SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (A) proposed temporary, emergency amendments to sentencing guidelines, policy statements, and commentary; (B) proposed permanent, non-emergency amendments to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and section 3664 of Pub. L. 106–310 (with respect to proposed emergency amendment #1), section 3611 of Pub. L. 106–310 (with respect to proposed emergency amendment #2), section 3651 of Pub. L. 106–310 (with respect to proposed emergency amendment #3), and section 112(b) of Pub. L. 106–386 (with respect to proposed emergency amendment #4) the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment.

DATES: Written public comment on the proposed emergency amendments in part (A) should be received by the Commission not later than February 5, 2001. Written public comment on the proposed permanent, non-emergency amendments in part (B), and on the proposed amendments in part (A) for purposes of promulgating those amendments as permanent, non-emergency amendments, should be received by the Commission not later than March 26, 2001. The Commission requests that, to the extent practicable, commentators submit written public comment on the proposed permanent, non-emergency amendments not later than March 9, 2001, in order for the Commission to consider that comment before its public hearing scheduled for the March 19–20, 2001 session. Note that the Commission may, at its February 2001 public meeting, revise the deadline for submission of written public comment to provide for an earlier deadline than the deadline published in this notice. *See* USSC Rules of Practice and Procedure, Rule 1.2.

The Commission plans to hold a public hearing on the proposed permanent, non-emergency amendments during its March 2001 session in Washington, DC. The public hearing will be held at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002–8002. A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502–4590, not later than March 9, 2001. Written testimony for the public hearing must be received by the Commission not later than March 9, 2001. Timely submission of written testimony is a requirement for testifying at the public hearing. The Commission requests that, to the extent practicable, commentators submit an electronic version of the comment and of the testimony for the public hearing.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p). This year, the Commission may submit non-emergency amendments to the Congress not later than May 1, 2001.

The Commission seeks comment on the proposed amendments, alternative proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed, permanent, non-emergency amendments published in this notice and in the **Federal Register** notice of November 7, 2000 (*see* 65 FR 66792). The Commission requests comment regarding which, if any, of the proposed non-emergency amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions for how the Commission should respond to those issues.

Reports and other additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. § 994(a), (o), (p), (x); section 112(b) of Pub. L. 106–386; and sections 3611, 3651, and 3664 of Pub. L. 106–310; USSC Rules of Practice and Procedure, Rules 4.3, 4.4.

Diana E. Murphy,

Chair.

Proposed Amendments to the Sentencing Guidelines

Part (A): Proposed Temporary, Emergency Amendments and Intent To Make Permanent Each of the Proposed Temporary, Emergency Amendments

The Commission hereby gives notice of, and requests comment on, its intent to promulgate each of the proposed amendments set forth in this Part as a temporary, emergency amendment and after promulgation as an emergency amendment, to promulgate each such amendment as a permanent, non-emergency amendment.

Proposed Amendment: Ecstasy

1. *Synopsis of Proposed Amendment:* This proposed amendment addresses the directive in the Ecstasy Anti-Proliferation Act of 2000 (the ''Act''), section 3664 of Pub. L. 106–310, which instructs the Commission to provide, under emergency amendment authority, increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy. The directive specifically requires the Commission to increase the base offense level for 3,4-methylenedioxy methamphetamine (MDMA), 3,4-methylenedioxy

amphetamine (MDA), 3,4-methylenedioxy-N-ethylamphetamine (MDEA), paramethoxy-methamphetamine (PMA), and any other controlled substance that is marketed as Ecstasy and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.

The proposed amendment addresses the directive by amending the Drug Equivalency Table in § 2D1.1, Application Note 10, to increase the marihuana equivalencies for the specified controlled substances. The increased equivalencies make the penalties for these substances comparable to other drugs of abuse. The increases also satisfy the sense of Congress in the Act that the penalties for these substances, particularly for high-level traffickers, are too low.

An issue for comment regarding whether the Commission should base the penalties of Ecstasy on the penalties for other drugs of abuse, such as powder cocaine, methamphetamine mixture, or mescaline follows the proposed amendment.

Proposed Amendment

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*'' in the line referenced to ''MDA'' by striking ''50 gm'' and inserting ''1 kg''; in the line referenced to ''MDMA'' by striking ''35 gm'' and inserting ''1 kg''; in the line referenced ''MDEA'' by striking ''30 gm'' and inserting ''1 kg''; and by inserting ''1 gm of Paramethoxymethamphetamine/PMA = 1 kg of marihuana'' after the line referenced to ''MDEA''.

Issue for Comment: It has been represented to the Commission that Ecstasy (*i.e.,* MDMA, MDEA, MDA and PMA) is similar in its hallucinogenic effect on the user to mescaline, and also has been described as having an added stimulant component that can elevate heart rate, blood pressure, and body temperature. It has also been suggested that the drug is neither physically nor psychologically addictive. The Commission invites comment on these representations and on the appropriate penalty structure for Ecstasy. The proposed amendment treats Ecstasy as being of comparable seriousness to heroin, providing a marihuana equivalency for Ecstasy that is the same as heroin. Accordingly, for sentencing purposes, 1 gm of Ecstasy will be the equivalent of 1 kg of marihuana. Should the Commission alternatively treat Ecstasy comparably to some other major drug of abuse? For example, should the Commission treat Ecstasy as being of comparable seriousness to powder cocaine (which would result in a marihuana equivalency for Ecstasy of 200 gm) or methamphetamine mixture (which would result in a marihuana equivalency for Ecstasy of 2 kg)? Or should the penalty be comparable to that for mescaline (which would result in a marihuana equivalency for Ecstasy of 10 gm) or some multiple of the penalty for mescaline? Comment also is requested regarding whether the Drug Quantity Table in § 2D1.1 should be revised with respect to Ecstacy to provide additional incremental penalties (perhaps with exponential quantity increases) so as to punish more severely those offenders who traffic in larger quantities.

Proposed Amendment: Amphetamine

2. *Synopsis of Proposed Amendment:* This proposed amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106–310 (the ''Act''), which directs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

There are no mandatory minimum sentences for amphetamine offenses. Currently, a quantity of amphetamine is sentenced at the same level as an equal quantity of powder cocaine. That is, with no or minimal criminal history, an offender convicted of trafficking 500 grams of amphetamine would receive a guideline range of 63 to 78 months, based solely on the weight of the drug. A weight of 5,000 grams (5 kilograms), and the lowest criminal history category, would result in a sentencing range of 121 to 151 months. The mathematical relationships between the weight of amphetamine and the current five- and ten-year quantity thresholds for methamphetamine-mix and methamphetamine-actual are 10-to-1 and 100-to-1, respectively.

The proposed amendment provides two options for implementing the directive. Both options propose to treat amphetamine and methamphetamine identically, at a 1:1 ratio (*i.e.,* the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (A) chemically are similar; (B) are produced by a similar method, and are trafficked in a similar manner; (C) share similar methods of use; (D) affect the same parts of the brain; and (E) have similar intoxicating effects. Both options also distinguish between pure amphetamine (*i.e.,* amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (*i.e.,* methamphetamine (actual) and methamphetamine mixture).

Although both options ultimately achieve the same penalty increase, the proposed options differ in how they implement the directive. Option One amends the Drug Equivalency Table of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). To determine the offense level under this option, the quantity of amphetamine (actual or mixture) is converted to its marijuana weight equivalency using the Drug Equivalency Tables. Option Two, on the other hand, amends § 2D1.1 specifically to include amphetamine in the Drug Quantity Table.

Included in both options is a reference to the controlled substance dextroamphetamine, which is a substance quite similar to amphetamine. Currently, dextroamphetamine has the same marihuana equivalency as amphetamine mixture. The proposed amendment (A) distinguishes between dextroamphetamine mixture and dextroamphetamine (actual); and (B) provides penalties for the dextroamphetamine mixture and dextroamphetamine (actual) that are the same as amphetamine mixture and amphetamine (actual), respectively.

Two issues for comment follows the proposed amendment. The first requests comment regarding whether the Commission should provide an alternative quantity ratio between amphetamine and methamphetamine. The second requests comment regarding whether § 2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine.

Proposed Amendment

Option 1

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*'' by striking ''200 gm'' after ''1 gm of Amphetamine ='' and inserting ''2 kg'';

by inserting ''1 gm of Amphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Amphetamine''; by striking ''200 gm'' after ''1 gm of Dextroamphetamine ='' and inserting ''2 kg''; and by inserting ''1 gm of Dextroamphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Dextroamphetamine''.

Option 2

Section 2D1.1(c)(1) is amended by inserting after the fifth entry the following:

''15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual), or 15 KG or more of Dextroamphetamine, or 1.5 KG or more of Dextroamphetamine (actual);''.

Section 2D1.1(c)(2) is amended by inserting after the fifth entry the following:

''At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual), or at least 5 KG but less than 15 KG of Dextroamphetamine, or at least 500 G but less than 1.5 KG of Dextroamphetamine (actual);''.

Section 2D1.1(c)(3) is amended by inserting after the fifth entry the following:

''At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual), or at least 1.5 KG but less than 5 KG of Dextroamphetamine, or at least 150 G but less than 500 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(4) is amended by inserting after the fifth entry the following:

''At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual), or at least 500 G but less than 1.5 KG of Dextroamphetamine, or at least 50 G but less than 150 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(5) is amended by inserting after the fifth entry the following:

''At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual), or at least 350 G but less than 500 G of Dextroamphetamine, or at least 35 G but less than 50 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(6) is amended by inserting after the fifth entry the following:

''At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual), or at least 200 G but less than 350 G of Dextroamphetamine, or at least 20 G but less than 35 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(7) is amended by inserting after the fifth entry the following:

''At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual), or at least 50 G but less than 200 G of Dextroamphetamine, or at least 5 G but less than 20 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(8) is amended by inserting after the fifth entry the following:

''At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual), or at least 40 G but less than 50 G of Dextroamphetamine, or at least 4 G but less than 5 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(9) is amended by inserting after the fifth entry the following:

''At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual), or at least 30 G but less than 40 G of Dextroamphetamine, or at least 3 G but less than 4 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(10) is amended by inserting after the fifth entry the following:

''At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual), or at least 20 G but less than 30 G of Dextroamphetamine or at least 2 G but less than 3 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(11) is amended by inserting after the fifth entry the following:

''At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual), or at least 10 G but less than 20 G of Dextroamphetamine, or at least 1 G but less than 2 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(12) is amended by inserting after the fifth entry the following:

''At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual), or at least 5 G but less than 10 G of Dextroamphetamine, or at least 500 MG but less than 1 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(13) is amended by inserting after the fifth entry the following:

''At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual), or at least 2.5 G but less than 5 G of Dextroamphetamine, or at least 250 MG but less than 500 MG of Dextraomphetamine (actual);''.

