that the sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.	regardless of type or quantity of drug. 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." In other words, the guideline sentence for this offense is directly tied to an offense the defendant was not charged with or convicted of. The government does not need to prove that there were any drugs involved for the defendant to be sentenced as a drug trafficker. • Explained that the tiered SOCs address the aggravating circumstances listed in the directive. Note that the Commission does not account for any mitigating circumstances, also contemplated by (but not listed in) the directive. • Explained that offenses involving conduct covered by the enhancements (failure to heave to, attempting to and actually sinking the vessel) "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." Also explained that an eight-level enhancement is appropriate for sinking the vessel because it "destroys evidence of illegal activity." In other words, and rather startlingly, the guidelines recommend a higher sentence due to *lack* of evidence.

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106 SD	10/10/08	110-384 Let Our Veterans Rest In Peace Act of 2008, sec. 3.	Desecration of veteran's grave	(a) In General. –Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements to ensure the guidelines and policy statements provide adequate sentencing enhancements for any offense involving the desecration, theft, or trafficking in, a grave marker, headstone, monument, or other object, intended to permanently mark a veteran's grave. (b) Commission Duties.—In carrying out this section, the Sentencing Commission shall – (1) ensure that the sentences, guidelines, and policy statements relating to offenders convicted of these offenses are appropriately severe and reasonably consistent with other relevant directives and other Federal sentencing guidelines and policy statements; (2) make any necessary conforming changes to the Federal sentencing guidelines; and (3) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.	**Amend. No. 733 (Nov. 1, 2009)** **USSG § 2B1.1** • Amended the SOC at subsection (b)(6), which adds two levels if the "offense level involved theft of, damage to, destruction of property from a national cemetery or veterans' memorial," to apply to "trafficking in" such property as well. • Explained that "[t]here 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." • Did not say how this increase will serve the purposes of sentencing.
107 RPT	10/28/09	111-84 Matthew	Report Mandatory	(a) Report.--Not later than 1 year after the date of enactment of this Act, the United States Sentencing Commission shall submit to	**Public Hearing held on May 27, 2010.** Written testimony available at

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		Shepard and James Byrd, Jr. Hate Crimes Prevention Act, sec. 4713.	minimums	the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on mandatory minimum sentencing provisions under Federal law. (b) Contents of Report.--The report submitted under subsection (a) shall include-- (1) a compilation of all mandatory minimum sentencing provisions under Federal law; (2) an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing; (3) an assessment of the impact of mandatory minimum sentencing provisions on the Federal prison population; (4) an assessment of the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98-473; 98 Stat. 1987) and the sentencing guidelines system in place after Booker v. United States, 543 U.S. 220 (2005); (5) a description of the interaction between	www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Agenda.htm. **Report submitted on Oct. 31, 2011.** Available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

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				mandatory minimum sentencing provisions under Federal law and plea agreements; (6) a detailed empirical research study of the effect of mandatory minimum penalties under Federal law; (7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy; and (8) any other information that the Commission determines would contribute to a thorough assessment of mandatory minimum sentencing provisions under Federal law.	
108 SD	03/23/10	111-148 Patient Protection and Affordable Care Act, sec. 10606(a)(2).	Health care fraud	(a) Fraud Sentencing Guidelines.-- (1) Definition. – In this subsection, the term "Federal health care offense" has the meaning given that term in section 24 of title 18, United States Code, as amended by this Act. (2) Review and amendments. – Pursuant to the authority under section 994 of title 28, United States Code, and in accordance with this subsection, the United States Sentencing Commission shall – (A) review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care	**Amend. No. 749 (Nov. 1, 2011)** **USSG §§ 2B1.1, 3B1.2** • Added new tiered enhancement at subsection (b)(8) that applies in "Federal health care offenses involving a Government health care program," as directed, except that the tiers apply to loss amounts "more than" the specified amount rather than "not less than" the specified amount, to maintain consistency with other provisions. • Added a new special rule at Application Note 3(F), as directed by Congress, to provide that, if a person is convicted of a "Federal health care offense involving a Government health care

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				offenses; (B) amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant; and (C) amend the Federal Sentencing Guidelines to provide – (i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $ 1,000,000 and less than $ 7,000,000; (ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $ 7,000,000 and less than $ 20,000,000; (iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government	program, the aggregate dollar amount of fraudulent bills is prima facie evidence of intended loss, "if not rebutted." • Defined "Federal health care offense" as that term is defined in 18 U.S.C. § 24, as required by the directive. • Defined "Government health care program" as "any plan or program that provides health benefits, whether directly, through insurance or otherwise, which is funded directly, in whole or in part, by federal or state government." Examples are "the Medicare program, the Medicaid program, and the CHIP program." By including state funded health care plans, this definition is broader than required by the directive. For further analysis, see the Federal Public Defender Comments on the 2011 proposed amendments: www.fd.org/pdf_lib/FPD%20Public%20Comment%202011.pdf. • Amended Application Note 3(A) to § 3B1.2 "to make clear that a defendant who is accountable under § 1B1.3 (Relevant Conduct) for a loss amount under § 2B1.1 that greatly exceeds the defendant's personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment." Provides example of a defendant "whose role in the scheme was limited to serving as a nominee owner and

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				health care program which involves a loss of not less than $ 20,000,000; and (iv) if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs. (3) Requirements. –In carrying this subsection, the United States Sentencing Commission shall – (A) ensure that the Federal Sentencing Guidelines and policy statements – (i) reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud; and (ii) provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances; (B) consult with individuals or groups representing health care fraud victims, law enforcement officials, the health care industry, and the Federal judiciary as part of the review described in paragraph (2); (C) ensure reasonable consistency with	who received little personal gain relative to the loss amount.”

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				other relevant directives and with other guidelines under the Federal Sentencing Guidelines; (D) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements; (E) make any necessary conforming changes to the Federal Sentencing Guidelines; and (F) ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing.	
109 GD	07/21/10	111-203 Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1079A(a)(1)	Securities fraud	(A) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and	**Amend. No. 761 (Nov. 1, 2012)** **USSG §§ 2B1.1, 2B1.4** • Created a new Application Note 3(F)(ix) to § 2B1.1 to establish a rebuttable presumption that "the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or

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				actual harm to the public and the financial markets from the offenses. (B) Requirements.--In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States Sentencing Commission shall – (i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect – (I) the serious nature of the offenses described in subparagraph (A); (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II); (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses; (iii) ensure reasonable consistency with other relevant directives and guidelines and	commodity during the 90-day period after the fraud was disclosed to the market, and (II) multiplying the difference in average price by the number of shares outstanding." • To provide "flexibility" (and to place the burden on the defendant to rebut the presumption), provided that in determining whether this will provide a "reasonable estimate of the actual loss," the court "may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense," such as "changes caused by external market forces. • Explained that the rule is based on the "modified rescissory method" and "should ordinarily provide a 'reasonable estimate of the loss.'" It is intended to be "a workable and consistent formula." [It is also the option endorsed by the government because it eliminates the need for expert testimony and opposed by Defenders and PAG because it may increase the guideline range based on external market forces, not intended, foreseen, or caused by the defendant]. Although the Commission cited two circuit cases in support of the rule (from the Third and Eleventh), it did not mention that two other circuits had adopted the "market adjusted method" of calculating loss, *see United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005), or that the Ninth Circuit had