Section 2D1.1(c)(14) is amended by inserting after the fifth entry the following:

''Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual), or less than 2.5 G of Dextroamphetamine, or less than 250 MG of Dextraomphetamine (actual);''.

Section 2D1.1(c) is amended in Note (B) of the ''Notes to Drug Quantity Table'', by inserting '', ''Amphetamine (actual), ''Dextroamphetamine (actual)',' after ''terms ''PCP (actual)''; by inserting '', amphetamine, dextroamphetamine,'' after ''substance containing PCP''; and by inserting '', amphetamine (actual), dextroamphetamine (actual),'' after ''weight of the PCP (actual)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 by inserting '', amphetamine, dextroamphetamine,'' after ''PCP''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)'' by striking ''200 gm'' after ''1 gm of Amphetamine = and inserting ''2 kg''; by inserting ''1 gm of Amphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Amphetamine''; by striking ''200 gm'' after ''1 gm of Dextroamphetamine ='' and inserting ''2 kg''; and by inserting ''1 gm of Dextroamphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Dextramphetamine''.

Issues for Comment

(1) In response to the directive in the Methamphetamine Anti-Proliferation Act of 2000 that instructs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine, the Commission has proposed two amendment options that use a 1:1 ratio between amphetamine and methamphetamine (*i.e.,* the same quantities of amphetamine and methamphetamine will result in the imposition of the same base offense level from the Drug Quantity Table in § 2D1.1). The Commission invites comment on whether some alternative ratio should be used. For example, should the Commission use a 2:1 ratio or a 5:1 ratio between amphetamine and methamphetamine, and if so, why?

(2) Section 2D1.1(b)(4) currently provides a two-level enhancement if the

offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. The Commission invites comment regarding whether this enhancement should be amended to include the importation of amphetamine or the manufacture of amphetamine from listed chemicals that the defendant knew were imported unlawfully. If so, should the Commission also include the importation of dextroamphetamine or the manufacture of dextroamphetamine from listed chemicals that the defendant knew were imported unlawfully, particularly because dextroamphetamine is so similar to amphetamine and would be treated the same as amphetamine under the proposed amendment options?

Proposed Amendment: Trafficking in List I Chemicals

3. *Synopsis of Proposed Amendment:* This proposed amendment addresses the three-part directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3651 of Pub. L. 106–310 (the ''Act''), regarding enhanced punishment for trafficking in List I chemicals. That section requires the Commission to promulgate an amendment implementing the directive under emergency amendment authority.

First, the directive instructs the Commission ''to provide increased penalties for offenses involving ephedrine, phenylpropanolamine (PPA), or pseudoephedrine (including their salts, optical isomers, and salts of optical isomers) to correspond to the quantity of controlled substance that reasonably could have been manufactured using the quantity of ephedrine, PPA, and pseudoephedrine possessed or distributed.'' In response to this directive, the proposed amendment provides a new chemical table specifically for ephedrine, pseudoephedrine, and PPA. The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1, assuming a 50 percent yield of the controlled substance from the chemicals. Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine, PPA, and pseudoephedrine produce methamphetamine (actual).

This new table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 increases the sentences for ephedrine, pseudoephedrine, and PPA by linking the theoretical yield of these chemicals to methamphetamine (actual) instead of methamphetamine (mixture) as had been done in the past. Additionally, this adjustment will have an impact on the relationship between §§ 2D1.1 and 2D1.11 by eliminating the six-level distinction that currently exists between offenses that involve possession of these precursor chemicals with intent to manufacture methamphetamine and offenses that involve an attempt to manufacture methamphetamine, at least for offenses involving ephedrine, PPA, and pseudoephedrine.

In order to address cases that involve more than one chemical, the proposed amendment eliminates the ephedrine equivalency table and instead proposes a rule that would require the court to determine the base offense level by using the quantity of the single chemical that results in the greatest base offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, the proposed amendment provides an exception to this rule for offenses that involve a combination of ephedrine, pseudoephedrine, or phenylpropanolamine because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of the chemicals involved, based on an ephedrine equivalency.

Second, the directive instructs the Commission ''to establish, based on scientific, law enforcement, and other data the Commission considers appropriate, a table in which the quantity of controlled substance that could reasonably have been manufactured shall be determined by using a table of manufacturing conversion ratios for ephedrine, PPA, and pseudoephedrine.'' In response to the directive, the proposed amendment adds to the Drug Equivalency Tables in § 2D1.1 a conversion table for ephedrine, PPA, and pseudoephedrine for cases that are cross-referenced out of § 2D1.11 because the offense involved the manufacture of methamphetamine. This table, which provides for a 50 percent conversion ratio for ephedrine, PPA, and pseudoephedrine, was developed using data from the Drug Enforcement Agency, Office of Diversion Control, as published on the web site of the Office of National Drug Control Policy (ONDCP). These data indicate that the actual yield of methamphetamine from ephedrine and pseudoephedrine is ''typically in the range of 50 to 75 percent''.

Third, the directive instructs the Commission ''to increase penalties for offenses involving any List I chemical other than ephedrine, PPA, and pseudoephedrine, 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.'' In response to this directive, the proposed amendment increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by two levels. These five additional List I chemicals also are associated with methamphetamine and amphetamine production. The maximum base offense level for these five chemicals will increase from level 30 to level 32. All other List I chemicals will remain at their current maximum base offense level of level 30.

An issue for comment follows the proposed amendment regarding whether, as an alternative, the maximum base offense level in the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in § 2D1.11 should be set lower than the maximum base offense level in § 2D1.1. This reduction would maintain the existing distinction between offenses involving possession of precursor chemicals with intent to manufacture versus attempt to manufacture for ephedrine, PPA, and pseudoephedrine currently captured by the maximum base offense level of 30 in § 2D1.11. The original relationship between controlled substances in § 2D1.1 and list I chemicals in § 2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table by eight levels. The eight level distinction later was reduced to six levels in response to a congressional directive.

Proposed Amendment

Section 2D1.11(d) is amended by striking the Chemical Quantity Table and the Notes that follow the Table in their entirety and inserting the following:

(D)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*

[Methamphetamine and amphetamine precursor chemicals]

Quantity	Base offense level
(1) 3 KG or more of Ephedrine; 3 KG or more of Phenylpropanolamine; 3 KG or more of Pseudoephedrine	Level 38.
(2) At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 36.
(3) At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 34.
(4) At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 32.
(5) At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseuodoephedrine.	Level 30.
(6) At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 28.
(7) At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 26.
(8) At least 8 G but less than 10 G of Ephedrine; At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	Level 24.
(9) At least 6 G but less than 8 G of Ephedrine; At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	Level 22.
(10) At least 4 G but less than 6 G of Ephedrine; At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	Level 20.
(11) At least 2 G but less than 4 G of Ephedrine; At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	Level 18.
(12) At least 1 G but less than 2 G of Ephedrine; At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	Level 16.
(13) At least 500 MG but less than 1 G of Ephedrine; At least 500 MG but less than 1 G of Phenylpropanolamine; At least 500 MG but less than 1 G of Pseudoephedrine.	Level 14.
(14) Less than 500 MG of Ephedrine; Less than 500 MG of Phenylpropanolamine; Less than 500 MG of Pseudoephedrine	Level 12