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				Federal statutes; (iv) make any necessary conforming changes to guidelines; and (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.	accepted the principle that only losses actually caused by the defendant's actions may be counted. *See United States v. Berger*, 587 F.3d 1038, 1044-46 (9th Cir. 2009). • Amended § 2B1.4 (Insider Trading) to provide a minimum offense level of 14 if the offense involved an "organized scheme to engage in insider trading." • Explained that the minimum offense level reflects the Commission's "view" that "a defendant who engages in considered, calculated systematic or repeated efforts to obtain and trade on inside information, as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration." • Data indicated that ordinarily the gain in insider trading cases already triggers a guideline range that requires incarceration, so the effect of the 14-level minimum floor will be to "ensure[] that the guidelines require a period of incarceration even in such a case involving relatively little gain." • Amended commentary to § 2B1.4 to "provide more guidance" regarding the applicability of § 3B1.3 (Abuse of a Position of Trust). Application Note 2 now advises that the 2-level enhancement for abuse of a position of trust should be applied "if the defendant's employment in a position that

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					involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense." It provided examples of situations to which it "would apply" and "ordinarily would not apply." Previous language that limited its application "only" to abuse of a position of "special" trust was removed. [The Commission had proposed a 4-level upward enhancement for abuse of position of trust, so this amendment was less harsh than proposed.] • Note that § 2B1.4 already had a base offense level 2 levels higher than under § 2B1.1 because it is presumptively "treated as a sophisticated fraud." USSG § 2B1.4, comment. (backg'd).
110 GD	07/21/10	111-203 Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1079A(a)(2)	Financial institution fraud/ mortgage fraud	(A) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for	**Amend. No. 761 (Nov. 1, 2012)** **USSG § 2B1.1** • Amended Application Note 3(E) to establish a new rule for determining credits against loss in mortgage fraud cases. It now provides that, in cases in which the collateral has not been disposed of at the time of sentencing, the loss to the victim shall be reduced by "the fair market value of the collateral as of the date on which the guilty of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendre*." Also

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				offenders involved in substantial bank frauds or other frauds relating to financial institutions. (B) Requirements. – In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States Sentencing Commission shall – (i) ensure that the guidelines and policy statements reflect— (I) the serious nature of the offenses described in subparagraph (A); (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II); (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses; (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;	established a rebuttable presumption that the most recent tax assessment value of the collateral is a "reasonable estimate of the fair market value." • In making the determination, the court "may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value." • Under the old rule, the fair market value of undisposed-of collateral was determined at the time of sentencing and based on actual appraisals. The new rule relieves probation officers (who advocated it) of accurately determining fair market value through appraisal. In some jurisdictions, tax assessment value is significantly lower than fair market value, so that the presumptive credit against loss will now be lower (resulting in a higher loss amount). Even the government said that this method, though "easily found," "is not always a just statement of the value of the property." The new rule shifts the burden to defendants to show that the tax assessment value is not a reasonable estimate of the fair market value of the collateral. • Amended commentary to the 4-level enhancement at § 2B1.1(b)(15)(B)(ii) if the offense "substantially endangered the solvency or financial security of an organization." Application Note 12 sets forth criteria for the court to

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				(iv) make any necessary conforming changes to guidelines; and (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.	consider, and includes a new consideration: Whether "one or more of the criteria listed [] was likely to result from the offense but did not result from the offense because of federal government intervention, such as a bailout." • Explained that the amendment reflects the Commission's "intent that [the enhancement] account for the risk of harm from the defendant's conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention." • Amended the upward departure provision at Application Note 19(A)(iv) to add an example. It now reads that departure may be warranted if "the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), <u>such as a risk of significant disruption of a national financial market</u>." • Explained that this example responds to the directive to consider whether the guidelines applicable to the offenses covered by the directives appropriately "account for the potential and actual harm to the public and the financial market[s]." [The Commission had proposed a new specific offense characteristic, so the amendment was less harsh than proposed. The government opposed a departure provision, urging

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					the adoption of a 6-level upward enhancement and a minimum offense level of 24. It said that the burden would be higher if only a departure.] • Added an example to Application Note 19(C), which provides that a downward departure may be warranted in cases "in which the offense level determined under this guideline substantially overstates the seriousness of the offense." The example provides that "a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims," and that, "in such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense." • Explained that the amendment "**responds to concerns raised in comment and case law** that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases."
111 RPT	07/01/2010	111–195 Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010,	Study Mandatory minimums for certain offenses	Not later than 1 year after the date of the enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under	**Submitted December 11, 2011.** **Available at** http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20111214_Iran_Sanctions_Transmission.pdf

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		sec. 107(b)		section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of-- (1) section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(a)); (2) sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. 2778, 2779, and 2780); and (3) the Trading with the enemy Act (50 U.S.C. App. 1 et seq.).	**The Commission's Conclusion:** Mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad. For example, section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for. the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission's *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011). There may be cases in which a mandatory minimum penalty for violating section 2778 is perceived as too severe because the offense had little impact on national security. The Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, but there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. If Congress decides to enact mandatory minimum penalties, the Commission unanimously believes that such penalties should be limited to offenses that are damaging to national security.
112 SD	10/12/10	111–273 Secure and	Drug	Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and, if	**Amend. No. 751 (Nov. 1, 2011)** **USSG § 2D1.1 [and by reference USSG § 3B1.3]**

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		Responsible Drug Disposal Act of 2010, sec. 4		appropriate, amend the Federal sentencing guidelines and policy statements to ensure that the guidelines and policy statements provide an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the Guidelines Manual if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3.	• Amended Application Note 8 of § 2D1.1 to provide that the 2-level enhancement under § 3B1.3 for abuse of position of trust or use of a special skill "ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. • Explained that the amendment "reflects the likelihood that in such a case the offender abused a position of trust (*i.e.*, the authority provided by 21 U.S.C. § 822 to receive controlled substances for the purpose of disposal) to facilitate the commission or concealment of the offense."
113 SD	08/03/10	111-220 Fair Sentencing Act of 2010	Cocaine base Crack cocaine	[Section 2 of the Act increased the drug quantities that trigger the 5- and 10-year mandatory minimum penalties from 5 and 50 grams to 28 and 280 grams, respectively. Section 3 of the Act eliminated the 5-year mandatory minimum for simple possession of crack cocaine.] Congress directed the Commission as follows: SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE. Pursuant to its authority under section 994 of	**Amend. No. 748 (Nov. 1, 2010)** **USSG §§ 2D1.1, 2D1.12** • Amended Drug Quantity Table at § 2D1.1 "to account for the changes in the statutory penalties made in section 2 of the Act." Offenses involving 28 grams of crack assigned a base offense level of 26, offenses involving 280 grams or more assigned a base offense level of 32, "and other offense levels are established by extrapolating upward and downward." • Explained that "[c]onforming to this approach ensures that the relationship between the statutory

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				title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense. SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS. Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if-- (1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense; (2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or	penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table." • Amended the mitigating role cap at § 2D1.1(b)(2), in response to section 7(1) of the Act, so that a defendant receiving the 4-level minimal role adjustment under § 3B1.2 will not be assigned a base offense level greater than 32. • Added new SOC at § 2D1.1(b)(2), in response to section 5 of the Act, to provide 2-level enhancement "[i]f the defendant used violence, made a credible threat to use violence, or directed the use of violence." Amended Application Note 3 to "clarify" that, while the new enhancement at (b)(2) is to apply cumulatively to the enhancement at (b)(1) ("if a dangerous weapon was possessed"), it does not apply if the defendant "merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence." This note suggests that mere possession of a weapon is not "violence" or "threat of violence," and that a defendant must do more than simply possess a dangerous weapon in order for the new enhancement to apply. It did not define "violence" or "threat of violence." It did not otherwise explain why the enhancements should apply cumulatively. • Makes a conforming change to § 2K2.4 (Use of