(D)(2) CHEMICAL QUANTITY TABLE *

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
(1) List I Chemicals:	Level 32.
51 KG or more of Benzaldehyde;	
132 KG or more of Hydriodic Acid;	
12 KG or more of Methylamine;	
37.8 KG or more of Nitroethane;	
600 KG or more of Norpseudoephedrine.	
(2) List I Chemicals:	Level 30.
At least 17 KG but less than 51 KG of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
At least 44 KG but less than 132 KG of Hydriodic Acid;	
320 KG or more of Isosafrole;	
At least 4 KG but less than 12 KG of Methylamine;	
500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
At least 12.6 KG but less than 37.8 KG of Nitroethane;	
At least 200 KG but less than 600 KG of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone.	
(3) List I Chemicals:	Level 28.
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;	
At least 6 KG but less than 20 KG of Benzyl Cyanide;	
At least 60 G but less than 200 G of Ergonovine;	
At least 120 G but less than 400 G of Ergotamine;	
At least 6 KG but less than 20 KG of Ethylamine;	
At least 13.2 KG but less than 44 KG of Hydriodic Acid;	
At least 96 KG but less than 320 KG of Isosafrole;	
At least 1.2 KG but less than 4 KG of Methylamine;	
At least 150 KG but less than 500 KG of N-Methylephedrine;	
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
At least 3.8 KG but less than 12.6 KG of Nitroethane;	
At least 60 KG but less than 200 KG of Norpseudoephedrine;	
At least 6 KG but less than 20 KG of Phenylacetic Acid;	
At least 3 KG but less than 10 KG of Piperidine;	
At least 96 KG but less than 320 KG of Piperonal;	
At least 480 G but less than 1.6 KG of Propionic Anhydride;	
At least 96 KG but less than 320 KG of Safrole;	
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
11 KG or more of Acetic Anhydride;	
1175 KG or more of Acetone;	
20 KG or more of Benzyl Chloride;	
1075 KG or more of Ethyl Ether;	
1200 KG or more of Methyl Ethyl Ketone;	
10 KG or more of Potassium Permanganate;	
1300 KG or more of Toluene.	
(4) List I Chemicals:	Level 26.
At least 1.8 KG but less than 5.3 KG of Benzaldehyde;	
At least 2 KG but less than 6 KG of Benzyl Cyanide;	
At least 20 G but less than 60 G of Ergonovine;	
At least 40 G but less than 120 G of Ergotamine;	
At least 2 KG but less than 6 KG of Ethylamine;	
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;	
At least 32 KG but less than 96 KG of Isosafrole;	
At least 400 G but less than 1.2 KG of Methylamine;	
At least 50 KG but less than 150 KG of N-Methylephedrine;	
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;	
At least 1.3 KG but less than 3.8 KG of Nitroethane;	
At least 20 KG but less than 60 KG of Norpseudoephedrine;	
At least 2 KG but less than 6 KG of Phenylacetic Acid;	
At least 1 KG but less than 3 KG of Piperidine;	
At least 32 KG but less than 96 KG of Piperonal;	
At least 160 G but less than 480 G of Propionic Anhydride;	
At least 32 KG but less than 96 KG of Safrole;	
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 3.3 KG but less than 11 KG of Acetic Anhydride;	
At least 352.5 KG but less than 1175 KG of Acetone;	
At least 6 KG but less than 20 KG of Benzyl Chloride;	
At least 322.5 KG but less than 1075 KG of Ethyl Ether;	
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;	
At least 3 KG but less than 10 KG of Potassium Permanganate;	
At least 390 KG but less than 1300 KG of Toluene.	
(5) List I Chemicals:	Level 24.
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;	
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;	
At least 14 G but less than 20 G of Ergonovine;	
At least 28 G but less than 40 G of Ergotamine;	
At least 1.4 KG but less than 2 KG of Ethylamine;	
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;	
At least 22.4 KG but less than 32 KG of Isosafrole;	
At least 280 G but less than 400 G of Methylamine;	
At least 35 KG but less than 50 KG of N-Methylephedrine;	
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;	
At least 879 G but less than 1.3 KG of Nitroethane;	
At least 14 KG but less than 20 KG of Norpseudoephedrine;	
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;	
At least 700 G but less than 1 KG of Piperidine;	
At least 22.4 KG but less than 32 KG of Piperonal;	
At least 112 G but less than 160 G of Propionic Anhydride;	
At least 22.4 KG but less than 32 KG of Safrole;	
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;	
At least 117.5 KG but less than 352.5 KG of Acetone;	
At least 2 KG but less than 6 KG of Benzyl Chloride;	
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;	
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;	
At least 1 KG but less than 3 KG of Potassium Permanganate;	
At least 130 KG but less than 390 KG of Toluene.	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
(6) List I Chemicals:	Level 22.
At least 712 G but less than 1.2 KG of Benzaldehyde;	
At least 800 G but less than 1.4 KG of Benzyl Cyanide;	
At least 8 G but less than 14 G of Ergonovine;	
At least 16 G but less than 28 G of Ergotamine;	
At least 800 G but less than 1.4 KG of Ethylamine;	
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;	
At least 12.8 KG but less than 22.4 KG of Isosafrole;	
At least 160 G but less than 280 G of Methylamine;	
At least 20 KG but less than 35 KG of N-Methylephedrine;	
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;	
At least 503 G but less than 879 G of Nitroethane;	
At least 8 KG but less than 14 KG of Norpseudoephedrine;	
At least 800 G but less than 1.4 KG of Phenylacetic Acid;	
At least 400 G but less than 700 G of Piperidine;	
At least 12.8 KG but less than 22.4 KG of Piperonal;	
At least 64 G but less than 112 G of Propionic Anhydride;	
At least 12.8 KG but less than 22.4 KG of Safrole;	
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 726 G but less than 1.1 KG of Acetic Anhydride;	
At least 82.25 KG but less than 117.5 KG of Acetone;	
At least 1.4 KG but less than 2 KG of Benzyl Chloride;	
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;	
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;	
At least 700 G but less than 1 KG of Potassium Permanganate;	
At least 91 KG but less than 130 KG of Toluene.	
(7) List I Chemicals:	Level 20.
At least 178 G but less than 712 G of Benzaldehyde;	
At least 200 G but less than 800 G of Benzyl Cyanide;	
At least 2 G but less than 8 G of Ergonovine;	
At least 4 G but less than 16 G of Ergotamine;	
At least 200 G but less than 800 G of Ethylamine;	
At least 440 G but less than 1.76 KG of Hydriodic Acid;	
At least 3.2 KG but less than 12.8 KG of Isosafrole;	
At least 40 G but less than 160 G of Methylamine;	
At least 5 KG but less than 20 KG of N-Methylephedrine;	
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;	
At least 126 G but less than 503 G of Nitroethane;	
At least 2 KG but less than 8 KG of Norpseudoephedrine;	
At least 200 G but less than 800 G of Phenylacetic Acid;	
At least 100 G but less than 400 G of Piperidine;	
At least 3.2 KG but less than 12.8 KG of Piperonal;	
At least 16 G but less than 64 G of Propionic Anhydride;	
At least 3.2 KG but less than 12.8 KG of Safrole;	
At least 4 KG but less than 16 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 440 G but less than 726 G of Acetic Anhydride;	
At least 47 KG but less than 82.25 KG of Acetone;	
At least 800 G but less than 1.4 KG of Benzyl Chloride;	
At least 43 KG but less than 75.25 KG of Ethyl Ether;	
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;	
At least 400 G but less than 700 G of Potassium Permanganate;	
At least 52 KG but less than 91 KG of Toluene.	
(8) List I Chemicals:	Level 18.
At least 142 G but less than 178 G of Benzaldehyde;	
At least 160 G but less than 200 G of Benzyl Cyanide;	
At least 1.6 G but less than 2 G of Ergonovine;	
At least 3.2 G but less than 4 G of Ergotamine;	
At least 160 G but less than 200 G of Ethylamine;	
At least 352 G but less than 440 G of Hydriodic Acid;	
At least 2.56 KG but less than 3.2 KG of Isosafrole;	
At least 32 G but less than 40 G of Methylamine;	
At least 4 KG but less than 5 KG of N-Methylephedrine;	
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;	
At least 100 G but less than 126 G of Nitroethane;	
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;	
At least 160 G but less than 200 G of Phenylacetic Acid;	
At least 80 G but less than 100 G of Piperidine;	
At least 2.56 KG but less than 3.2 KG of Piperonal;	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
At least 12.8 G but less than 16 G of Propionic Anhydride;	
At least 2.56 KG but less than 3.2 KG of Safrole;	
At least 3.2 KG but less than 4 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 110 G but less than 440 G of Acetic Anhydride;	
At least 11.75 KG but less than 47 KG of Acetone;	
At least 200 G but less than 800 G of Benzyl Chloride;	
At least 10.75 KG but less than 43 KG of Ethyl Ether;	
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;	
At least 100 G but less than 400 G of Potassium Permanganate;	
At least 13 KG but less than 52 KG of Toluene.	
(9) List I Chemicals:	Level 16.
3.6 KG or more of Anthranilic Acid;	
At least 107 G but less than 142 G of Benzaldehyde;	
At least 120 G but less than 160 G of Benzyl Cyanide;	
At least 1.2 G but less than 1.6 G of Ergonovine;	
At least 2.4 G but less than 3.2 G of Ergotamine;	
At least 120 G but less than 160 G of Ethylamine;	
At least 264 G but less than 352 G of Hydriodic Acid;	
At least 1.92 KG but less than 2.56 KG of Isosafrole;	
At least 24 G but less than 32 G of Methylamine;	
4.8 KG or more of N-Acetylanthranilic Acid;	
At least 3 KG but less than 4 KG of N-Methylephedrine;	
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;	
At least 75 G but less than 100 G of Nitroethane;	
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;	
At least 120 G but less than 160 G of Phenylacetic Acid;	
At least 60 G but less than 80 G of Piperidine;	
At least 1.92 KG but less than 2.56 KG of Piperonal;	
At least 9.6 G but less than 12.8 G of Propionic Anhydride;	
At least 1.92 KG but less than 2.56 KG of Safrole;	
At least 2.4 KG but less than 3.2 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 88 G but less than 110 G of Acetic Anhydride;	
At least 9.4 KG but less than 11.75 KG of Acetone;	
At least 160 G but less than 200 G of Benzyl Chloride;	
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;	
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;	
At least 80 G but less than 100 G of Potassium Permanganate;	
At least 10.4 KG but less than 13 KG of Toluene.	
(10) List I Chemicals:	Level 14.
At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;	
At least 71.2 G but less than 107 G of Benzaldehyde;	
At least 80 G but less than 120 G of Benzyl Cyanide;	
At least 800 MG but less than 1.2 G of Ergonovine;	
At least 1.6 G but less than 2.4 G of Ergotamine;	
At least 80 G but less than 120 G of Ethylamine;	
At least 176 G but less than 264 G of Hydriodic Acid;	
At least 1.44 KG but less than 1.92 KG of Isosafrole;	
At least 16 G but less than 24 G of Methylamine;	
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;	
At least 2.25 KG but less than 3 KG of N-Methylephedrine;	
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;	
At least 56.25 G but less than 75 G of Nitroethane;	
At least 800 G but less than 1.2 KG of Norpseudoephedrine;	
At least 80 G but less than 120 G of Phenylacetic Acid;	
At least 40 G but less than 60 G of Piperidine;	
At least 1.44 KG but less than 1.92 KG of Piperonal;	
At least 7.2 G but less than 9.6 G of Propionic Anhydride;	
At least 1.44 KG but less than 1.92 KG of Safrole;	
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 66 G but less than 88 G of Acetic Anhydride;	
At least 7.05 KG but less than 9.4 KG of Acetone;	
At least 120 G but less than 160 G of Benzyl Chloride;	
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;	
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;	
At least 60 G but less than 80 G of Potassium Permanganate;	
At least 7.8 KG but less than 10.4 KG of Toluene.	
(11) List I Chemicals:	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
Less than 2.7 KG of Anthranilic Acid; Less than 71.2 G of Benzaldehyde; Less than 80 G of Benzyl Cyanide; Less than 800 MG of Ergonovine; Less than 1.6 G of Ergotamine; Less than 80 G of Ethylamine; Less than 176 G of Hydriodic Acid; Less than 1.44 KG of Isosafrole; Less than 16 G of Methylamine; Less than 3.6 KG of N-Acetylanthranilic Acid; Less than 2.25 KG of N-Methylephedrine; Less than 2.25 KG of N-Methylpseudoephedrine; Less than 56.25 G of Nitroethane; Less than 800 G of Norpseudoephedrine; Less than 80 G of Phenylacetic Acid; Less than 40 G of Piperidine; Less than 1.44 KG of Piperonal; Less than 7.2 G of Propionic Anhydride; Less than 1.44 KG of Safrole; Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
Less than 66 G of Acetic Anhydride; Less than 7.05 KG of Acetone; Less than 120 G of Benzyl Chloride; Less than 6.45 KG of Ethyl Ether; Less than 7.2 KG of Methyl Ethyl Ketone; Less than 60 G of Potassium Permanganate; Less than 7.8 KG of Toluene.	

***Notes:**

(A) Except as provided in subdivision (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.* list I or list II) under subsection (d) of this guideline.

(B) To calculate the base offense level in an offense that involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency using the table below; (ii) add the quantities that result from that equivalency; and (iii) use the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table to determine the base offense level.

Pseudoephedrine and Phenylpropanolamine Equivalency Table

1 gm of Pseudoephedrine=1 gm of Ephedrine

1 gm of Phenylpropanolamine=1 gm of Ephedrine

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking the text of Note 4 in its entirety and inserting the following:

''(A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision B, if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.,* list I or list II) under subsection (d) of this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of 16. In this case, the base offense level would be level 38.