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				(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors: (i) The defendant-- (I) used another person to purchase, sell, transport, or store controlled substances; (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction. (ii) The defendant-- (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual; (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug	Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to provide that a defendant sentenced under both § 2D1.1 and § 2K2.4, the new enhancement under subsection (b)(2) for use of violence or threat of violence does not apply because it is accounted for by § 2K2.4. • Adds new SOC at subsection (b)(11) (in response to section (6)(1) of the Act), to provide a 2-level enhancement if the defendant "bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense." [Note that the directive specifies that this enhancement is to apply to "drug trafficking offenses," whereas the enhancement as promulgated by the Commission applies to any offense sentenced under § 2D1.1, which includes offenses such as those involving submersible vessels and having no element of drugs or drug trafficking.] • Added new Application Note 27 to explain that the new bribery enhancement at subsection (b)(11) does not apply "if the purpose of the bribery was to obstruct or impede the investigation, prosecution or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice)." • Added new SOC at subsection (b)(12) (in response to section 6(2) of the Act) to provide 2-level enhancement "[i]f the defendant maintained a

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				trafficking; (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense. (iii) The defendant was involved in the importation into the United States of a controlled substance. (iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense. (v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood. SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.	premises for the purpose of manufacturing or distributing a controlled substance." Also added a new Application Note 28 to define "premises" by reference to the background commentary to § 2D1.8 (a "building, room, or enclosure), to set forth two factors to consider in making the determination (possessory interest and extent of control), and to emphasize that in order for the enhancement to apply, manufacturing or distributing a controlled substance, though not necessarily the "sole purpose" for which the premises is maintained, must be "one of the defendant's primary or principal uses of the premises," rather than an "incidental or collateral" use. • Added new SOC at subsection (b)(14) (in response to section 6(3) of the Act) to provide a 2-level enhancement if the defendant "receives an adjustment under § 3B1.1 (Aggravating Role) **and** the offense involved 1 or more of" five specified "super-aggravating factors." Added new Application Note 29 to provide guidance regarding these factors. Also revised the commentary to § 3B1.4 (Using a Minor to Commit a Crime) and § 3C1.1 (Obstructing or Impeding the Administration of Justice" to explain how new subsection (b)(14) interacts with them. • Added new SOC providing a 2-level **downward** adjustment at subsection (b)(15) (in response to subsection7(2) of the Act) "if the defendant

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				Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that-- (1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and (2) there is an additional reduction of 2 offense levels if the defendant-- (A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise; (B) was to receive no monetary compensation from the illegal transaction; and (C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense. SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION. The United States Sentencing Commission shall--	receives the 4-level ('minimal participant') reduction at § 3B1.2(a) and the offense involved **all** of [three specified] factors." (Emphasis added.) The three factors closely tracked the language of the directive. • Amended § 2D2.1 (Unlawful Possession; Attempt or Conspiracy) to "account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act," which eliminated the 5-year mandatory minimum penalty for simple possession of more than five grams of crack cocaine. To do so, it deleted the cross reference at § 2D2.1(b)(1), which referred courts to the drug trafficking guideline at § 2D1.1 for defendants who possessed more than five grams of crack. **Amend. No. 750 (Nov. 1, 2011)** **Repromulgated the emergency amendment as permanent.** • Added new commentary regarding the new SOC at subsection (b)(12) for maintaining a drug-involved premises for the purpose of manufacturing or distributing a controlled substance to specify that "distribution" includes "storage of a controlled substance for the purpose of distribution." • Explained that "[t]he new amendment differs from the temporary, emergency revisions in clarifying

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				(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.	that distribution includes storage of a controlled substance for the purpose of distribution." The Commission gave no reason for expanding the reach of the SOC or for defining "distribution" to mean "storage for purposes of distribution."
114 RPT	08/03/10	111-220 Fair Sentencing Act of 2010, sec. 10.	Report to Congress Crack cocaine	Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in	**[Due by August 2015]**

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				Federal sentencing law under this Act and the amendments made by this Act.	
115 SD	07/09/2012	112-144 Food and Drug Administration Safety and Innovation Act, sec. 717(b)	Trafficking in counterfeit drugs	(b) (1) Directive to sentencing commission.-- Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this subsection, the United States Sentencing Commission shall review and amend, if appropriate, its guidelines and its policy statements applicable to persons convicted of an offense described in section 2320(a)(4) of title 18 [trafficking in counterfeit drugs], United States Code, as amended by subsection (a), in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements. (2) Requirements.-- In carrying out this subsection, the Commission shall-- (A) ensure that the sentencing guidelines and policy statements reflect the intent of Congress that the guidelines and policy statements reflect the serious nature of the offenses described in paragraph (1) and the need for an effective deterrent and appropriate punishment to prevent such offenses; (B) consider the extent to which the guidelines may or may not appropriately account for the potential and actual harm to	**Amend. No. 773 (Nov. 1, 2013)** **USSG § 2B5.3** • Referenced new offense to USSG §2B5.3. • Added a new 2-level enhancement at subsection (5) if the offense involves a counterfeit drug. • Explained that after reviewing the legislative history of the Act, public comment, testimony, and data, the Commission "determined that offenses involving counterfeit drugs involve a threat to public safety and undermine the public's confidence in the drug supply chain. Furthermore, unlike many other goods covered by the infringement guidelines, offenses involving counterfeit drugs circumvent a regulatory scheme established to protect the health and safety of the public." • Added a new invited upward departure if "the offense resulted in death or serious bodily injury." • Explained that, although §5K2.1 (Death) and § 5K2.2 (Physical Injury) already authorize upward departure for this reason, "the amendment is intended to heighten awareness of the availability of departure in such cases."

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				the public resulting from the offense; (C) assure reasonable consistency with other relevant directives and with other sentencing guidelines; (D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (E) make any necessary conforming changes to the sentencing guidelines; and (F) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **Note:** Subsection 717(a) of the Act amended 18 U.S.C. § 2320(a) by adding new subsection (4) that prohibits trafficking in a counterfeit drug. A "counterfeit drug" is a drug, as defined by 21 U.S.C. § 321, that uses a counterfeit mark. *See* 18 U.S.C. § 2320(f)(6).	
116 GD	10/05/2012	112-186 Strengthening and Focusing	Pre-retail medical products	(a) In General.--Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall	**Amend. No. 772 (Nov. 1, 2013)** **USSG § 2B1.1**

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		Enforcement to Deter Organized Stealing and Enhance Safety [SAFE DOSES] Act of 2012, sec. 7		review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of offenses under section 670 of title 18, United States Code, as added by this Act, section 2118 of title 18, United States Code, or any another section of title 18, United States Code, amended by this Act, to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses. (b) Requirements.--In carrying out this section, the United States Sentencing Commission shall-- (1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately reflect-- (A) the serious nature of such offenses; (B) the incidence of such offenses; and (C) the need for an effective deterrent and appropriate punishment to prevent such offenses; (2) consider establishing a minimum offense level under the Federal sentencing guidelines and policy statements for offenses covered by	• Referenced new offense to USSG §2B1.1. • Amended § 2B1.1 to add a new SOC at subsection (b)(8) to provide a two-pronged enhancement, as follows: The greater of a 2-level increase if the offense "involved conduct described in 18 U.S.C. § 670," or a 4-level increase if the offense "involved" such conduct and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product (if the 4-level increase applies, §3B1.3 for abuse of position of trust does not apply). • Added an invited upward departure in "a case involving conduct described in 18 U.S.C. § 670 cases if the offense resulted in serious bodily injury or death, including serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product." • Explained that the enhancement is not limited to those charged or convicted under § 670 because, "based on public comment, testimony and sentencing data, the Commission concluded that the enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail product, regardless of the offense of conviction."