(B) Determining the Base Offense Level for Offenses Involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency; (ii) add the quantities that result from that equivalency; and (iii) use the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table to determine the base offense level.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine. The 50 grams of phenylpropanolamine converts to 50 grams of ephedrine, which when added to the quantity of ephedrine, results in a total of 130 grams of ephedrine. In this case, the base offense level would be level 32.

(C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking Notes 5 and 6 in their entirety; and by redesignating Notes 7 and 8 as Notes 5 and 6, respectively.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the first sentence by inserting

''(including ephedrine, pseudoephedrine, and phenylpropanolamine)'' after ''list I chemicals''.

The Commentary to 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the ''Drug Equivalency Tables'' by inserting after the subdivision captioned ''Schedule V Substances'' the following new subdivision:

List I Chemicals (Relating to the Manufacture of Amphetamine or Methamphetamine) * * *

1 gm of Ephedrine=10 kg of marihuana
1 gm of Phenylpropanolamine=10 kg of marihuana
1 gm of Pseudoephedrine=10 kg of marihuana

* * * Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

Issues for Comment

(1) Currently, there is a six level difference between the base offense levels in the Drug Quantity Table of § 2D1.1 and the Chemical Quantity Table in § 2D1.11. (The original relationship between controlled substances in § 2D1.1 and list I chemicals in § 2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table in § 2D1.11 by eight levels. The eight level distinction was later reduced to six levels as a result of a congressional directive.) This six level difference effectively creates a distinction between offenses involving possession of precursor chemicals with intent to manufacture a controlled substance and offenses involving an actual attempt to manufacture a controlled substance. However, the proposed amendment essentially will eliminate this distinction for cases involving ephedrine, pseudoephedrine, and phenylpropanolamine by (1) Eliminating that six-level difference in offense level from the § 2D1.1 offense level that corresponds to the amount of controlled substance that could be manufactured from a given quantity of precursor chemical (assuming a 50% yield); and (2) setting the maximum base offense level at level 38, the maximum base offense level provided for the manufacture of methamphetamine in § 2D1.1. The Commission invites comment regarding whether the maximum base offense level for the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in § 2D1.11 should be lower than level 38. A lower maximum base offense level would maintain a distinction between offenses involving possession of precursor chemicals with intent to manufacture methamphetamine and offenses involving an actual attempt to manufacture methamphetamine.

(2) In response to the congressional directive to increase penalties for offenses involving List I chemicals other than ephedrine, PPA, and pseudoephedrine, the Commission invites comment regarding whether, in addition to or instead of the proposed amendment, the penalty structure in § 2D1.11 should be changed to increase penalties for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine at each quantity level in the Chemical Quantity Table, and if so, by how much.

Proposed Amendment: Human Trafficking

4. *Synopsis of Proposed Amendment:* This amendment implements the directive found at section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the ''Act''), Pub. L. 106–386.

The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission is also directed to consider how to address four new statutes: 18 U.S.C. 1589 (Forced Labor); 18 U.S.C. 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 18 U.S.C. 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 18 U.S.C. § 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).

Specifically, the Commission is directed to ''review and, if appropriate, amend the sentencing guidelines applicable to * * * the trafficking of persons including * * * 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 Worker Protection Act.''

The Commission is directed to ''take all appropriate measures to ensure that these sentencing guidelines * * * are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses.'' The Commission is also directed to ''consider providing sentencing enhancements'' in cases which involve: (A) a large number of victims; (B) a pattern of continued and flagrant violations; (C) the use or threatened use of a dangerous weapon; or (D) the death or bodily injury of any person.

To address this multi-faceted directive, this proposed amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. 201 et. seq.), a criminal violation of the Act is only a Class B misdemeanor. *See* 29 U.S.C. 216. Thus, the guidelines are not applicable to those offenses.

The proposed amendment references the new offense at 18 U.S.C. 1591 to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are analogous to the offenses referenced to the prostitution guideline.

Section 2G1.1(b)(2) is proposed to be amended to include a [6][9] level increase for victimization of children who have not attained the age of 12 years, a [4][6] level increase for victimization of children who have not attained the age of 14 years, and a [2][3] level increase for children who have not attained the age of 16 years. This change increases by [2][5] levels the punishment for victimization of a child under 12 years of age and creates an additional category of victims—children between the ages of 12 and 14 years. These changes were proposed in recognition of Congress's distinction in section 1591 between offenses involving minors under 14 years of age (statutory cap of ''any term of years or life'') and offenses involving minors between 14 and 18 years of age (statutory cap of ''not more than 20 years''). This change conforms the guidelines to the penalties of section 1591.

The special instruction at § 2G1.1(d)(2) has been added to ensure that attempts to violate section 1591 are

not to be referred to § 2X1.1 (Attempt, Solicitation, or Conspiracy). This change implements Congress's direction in 18 U.S.C. 1594 that ''whoever attempts to violate section * * * 1591 shall be punishable in the same manner as a completed violation of that section.''

An additional application note—Application Note 12—has been added to § 2G1.1 to provide an encouraged upward departure when an offense ''involved substantially more than [6][10][25] victims.'' This encouraged upward departure was added in response to Congress's directive that the Commission consider enhanced sentencing in cases which involve ''a large number of victims.'' A departure note is provided, rather than an enhancement, because of the current special grouping rule in § 2G1.1(d)(1) regarding multiple victims that requires that counts involving different victims not be grouped.

Section 1591 cases have been alternatively referred in Appendix A to § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material). This has been done 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. Such offenses, as recognized by the higher base offense level at § 2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, commercial pornography. In the interest of consistency and proportionality, the same changes have been made to § 2G2.1 as those discussed above for § 2G1.1.

The proposed amendment conforms to the view 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, 1583, and 1584 . Section 2H4.1 is also designed to cover offenses under three new statutes, 18 U.S.C. 1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor services of another by abusing or threatening abuse of the law or the legal process. *See* 18 U.S.C. 1589. Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of §§ 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to these offenses), 1591 (sex trafficking of children by force, fraud or coercion), or 1594(a) (attempts to violate these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors which have been traditionally sentenced under § 2H4.1.

The proposed amendment provides an alternative, less punitive base offense level for those who violate 18 U.S.C. 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence set for section 1592 offenses (*i.e.,* 5 years). The amendment proposes level [15] as the appropriate level because similar offenses involving documents are punishable at level 15 under § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship or Legal Resident Status or a United States Passport). However, the proposed amendment also includes an additional, bracketed base offense level of [18].

Section 2H4.1(b)(2) has been expanded to provide a 2-level increase if a dangerous weapon was brandished or its use was threatened, with an increase to 4 levels for actual use. Currently, only actual use of a dangerous weapon is covered. This change reflects Congress's directive to consider an enhancement for the ''use or threatened use of a dangerous weapon.''

The proposed amendment adds an enhancement at § 2H4.1(b)(3), for offenses involving more than [6][10][25] victims. This change reflects Congress's directive to consider an enhancement for cases ''involving a large number of victims.'' Also, § 2H4.1, Application Note 3, which formerly provided an encouraged upward departure for offenses involving more than 10 victims, has been altered to encourage departure ''if the offense involved substantially more than [6][10][25] victims.''

The proposed amendment also adds § 2H4.1 to the list of guidelines in § 2X1.1 that expressly cover attempts and conspiracies. This change implements Congress's direction in 18 U.S.C. 1594 that ''whoever attempts to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591 shall be punishable in the same manner as a completed violation of that section.'' With the exception of section 1591, all the specified statutes are referenced to § 2H4.1. Conforming amendments are made to the title of § 2H4.1.

The proposed amendment creates a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to Congress's directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years imprisonment for subsequent offenses, currently are not referred to any specific guideline. The Department of Justice and Department of Labor both recommend creation of a discrete guideline for these offenses. The proposed base offense level (level [4][6]) has been proposed in recognition of the small statutory maximum sentences set for these cases by Congress. Similarly, § 2H4.2(b)(1), an enhancement for bodily injury, and § 2H4.2(b)(2), an enhancement for offenders who commit their offenses after previously sustaining a civil penalty for similar misconduct, have been established to respond to Congress's directive that the Commission consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This proposed amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The proposed amendment amends § 5E1.1 (Restitution) to include a reference to 18 U.S.C. 1593 in the guideline provision regarding mandatory restitution.

Proposed Amendment

Section 2G1.1 is amended by striking subsection (b)(2) in its entirety and inserting the following:

''[(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by [6][9] levels; (B) attained the age of 12 years but not attained the age of 14 years, increase by [4][6] levels; or (C) attained the age of 14

years but had not attained the age of 16 years, increase by [2][3] levels.]''.

Section 2G1.1(d) is amended by adding at the end the following:

''(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591, do not apply § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).''.

The Commentary to § 2G1.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2421''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 2 in the fourth sentence by adding ''(B)'' after ''purposes of subsection (b)(1).''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''[12.Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.]''.

The Commentary to § 2G1.1 captioned ''Background'' is amended by adding at the end the following paragraph:

''This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (A) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (B) the person (i) had not attained the age of 18 years; and (ii) will be caused to engage in a commercial sex act.''.

Section 2G2.1 is amended by striking subsection (b)(1) in its entirety and inserting the following:

''[(1) If the offense involved a victim who had (A) not attained the age of 12 years, increase by [6][9] levels; (B) attained the age of 12 years but not attained the age of 14 years, increase by [4][6] levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by [2][3] levels.]''.

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

''(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591, do not apply § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).''.

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2251(a)''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''[6. Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.]''.

Section 2H4.1 is amended in the title by adding ''; Attempt or Conspiracy'' after ''Trade''.

Section 2H4.1(a) is amended by striking ''22'' and inserting the following:

''(1) 22; or

(2) [15][18], if the defendant was convicted only of an offense under 18 U.S.C. 1592.''.

Section 2H4.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''[(2) If (i) a dangerous weapon was used, increase by 4 levels; or (ii) a dangerous weapon was brandished or its use was threatened, increase by 2 levels.]''.

Section 2H4.1(b) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively, and inserting after subdivision (2) the following:

''[(3) If the offense involved more than [6][10][25] victims, increase by [2][4] levels.]''.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by striking ''1588'' and inserting ''1590, 1592''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended by striking the text of Note 3 in its entirety and inserting the following:

''Upward Departure.'' If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 in the second paragraph by inserting after ''2E5.1;'' the following new lines:

''§ 2G1.1 (if the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591 (*See* 18 U.S.C. 1594(a));

§ 2H4.1;''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 in the third paragraph by inserting ''2H4.1'' after ''2H1.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 1588'' the following new lines:

''18 U.S.C. 1589 2H4.1
18 U.S.C. 1590 2H4.1
18 U.S.C. 1591 2G1.1, 2G2.1
18 U.S.C. 1592 2H4.1''.

Chapter Two, Part H, is amended in Subpart 4 by adding at the end the following:

''§ 2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

(a) Base Offense Level: [4][6].

(b) Specific Offense Characteristics.

(1) If the offense involved (i) serious bodily injury, increase by [4] levels; or (ii) bodily injury, increase by [2] levels.

(2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by [2] levels.

Commentary

Statutory Provision: 29 U.S.C. 1851

Application Notes:

1. Definitions.—For purposes of subsection (b)(1), ''bodily injury'' and ''serious bodily injury'' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 *et seq.*).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''29 U.S.C. 1141'' the following:

''29 U.S.C. 1851 2H4.2''.

Section 5E1.1(a)(1) is amended by inserting ''§ 1593,'' after ''18 U.S.C.''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting ''1593,'' after ''18 U.S.C. §§ ''.

Part (B): Proposed Non-Emergency Amendments

Proposed Amendment: Sexual Predators

5. *Synopsis of Proposed Amendment:* This is a three-part amendment that includes:

(A) Amendments to implement the ''pattern of activity'' directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the ''Act''), and related amendments.

(B) Amendments related to grouping certain child pornography counts of conviction.

(C) Amendments to implement the directive in the Act to provide an enhancement for transportation offenses under chapter 117 of title 18, United States Code, and other related amendments.

Part (A): Enhancement for Pattern of Activity

Synopsis: Part A proposes several options, including a possible combination of approaches to satisfy the

Congressional directive in the Act that requires the Commission to increase the penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. There are many types of conduct that may indicate that a defendant is a high risk sex offender engaging in a pattern of prohibited sexual conduct. Each of these components considers various aspects of sex offenders and the types of activity involved in a pattern of behavior. There are four options presented by this amendment that could be used either in combination or alone to implement the directive. In addition to these four options, the proposal amends the guideline covering terms of supervised release, § 5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime shall be the maximum term authorized by statute.

The first option would create a new Chapter Four guideline, § 4B1.5, that aims to incapacitate high risk sex offenders who have an instant offense of conviction of sexual abuse and a prior felony conviction for sexual abuse. Two options are contained within this option. Option 1A sanctions defendants whose instant offense of conviction and prior conviction involve prohibited sexual conduct. In contrast to option 1B, option 1A increases the defendant's criminal history to not less than category IV or V, as opposed to criminal history category VI. Option 1A also includes a wider range of offenses involving prohibited sexual conduct. Under Option 1A, chapter 109A offenses are bracketed for either (1) possible exclusion from the scope of instant offenses of conviction that would trigger the guideline, or (2) limiting those offenses to those that are perpetrated against a minor. Excluding chapter 109A offenses focuses application of the guideline to those defendants who use the internet or other interstate means to prey on minors.

Option 1B tracks legislation from the 106th Congress that proposed a mandatory minimum life sentence for defendants whose instant offense of conviction and prior conviction involved direct sexual contact. This option provides for sentences at or near the statutory maximum for these types of defendants.

The second option would create a Chapter Four guideline, § 4B1.6, that provides a five-level increase (and a minimum offense level of level 32) for defendants who engage in a pattern of activity involving prohibited sexual conduct. This guideline requires that (1) the defendant's instant offense of conviction is a sex crime; and (2) the defendant previously has engaged in two or more instances of prohibited sexual conduct, whether or not that conduct resulted in a conviction.

The third option would provide a Chapter Two specific offense characteristic in the sexual abuse guidelines. This specific offense characteristic mirrors the current pattern of activity adjustment in § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor). A defendant who abuses or exploits a minor on two or more occasions will receive a two-level increase in offense level pursuant to this enhancement.

The fourth option provides language encouraging an upward departure for a defendant who commits repeated acts of sexual abuse of the same minor. This component would allow courts to sanction a defendant for a pattern of multiple acts of abuse of the same victim over a period of time.

Proposed Amendment

(1) Option 1: Chapter Four, Part B, is amended by adding at the end the following:

''§ 4B1.5. Repeat and Dangerous Sex Offender

(a) A defendant is a repeat and dangerous sex offender if—

(1) The instant offense of conviction is a sex crime; and

(2) The defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction.

(b) If (1) a repeat and dangerous sex offender is not a career offender pursuant to § 4B1.1 (Career Offender); and (2) the offense level for that repeat and dangerous sex offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply.

Offense statutory maximum	Offense level
(A) Life	[37]
(B) 25 years or more	[34]
(C) 20 years or more, but less than 25 years	[32]
(D) 15 years or more, but less than 20 years	[29]
(E) 10 years or more, but less than 15 years	[24]
(F) 5 years or more, but less than 10 years	[17]
(G) More than 1 year, but less than 5 years	[12]

(c) If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the applicable offense level in subsection (b) by the number of levels corresponding to that adjustment.

(d) A repeat and dangerous sex offender's criminal history category in every case shall be [Option 1A: not less than Category [IV][V]] [Option 1B: Category VI].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Offense Statutory Maximum' means the maximum term of imprisonment authorized for the instant offense of conviction that is a sex crime, including any increase in that maximum term under a sentencing enhancement provision that applies to that sex crime because of the defendant's prior criminal record (such as the sentencing enhancement provisions contained in 18 U.S.C. §§ 2247(a) and 2426(a)).

[Option 1A:

'Sex offense conviction' has the meaning given that term in 18 U.S.C. § 2426, but such term does not include trafficking in, receipt of, or possession of, child pornography.

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking in, receipt of, or possession of, child pornography, or recordkeeping offenses), or chapter 117 (not including transmitting information about a minor or filing a factual statement about alien individual), of title 18, United States Code, or an attempt or a conspiracy to commit such an offense.]

[Option 1B:

'Sex offense conviction' means a prior conviction for (A) any sex crime referred to in Application Note 2; or (B) any offense under State law consisting of conduct that would have been such a sex crime if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. The term ''State'' has the meaning given that term in 18 U.S.C. § 2426(b)(2).

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under 18 U.S.C. § 2241, § 2242, § 2243, § 2244, § 2245, § 2251A, or § 2423, including an attempt or conspiracy to commit such an offense.]

3. Determination of Prior Sex Offense Convictions Under Subsection (a)(2).—For purposes of subsection (a)(2), the date that a defendant sustained a conviction shall be the date that the

guilt of the defendant was established, whether by guilty plea, trial or plea of nolo contendere.

4. Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (b).

[5. Departure Provision.—There may be cases in which reliable information indicates that the guideline sentence resulting from application of this guideline either understates or overstates the likelihood that the defendant will commit another sexual offense, or the seriousness of the defendant's criminal history. In such cases, an upward or a downward departure, respectively, may be warranted. Such reliable information may include, for example, risk assessments and other expert testimony regarding the likelihood of recidivism.]''.

(2) Option 2:

Chapter Four, Part B, [as amended by this amendment,] is amended by adding at the end the following:

''§ 4B1.6 Sexual Predator

If—

(a) the defendant is not a career offender pursuant to § 4B1.1 (Career Offender) and is not a repeat and dangerous sex offender pursuant to § 4B1.5 (Repeat and Dangerous Sex Offender); and

(b)(1) the instant offense of conviction is a sex offense that the defendant committed as part of a pattern of activity involving prohibited sexual conduct [with a minor]; [[and][or] (2) the instant offense of conviction is a sex offense and the defendant is a sexual predator], increase by [5] levels; but if the resulting offense level is less than [32][30], increase to level [32][30].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Sex offense' means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.

'Pattern of activity' means any combination of two or more prior separate instances of prohibited sexual conduct by the defendant with a minor victim other than a minor victim of the instant offense of conviction, whether or not the conduct resulted in a conviction for such conduct.

'Prohibited sexual conduct' (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; (C) includes trafficking in child pornography if the defendant has a prior felony conviction for trafficking in child pornography; and (D) does not include possession of child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).

[2. Sexual Predator Determination.—For purposes of this guideline, the defendant is a sexual predator if the court determines, under the totality of the circumstances, that the defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. [In making this determination, the court may rely on information such as expert psychosexual evaluations and other reliable evidence.]]

Background: This guideline is intended to provide lengthy incarceration for offenders who present a continuing danger to the public. It applies to any offender whose instant offense of conviction is a sex offense, regardless of the specific sex offense of conviction or Chapter Two guideline under which the offender is sentenced. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant was convicted of any of several federal and state sex offenses (see 18 U.S.C. 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

[The guideline is intended to target those dangerous offenders for whom future sex offending is likely. Research has shown that recidivism rates vary depending on characteristics of the offender that may be determined at the time of sentencing, such as a proven sexual preference for minors or other psychopathy. Psychosexual evaluations by certified professionals using empirically-validated risk assessment instruments may be useful to identify those offenders who are most likely to reoffend.]

The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline. In addition, treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of the term of supervised release that is imposed.]''.

(3) Option Three: Section 2A3.1(b) is amended by adding at the end the following:

''(7) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(7) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(7) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.2(b) is amended by adding at the end the following:

''(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(5) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.3(b) is amended by adding at the end the following:

''(3) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by adding at the end the following:

''5. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(3) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(3) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.4(b) is amended by adding at the end the following:

''(6) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(6) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(6) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

(4) Option Four: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by adding at the end the following:

''5. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

(5) Conforming Amendments: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Notes 5 and 7 in their entirety; and by redesignating Note 6 as Note 5.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 8.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Note 4.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Note 8.

(6) Supervised Release Provision: Section 5D1.2 is amended by striking subsection (b) in its entirety and inserting the following:

''(b) Except as otherwise provided—

(1) The term of supervised release imposed shall be not less than any statutorily required term of supervised release; and

(2) If the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum term of supervised release authorized by statute.''.

The Commentary to § 5D1.2 captioned ''Application Notes'' is amended in Note 1 by inserting ''Safety Valve Cases.—'' before ''A defendant who qualifies''; in Note 2 by inserting ''Supervised Release Cases.—'' before ''Upon motion of the Government''; by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; and by inserting before Note 2, as redesignated by this amendment, the following:

''1. Definition.—For purposes of this guideline, the term 'sex offense' means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.''.

Issue for Comment: Option Two proposes a new guideline at § 4B1.6 that would provide a five-level increase and a minimum offense level of level [32] if the defendant is a sexual predator. As highlighted by the bracketed language ''[and][or]'' in § 4B1.6(b)(2), the Commission invites comment regarding whether the court must find both that the defendant is a sexual predator and that the defendant engaged in a pattern of activity involving sexual abuse or exploitation, or whether a finding of one of these factors would be sufficient in order for the five-level increase to apply.