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				this Act; (3) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements; (5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and (6) ensure that the Federal sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code. **Note:** The SAFE DOSES Act created a new offense at 18 U.S.C. § 670 (theft and related offenses related to pre-retail medical products).	• Explained that the 4-level enhancement for those who commit "such offenses" while employed in the supply chain, also not limited to those convicted of § 670, "reflect[s] the likelihood that the defendant's position in the supply chain facilitated the commission or concealment of the offense." • Explained that the invited upward departure responded to public comment and testimony that § 2B1.1 "may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products."
117 GD	12/7/2012	112-206 Child Protection Act of 2012, sec. 3(b)	Obstruction of justice; child witness	(b) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements to ensure--	**[No amendment.]** • Referenced the new offense to USSG 2J1.2 (Obstruction of Justice). • USSG § 2J1.2 already provides for an 8-level enhancement "if the offense involved causing or

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				(1) that the guidelines provide an additional penalty increase above the sentence otherwise applicable in Part J of Chapter 2 of the Guidelines Manual if the defendant was convicted of a violation of section 1591 of title 18, United States Code, or chapters 109A, 109B, 110, or 117 of title 18, United States Code; and (2) if the offense described in paragraph (1) involved causing or threatening to cause physical injury to a person under 18 years of age, in order to obstruct the administration of justice, an additional penalty increase above the sentence otherwise applicable in Part J of Chapter 2 of the Guidelines Manual. **Note:** Section 3(a) of the Act established a new offense at 18 U.S.C. 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under § 1514 (civil action to restrain harassment of a victim or witness), with a statutory maximum of five years' imprisonment.	threatening to cause physical injury to a person . . . in order to obstruct the administration of justice."
118 GD	01/14/2013	112-269 Foreign and Economic Espionage Penalty Enhancement	Trade secrets; economic espionage	(a) In General.--Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of offenses relating to the transmission or	**Amend. No. 771 (Nov. 1, 2013)** **USSG § 2B1.1** • Expanded enhancement at (b)(5) (and moved it to (b)(13)) to provide a new 2-level enhancement if the "offense involved misappropriation of a trade

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		Act of 2012, sec. 3(a)		attempted transmission of a stolen trade secret outside of the United States [18 U.S.C. § 1832] or economic espionage [18 U.S.C. 1831], in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately, reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses. (b) Requirements.--In carrying out this section, the United States Sentencing Commission shall-- (1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately account for the simple misappropriation of a trade secret, including the sufficiency of the existing enhancement for these offenses to address the seriousness of this conduct; (2) consider whether additional enhancements in the Federal sentencing guidelines and policy statements are appropriate to account for-- (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and	secret and the and the defendant knew or intended [] that the trade secret would be transported or transmitted out of the United States." • Increased the already existing enhancement from 2 to 4 levels, with a new floor of 14, if the offense "involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent." • In its Reason for Amendment, detailed the identity of the entities consulted, as directed, and explained that it made these changes based on public comment and testimony regarding increased risk of harm and growing threat to economic growth and national security. • Explained that the new enhancement for theft of trade secrets accounts for the "significant obstacles to effective investigation and prosecution and causes both increased harm to victims and more general harms to the nation." It noted that "civil remedies may not be readily available or effective, and the transmission of a stolen trade secret outside the United States substantially increases the risk that the trade secret will be exploited by a foreign competitor." At the same time, it said that "simple movement of a stolen trade secret within a domestic multinational company (e.g., from a United States office to an overseas office of the same company) may not pose the same risks or

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				(B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent; (3) ensure the Federal sentencing guidelines and policy statements reflect the seriousness of these offenses and the need to deter such conduct; (4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements, and related Federal statutes; (5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and (6) ensure that the Federal sentencing guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. (c) Consultation.--In carrying out the review required under this section, the Commission shall consult with individuals or groups representing law enforcement, owners of trade secrets, victims of economic espionage	harms." • Regarding the increased enhancement and 14-level floor for economic espionage, explained that "the United States is unlikely to obtain a foreign government's cooperation when seeking relief for the victim, and offenders backed by a foreign government likely will have significant financial resources to combat civil remedies." • Considered whether the guidelines adequately account for simple misappropriation of trade secrets, and determined that they do.

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				offenses, the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State and the Office of the United States Trade Representative. (d) Review.--Not later than 180 days after the date of enactment of this Act, the Commission shall complete its consideration and review under this section.	