Part (B): Grouping

Synopsis: Part B of the proposed amendment resolves a circuit conflict regarding who the ''victim'' is in child pornography cases for purposes of grouping of multiple counts. The amendment proposes two options for resolving the circuit conflict on the grouping of multiple counts of child pornography trafficking, receipt, and possession. Option One would allow grouping of child pornography trafficking and possession counts pursuant to § 3D1.2(d). This grouping provision does not require a determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction. Option Two would not permit the grouping of multiple counts of child pornography trafficking and possession pursuant to § 3D1.2. This option is based on the premise that multiple acts of possession or trafficking represent separate instances of fear and risk of harm, and would require the assignment of units pursuant to § 3D1.4.

Proposed Amendment

(1) Option One: Section 3D1.2(d) is amended by inserting after ''§§ 2F1.1, 2F1.2;'' the following new line:

''§§ 2G2.2, 2G2.4;''.

(2) Option Two: The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 2 by adding at the end the following new paragraph:

''Similarly, [multiple counts involving the exploitation of the same minor are not to be grouped under § 3D1.2 and] counts involving the production of material involving the exploitation of a minor are not to be grouped under § 3D1.2 with counts involving the trafficking of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (*i.e.*, cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by adding at the end the following application note:

''4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving trafficking in, receiving, transporting, shipping, advertising, or possessing with the intent to distribute, material involving the exploitation of a minor are not to be grouped under § 3D1.2 (Groups of Closely Related Counts). Such counts do not involve 'substantially the same harm' for purposes of § 3D1.2.

Similarly, such counts are not to be grouped under § 3D1.2 with counts involving the production of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (*i.e.*, cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.''.

The Commentary to § 2G2.4 captioned ''Application Notes'' is amended by adding at the end the following application note:

''3. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the possession of material involving the exploitation of a minor are not to be grouped under § 3D1.2 (Groups of Closely Related Counts). Such counts do not involve 'substantially the same harm' for purposes of § 3D1.2.''.

Section 3D1.2(d) is amended by inserting '', 2G2.2, 2G2.4;'' after ''2G2.1''.

Part (C): Enhancement for Transportation Offenses and Other Amendments

Synopsis: Part C of the proposed amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. Pursuant to the authority in the Act and pursuant to the Commission's general authority under 28 U.S.C. 994 to promulgate guideline amendments, the amendment proposes a number of offense level increases in § 2A3.2, the ''statutory rape'' guideline, and in § 2A3.4, the abusive sexual contact guideline. Specifically, the amendment proposes to do the following:

(1) Distinguish between chapter 117 violations that involve the commission of an underlying sexual act and those violations (*e.g.*, sting cases) that do not, by providing in an alternative base offense level in § 2A3.2 three additional levels for chapter 117 violations that also involve an underlying sexual act.

(2) Provide an across-the-board three-level increase in the base offense level for offenses sentenced under § 2A3.2, such that the base offense level (A) for statutory rape in its most basic form unaccompanied by aggravating conduct is increased from level 15 to level 18; (B) for a chapter 117 violation (unaccompanied by a sexual act) is increased from level 18 to level 21; and (C) a chapter 117 violation (accompanied by a sexual act) results in a base offense level of level 24. This increase also maintains the proportionality between §§ 2A3.2 and 2G2.2.

(3) Provide an enhancement of 2 levels if the offense involved incest as

an additional enhancement to the two-level enhancement for custody, care, or supervisory control, and provide in the Commentary a definition of ''incest'' that tracks that found in the Model Penal Code. A review of the 228 case files from FY 99 that involved sex crimes against children revealed that 26% of the offenders were parents or relatives of the victim. Additionally, 45 other offenders were either the boyfriend/girlfriend of the parent, or a step-parent or step grandparent of the victim.

(4) Amend the Statutory Index to include a reference to the statutory rape guideline, § 2A3.2, for chapter 117 offenses. Often in ''sting'' cases, the defendant travels across state lines in order to meet a minor for what the defendant believes will be an encounter involving consensual sexual activity.

(5) Make conforming changes to the existing three-level decrease for chapter 117 violations that do not include aggravating conduct so that such violations receive the offense level applicable to statutory rape in its basic form.

(6) Make technical changes (such as the addition of headings and the reordering of applications notes) not intended to have substantive effect.

In addition, the amendment proposes to amend the guideline covering the production of child pornography, § 2G2.1, to provide additional enhancements to account for aggravating conduct that may be present in such cases, specifically, the production of sadistic or masochistic material, serious bodily injury, or the trafficking of produced materials. Note that the addition of the enhancement in § 2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under § 3D1.2(c), contrary to the proposal in Option 2 of Part B of this amendment. These amendments also are intended to restore proportionality in sentences between child pornography production offenses and child pornography trafficking offenses.

Proposed Amendment

Section 2A3.1(b) is amended by adding at the end the following:

''(7) If the offense involved incest, increase by 2 levels.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.''; and by inserting after ''18 U.S.C. 2256(8).'' the following new paragraph:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. 2246(2).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Custody, Care, and Supervisory Control Enhancement.—'' before ''Subsection''.

Section 2A3.2(a) is amended by redesignating subdivisions (1) and (2) as subdivisions (2) and (3), respectively; and by inserting after ''Base Offense Level:'' the following:

''(1) [24], if the offense involved a violation of chapter 117 of title 18, United States Code and the commission, or attempted commission, of a sexual act;''.

Section 2A3.2(a) is amended in redesignated subdivision (2) by striking ''18'' and inserting ''[21]''; and by inserting '', but not the commission, or attempted commission, of a sexual act'' before the semicolon.

Section 2A3.2(a) is amended in redesignated subdivision (3) by striking ''15'' and inserting ''[18]''.

Section 2A3.2(b) is amended by striking subdivision (4) in its entirety and inserting the following:

''(4) If (A) none of subsections (b)(1) through (b)(3) applies; and (B) subsection (a)(1) applies, decrease by 6 levels.'';

By redesignating subdivision (4) as subdivision (5); and by inserting after subdivision (3) the following:

''(4) If the offense involved incest, increase by 2 levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.''; and by inserting after ''(sexual abuse)'' the following paragraph:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. 2246(2).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 2 in its entirety; and by redesignating Notes 3 through 7 as Notes 2 through 6, respectively.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 2 (formerly Note 3) by inserting ''Custody, Care, and Supervisory Control Enhancement.—'' before ''Subsection''; and by inserting ''(A)'' after ''(b)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 3 (formerly Note 4) by inserting ''Abuse of Position of Trust.—'' before ''If the''; and by inserting ''(A) or (B)'' after ''(b)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 4 (formerly Note 5) by inserting ''Misrepresentation of Identity.—'' before ''The enhancement''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 5 (formerly Note 6) by inserting ''Use of Computer or Internet-Access Device.—'' before ''Subsection (b)(3) provides''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 6 (formerly Note 7) by inserting ''Cross Reference.—'' before ''Subsection (c)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 8 in its entirety and inserting the following:

''7. Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(A) The defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense.

(B) The defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.''.

Section 2A3.4(b) is amended by adding at the end the following:

''(6) If the offense involved incest, increase by 2 levels.

(7) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.'';

and by inserting at the end the following:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. § 2246(2).''.

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

''(4) If (A) the offense involved the production of sexually explicit material that portrays sadistic or masochistic conduct or other depictions of violence; or (B) the victim sustained serious bodily injury, increase by [2][4] levels.

(5) If the offense involved any distribution of the sexually explicit material, increase by [2] levels.''.

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

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

'Minor' means an individual who had not attained the age of 18 years.

'Distribution' has the meaning given that term in Application Note 1 of the Commentary to § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. § 2423(b)'' by inserting '', 2A3.4'' after ''2A3.3''.

Issues for Comment

(1) The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements added to these guidelines (that became effective November 1, 2000) for use of a computer and/or misrepresentation of a criminal participant's identity sufficiently provide an appropriate enhancement, or is an additional enhancement in these guidelines for other aggravating conduct needed?

(2) The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement in order to maintain proportionality between these guidelines and the guidelines covering pornography offenses, particularly, 2G2.2 (Trafficking In Material Involving the Sexual Exploitation of a Minor).

Proposed Amendment: Stalking and Domestic Violence

6. *Synopsis of Proposed Amendment:* This proposed amendment addresses section 1107 of the Victims of Trafficking and Violence Act 2000 (the ''Act''), Pub. L. 106–386. That section amends 18 U.S.C. 2261, 2261A, and 2262 to broaden the reach of these statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person. The Act also amends section 2261A to provide a new offense at section 2262A(2) which prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.

The Act also includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. 2261 with specific consideration to be given to the following factors:

(i) Whether the Federal Sentencing Guidelines relating to stalking offences 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 (stalking and domestic violence offenses).

This proposed amendment increases the base offense level in § 2A6.2 (Stalking or Domestic Violence) and adds a cross reference to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

For several reasons, the proposed amendment treats the new stalking by mail offense the same under the guidelines as other stalking offenses and covers it under § 2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to referring this new offense to § 2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that stalking by mail offenses require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third, referencing stalking by mail offenses to § 2A6.1, could possibly result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order and engages in some conduct evidencing an intent to carry out such threat, receives an offense level of level 20 under § 2A6.1. A defendant who commits a stalking offense, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order, receives an offense level of level 18 under § 2A6.2. Arguably, the second defendant should receive punishment, equal to, or perhaps greater than that received by the first defendant.

Because of the concern with regard to the proportionality in sentencing stalking and domestic violence offenses vis-a-vis other crimes, such as

threatening or harassing communications, this amendment proposes to increase the base offense level in § 2A6.2 from level 14 to level [16][18]. Setting the base offense level at level [16] [18] for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.

This amendment also amends Application Note 3 to § 1B1.5 (Interpretation of References to Other Offense Guidelines) to clarify generally the operation of cross references. A review of the 16 cases sentenced under this guideline in fiscal years 1998 and 1999 indicated that there is some confusion as to whether a cross reference can and should be applied to conduct that is not within federal jurisdiction (*e.g.*, conduct in violation of state or local law) as is often the case in stalking and domestic violence offenses. This new application note makes clear that, unless otherwise specified, cross references in Chapter Two are to be determined consistent with the provisions of § 1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.

Proposed Amendment

Section 2A6.2(a) is amended by striking ''14'' and inserting ''[16][18]''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by striking the last paragraph in its entirety and inserting:

''Stalking' means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person, the person's immediate family, including that person's spouse or intimate partner; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in subdivision (A) of this note. *See* 18 U.S.C. § 2261A. 'Immediate family' has the meaning set forth in 18 U.S.C. § 115(c)(2). 'Course of conduct' and 'spouse or intimate partner' have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.''.

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 3 by inserting after the first sentence the following:

''Consistent with the provisions of § 1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.''.

Proposed Amendment: Re-Promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine or Methamphetamine Laboratory Operators as Permanent Amendment

7. *Synopsis of Proposed Amendment:* This proposed amendment addresses the ''substantial risk'' directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the ''Act''), section 102 of Pub. L. 106–310.

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments ''as soon as practicable,'' the substantial risk directive specifically requires that the amendment implementing the directive shall apply ''to any offense occurring on or after the date that is 60 days after the date of the enactment'' of the Act. Because of ex post facto concerns raised by this 60-day clause, the Commission promulgated an amendment in November 2000 that implemented the substantial risk directive. The amendment became effective December 16, 2000.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (A) the Controlled Substances Act (21 U.S.C. 801 *et seq.*); (B) the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*); or (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

In carrying out this directive, the Act requires the Commission to provide the following enhancements—

(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.

Three options are now presented to implement the directive on a permanent basis.

Option 1.—Option 1 proposes to re-promulgate the emergency amendment without any changes. The pertinent parts of Option 1 are as follows:

(1) Guidelines Amended.—The amendment provides new enhancements in §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment does not amend § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) or § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation or Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix (A) (Statutory Index) to §§ 2D1.11 and 2D1.12, the cross reference in these guidelines, which applies if the offense involved the manufacture of a controlled substance, will result in application of § 2D1.1 and accordingly, the new enhancements.

(2) Structure.—The basic structure of the amendment to §§ 2D1.1 and 2D1.10 tracks the structure of the directive. Accordingly, in § 2D1.1, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense (A) involved the manufacture of amphetamine or methamphetamine; and (B) created a substantial risk of either harm to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provides a six-level increase and a minimum offense level of 30.

However, the structure of the amendment in § 2D1.10 differs from that

in § 2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involved a substantial risk of harm to human life is unnecessary because § 2D1.10 applies only to convictions under 21 U.S.C. 858, and the creation of a substantial risk of harm to human life is an element of a § 858 offense. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment is unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.

(3) Determining ''Substantial Risk of Harm''.—Neither the directive nor any statutory provision defines ''substantial risk of harm''. Based on an analysis of relevant case law that interpreted ''substantial risk of harm'', the amendment provides commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm.

(4) Definitions.—The definition of ''incompetent'' is modeled after several state statutes, which proved useful for purposes of this amendment.

The definition of ''minor'' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).

Option 2.—Option 2 proposes to expand the emergency amendment, as set forth in Option 1, to apply to the manufacture of all controlled substances rather than only amphetamine or methamphetamine. Although the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine, the Commission may, under its general promulgation authority, expand the scope of an emergency amendment when it re-promulgates the amendment as a permanent amendment. The reason for the proposed expansion is that if the manufacture of any controlled substance creates a substantial risk of harm to human life or the environment, there is a strong argument that the increased penalties should apply regardless of the type of controlled substances involved in the offense. The pertinent parts of Option 2 are as follows:

(1) § 2D1.1.—The enhancement in subsection (b)(6) is proposed to apply to the manufacture of any controlled substance, not just to the manufacture of amphetamine or methamphetamine. The expansion to all controlled substances in § 2D1.1 is rather straightforward. Conforming changes are made to the Commentary, but the amendment to § 2D1.1 otherwise remains the same as the emergency amendment.

(2) § 2D1.10.—Option 2's proposed expansion to all controlled substances in § 2D1.10 requires a restructuring of the guideline (as it was amended by the emergency amendment).

First, Option 2 proposes to increase the alternative base offense level in subsection (a)(1) from ''3 plus'' to ''6 plus the offense level from the Drug Quantity Table in § 2D1.1''. This proposed increase corresponds to the proposed deletion of subsection (b)(1)(A) of the emergency amendment. As explained above in the description of Option 1 under ''Structure,'' subsection (b)(1)(A) provides a three-level increase ''if the offense involved the manufacture of amphetamine or methamphetamine,'' without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. However, if the emergency amendment is to be expanded to apply to the manufacture of all controlled substances, this enhancement no longer is appropriate. In order not to lose the three-level increase that was provided by this enhancement, the three levels from this enhancement are built into the alternative base offense level in subsection (a)(1).

Second, Option 2 proposes two alternatives for addressing the minimum offense level of level 27 that also was provided by the enhancement in subsection (b)(1)(A). Option 2(a) increases the current alternative base offense level in subsection (a)(2) from level 20 to level 27. Although this option is consistent with expanding the entire emergency amendment to all controlled substances, the impact of this change is likely to be significant for lower level drug offenders. Option 2(b) proposes to add an additional alternative base offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintains the alternative base offense level 20 for all other controlled substances. Although this option has less of an impact on lower level drug offenders than Option 2(a), it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances.

Finally, Option 2 makes the enhancement that applies if the offense created a substantial risk of harm to the life of a minor or an incompetent applicable to all controlled substances. Conforming amendments are made to the Commentary.

Option 3.—This option assumes that the manufacture of amphetamine or methamphetamine is inherently dangerous and poses a substantial risk of harm to human life or the environment. Thus, the statutorily directed minimum enhancement and minimum offense level is automatic for the manufacture of amphetamine or methamphetamine. For all other controlled substances, it must be proved that the manufacturing process created the substantial risk of harm.

This option also combines the substantial risk enhancement with the environmental damage enhancement in § 2D1.1(b)(5).

Proposed Amendment

Option 1:

Sections 2D1.1 and 2D1.10, as amended by Amendment 608 (*see* Supplement to the 2000 Supplement to Appendix C), are repromulgated with the following minor, editorial changes:

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

The Commentary to § 2D1.10 captioned ''Background'' is amended by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Option 2:

Section 2D1.1(b)(6)(A) is amended in subdivision (i) by striking ''amphetamine or methamphetamine'' and inserting ''a controlled substance''.

Section 2D1.1(b)(6)(B) is amended in subdivision (i) by striking ''amphetamine or methamphetamine'' and inserting ''a controlled substance''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by inserting ''Hazardous or Toxic Substances.—''before ''Subsection (b)(5) applies''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in the heading to Note 21 by striking ''Amphetamine and Methamphetamine'' and inserting ''Controlled Substances''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by inserting '', in a broader form,'' after ''Subsection (b)(6) implements''.

Section 2D1.10 is amended by striking subdivisions (a) and (b) in their entirety and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) 6 plus the offense level from the Drug Quantity Table in § 2D1.1; or

[Option 2(a): (2) 27.]

[Option 2(b): (2) 27, if the offense involved the manufacture of amphetamine or methamphetamine; or

(3) 20, otherwise.]

(b) Specific Offense Characteristic

(1) If the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by 3 levels. If the resulting offense level is less than level 30, increase to level 30.''

The Commentary to § 2D1.10 captioned ''Application Notes'' is amended in the heading to Note 1 by striking ''Associated with the Manufacture of Amphetamine and Methamphetamine''.

The Commentary to § 2D1.10 captioned ''Application Notes'' is amended in Note 1(A)(iv) by striking ''amphetamine or methamphetamine laboratory'' and inserting ''illicit''.

The Commentary to § 2D1.10 captioned ''Background'' is amended by striking ''Subsection'' and inserting ''Subsections (a)(2) and''; by striking ''implements'' and inserting ''implement , in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Option 3:

Section 2D1.1(b) is amended by redesignating subdivision (7) as (6); and by striking subdivisions (5) and (6) in their entirety and inserting the following:

''(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; or (ii)(I) involved the manufacture of a controlled substance other than amphetamine or methamphetamine; and (II) created a substantial risk of harm to human life or the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of a controlled substance; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by inserting ''(A)'' after ''Subsection (b)(5)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in the heading to Note 21 by striking ''Amphetamine and Methamphetamine'' and inserting ''Controlled Substances''.

The Commentary to § 2D1.1 captioned ''Application Notes is amended in Note 21(A) by striking ''subsection (b)(6)'' and inserting ''subsections (b)(5)(B) and (b)(5)(C)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 subdivision (B) by striking ''(b)(6)'' and inserting ''(b)(5)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by inserting ''(A)'' after ''Subsection (b)(5)''; by striking ''Subsection (b)(6)'' and inserting ''Subsections (b)(5)(B) and (b)(5)(C)''; by striking implements'' and inserting ''implement, in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Section 2D1.10(a) is amended in subdivision (2) by striking ''20'' and inserting ''27''.

Section 2D1.10(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by 3 levels. If the resulting offense level is less than level 30, increase to level 30.''

The Commentary to 2D1.10 captioned ''Application Notes'' is amended in the title to Note 1 by striking ''Associated with the Manufacture of Amphetamine and Methamphetamine''.

The Commentary to 2D1.10 captioned ''Application Notes'' is amended in Note 1(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to 2D1.10 captioned ''Background'' is amended by striking ''Subsection'' and inserting ''Subsections (a)(2) and''; by striking ''implements'' and inserting ''implement, in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Issue for Comment: The Commission invites comment regarding whether it should provide, for controlled substances other than amphetamine or methamphetamine, an upward departure rather than an enhancement provision if the manufacture of the controlled substance created a substantial risk of harm to human life or the environment.

Proposed Amendment: Mandatory Restitution for Amphetamine and Methamphetamine Offenses

8. *Synopsis of Proposed Amendment:* This proposed amendment implements the provision in the Methamphetamine Anti-Proliferation Act of 2000, section 3613 of Pub. L. 106–310, that amends 21 U.S.C. 853(q) to provide mandatory restitution for offenses that involve the manufacture of methamphetamine. The proposed amendment amends § 5E1.1 (Restitution) to include a reference to 21 U.S.C. § 853(q) in the guideline provision regarding mandatory restitution.

Proposed Amendment

Section 5E1.1 is amended in subsection (a)(1) by inserting '', or 21 U.S.C. § 853(q)'' after ''3663A''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting '', and 21 U.S.C. § 853(q)'' after ''3663A''.

Proposed Amendment: Safety Valve

9. *Synopsis of Proposed Amendment:* This amendment proposes to delete the language in § 2D1.1(b)(6) that limits application of the safety valve to defendants at offense levels 26 and greater. The proposed amendment also deletes commentary that is outdated because of the operation of § 5C1.2 (Limitation on Applicability on Statutory Minimum Sentences in Certain Cases). Conforming changes are made to § 5C1.2.

Proposed Amendment

Section 2D1.1(b)(6) is amended by striking ''subdivisions (1)–(5)'' and inserting ''subsections (a)(1)–(5)''; and by striking ''and the offense level determined above is level 26 or greater''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking Note 14 in its entirety; and by redesignating Notes 15 through 20 as Notes 14 through 19, respectively.

Section 5C1.2 is amended in the first paragraph by striking ''In'' and inserting ''(a) Except as provided in subsection (b), in''.

Section 5C1.2 is amended by inserting after subsection (a), as so designated by this amendment, the following:

''(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Notes 2 through 7 by striking ''subdivision'' each place it appears and inserting ''subsection (a)''; and by striking ''subdivisions'' in Note 3 and inserting ''subsection (a)''.

Proposed Amendment: Anhydrous Ammonia

10. *Synopsis of Proposed Amendment:* This proposed amendment addresses the new offense, at section 423 of the Controlled Substances Act (21 U.S.C. 864), of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. This new offense, created by the Methamphetamine Anti-Proliferation Act of 2000, section 3653 of Pub. L. 106–310, carries the statutory penalties contained in section 403 of the Controlled Substances Act (21 U.S.C. 843), *i.e.,* not more than fours years' imprisonment (or not more than eight years' imprisonment in the case of certain prior convictions) or not more than 10 years' imprisonment (or not more than 20 years' imprisonment in the case of certain prior convictions) if the offense involved the manufacture of methamphetamine.

The proposed amendment references the new offense to § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy). Reference to this guideline is appropriate because the new offense is similar to other offenses already referenced to the guideline and having the same penalty structure, such as 21 U.S.C. 843(a)(6), which among other things makes it unlawful to possess any chemical, product, or material which may be used to manufacture a controlled substance. The proposed amendment also makes minor, non-substantive changes to the guideline in order to fully reference the new and existing offenses into the guideline.

Proposed Amendment

Section 2D1.12 is amended in the heading by inserting ''Transportation, Exportation,'' after ''Distribution,''; by striking ''or'' before ''Equipment'' and inserting a comma; and by inserting '', Chemical, Product, or Material'' after ''Equipment''.

Section 2D1.12 is amended in each of subsections (a)(1), (a)(2), and (b)(1), by inserting ''flask,'' after ''prohibited''; and by inserting '', chemical, product, or material'' after ''equipment''.

The Commentary to § 2D1.12 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''843''; and by inserting '', 864'' after ''(7)''.

The Commentary to § 2D1.12 captioned ''Application Notes'' is amended by striking the text of Note 1 in its entirety and inserting the following:

''If the offense involved the large-scale [(A)] manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material [; or (B) theft of anhydrous ammonia,] an upward departure may be warranted.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''21 U.S.C. § 863'' the following:

''21 U.S.C. § 864 2D1.12''.

Issue for Comment: The Commission invites comment regarding whether the enhancement at § 2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine through the use of anhydrous ammonia. Should, for example, subsection (b)(1) of § 2D1.12 provide for an enhancement of up to [10] levels, or should an alternative method be provided to account for the seriousness of using anhydrous ammonia, such as a cross reference to § 2D1.11 using a conversion to methamphetamine if anhydrous ammonia is involved? Generally, what is the most appropriate penalty structure for offenses involving anhydrous ammonia?

Proposed Amendment: GHB

11. *Synopsis of Proposed Amendment:* This proposed amendment implements the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172 (the ''Act''), which provides the emergency scheduling of gamma hydroxybutyric acid (''GHB'') as a Schedule I controlled substance under the Controlled Substances Act when the drug is used illicitly. (There are approved applications of GHB under the Federal Food, Drug, and Cosmetic Act, for which the drug is scheduled in Schedule III.) The Act also amended section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C)) and section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. § 960(b)(3)) to provide penalties of not more than 20 years for an offense that involves GHB. Additionally, the Act added gamma butyrolactone (''GBL'') to the list of List I chemicals in section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C)).

Under the current structure of the Drug Quantity Table in § 2D1.1, GHB and other Schedule I and II depressants, with statutory maximum terms of imprisonment of 20 years, are sentenced identically to Schedule III substances, which have a five-year statutory maximum. The guidelines provide a maximum offense level of level 20 for these substances, which equates to a sentencing range of 33 to 44 months for offenders with minimal or no criminal history (Criminal History Category I). The lack of penalty distinctions between offenses with such divergent statutory maxima raises proportionality concerns. Recognizing the need to provide higher penalties for the more serious offenses involving Schedule I and II depressants, the proposed amendment eliminates the maximum base offense level of level 20 in the Drug Quantity Table of § 2D1.1 for Schedule I and II depressants (including GHB). The same change is made with respect to flunitrazepam, which, for sentencing purposes, is tied to Schedule I and II depressants.

The proposed amendment also amends the Chemical Quantity Table in § 2D1.11 to include GBL, a precursor for GHB, as a List I chemical. Offense levels for GBL were established in the same fashion as other list I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the Drug Quantity Table in § 2D1.1. From this offense level, six levels were subtracted. This result identifies the corresponding offense level in the Chemical Quantity Table in § 2D1.11.

The proposed amendment also adds Iodine to the Chemical Quantity Table in response to a recent classification of iodine as a List II chemical. 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.

Proposed Amendment

(1) Uncap Schedule I and II Depressants

Section 2D1.1(c)(1) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''30,000,000 units or more of Schedule I or II Depressants; 1,875,000 units or more of Flunitrazepam.''.

Section 2D1.1(c)(2) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; At least 625,000 but less than 1,875,000 units of Flunitrazepam.''.

Section 2D1.1(c)(3) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants; At least 187,500 but less than 625,000 units of Flunitrazepam.''.

Section 2D1.1(c)(4) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; At least 62,500 but less than 187,500 units of Flunitrazepam.''.

Section 2D1.1(c)(5) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants; At least 43,750 but less than 62,500 units of Flunitrazepam.''.

Section 2D1.1(c)(6) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 400,000 but less than 700,000 units of Schedule I or II Depressants; At least 25,000 but less than 43,750 units of Flunitrazepam.''.

Section 2D1.1(c)(7) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 100,000 but less than 400,000 units of Schedule I or II Depressants; At least 6,250 but less than 25,000 units of Flunitrazepam.''

Section 2D1.1(c)(8) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 80,000 but less than 100,000 units of Schedule I or II Depressants; At least 5,000 but less than 6,250 units of Flunitrazepam.''.

Section 2D1.1(c)(9) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 60,000 but less than 80,000 units of Schedule I or II Depressants; At least 3,750 but less than 5,000 units of Flunitrazepam.''.

Section 2D1.1(c)(10) is amended in the line referenced to Schedule I or II Depressants by striking ''40,000 or more'' and inserting ''At least 40,000 but less than 60,000''; and in the line referenced to Flunitrazepam, by striking ''2,500 or more'' and inserting ''At least 2,500 but less than 3,750''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Flunitrazepam * * * '' in the heading by striking '' * * * '' after ''Flunitrazepam''; and by striking the following:

'' * * * Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Schedule I or II Depressants * * * '' in the heading by striking ''* * * '' after ''Schedule I or II Depressants''; and by striking the following:

'' * * * Provided, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.''.

(2) Adding GBL and Iodine to the Chemical Quantity Table in § 2D1.11

Section 2D1.11(d)(1) is amended by inserting at the end the following:

''10,000 KG or more of Gamma-butyrolactone.''.

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

''At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''7.52 KG or more of Iodine.''.

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

''At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 2.51 KG but less than 7.52 KG of Iodine.''.

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

''At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1.76 KG but less than 2.51 KG of Iodine.''.

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

''At least 400 KG but less than 700 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1 KG but less than 1.76 KG of Iodine.''.

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

''At least 100 KG but less than 400 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 250.8 G but less than 1 KG of Iodine.''.

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

''At least 80 KG but less than 100 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 200.64 G but less than 250.8 G of Iodine.''.

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

''At least 60 KG but less than 80 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 150.48 G but less than 200.64 KG of Iodine.''.

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

''At least 40 KG but less than 60 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 100.32 G but less than 150.48 G of Iodine.''.

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

''Less than 40 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''Less than 100.32 G of Iodine.''.

Proposed Amendment: Economic Crime Package

12. *Synopsis of Proposed Amendment:* The Economic Crime Package consists of six parts. Part A is a proposal to consolidate the theft, property destruction and fraud guidelines. Part B contains three options for the loss table for the consolidated guideline and two options for a revised loss table in § 2T4.1 (Tax Table). Part C contains two proposals to amend the definition of loss for the consolidated guideline. Part D proposes necessary changes to several guidelines which refer to the loss tables in either § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables. Part E contains the technical and conforming amendments to the guidelines that would be necessary as a result of the theft and fraud consolidation. Part F contains a proposal to resolve a circuit split regarding the computation of tax loss in § 2T1.1.

Part A. Consolidation of Theft, Property Destruction and Fraud

Synopsis of Proposed Amendment: This amendment consolidates the three guidelines covering theft (§ 2B1.1), property destruction (§ 2B1.3), and fraud (§ 2F1.1). Consolidation of these guidelines is proposed in response to concerns raised by probation officers, judges, and practitioners over several years. The issues were among those discussed during Commission public hearings in 1997 and 1998 on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that although theft and fraud offenses are conceptually similar, differences in guideline structure can lead to disparate penalty levels among similar cases, depending on how the offense is charged, and the court's choice of the applicable guideline pursuant to § 1B1.2.

Bracketed place holders are indicated for the loss table (see Part B), definition of loss (see Part C), and the options regarding two circuit conflicts: Tax loss (see Part F) and new commentary regarding the application of subsection (b)(3) regarding a ''person in the business of receiving and selling receiving stolen property,'' and a scholarship fraud enhancement and accompanying application note. In the event that the Commission does not promulgate the consolidation proposal, these bracketed options can be promulgated separately.

Base Offense Level: The proposal calls for a base offense level of level 6. The current base offense level for fraud offenses is level 6; the base offense level for theft and property destruction offenses currently is level 4. Starting with the base offense level 6, the proposed loss table for the consolidated guideline envisions two-level increments for increasing loss amounts beginning at $5,000. Currently the loss table for theft offenses provides one-level enhancements when loss exceeds $100, $1,000, $2,000, and $5,000, respectively, so that a theft offense involving more than $2,000 in loss results in an offense level of level 7, with the possibility of an additional increase for more-than-minimal planning. Under the proposed consolidated loss table, a theft offense involving more than $2,000 (but less than $5,000) would receive the base offense level of level 6, with no possible increase for more-than-minimal planning.

In contrast, under the proposed table, a fraud offense involving the same amount of loss would start with the same base offense level of level 6 but would receive no additional increase based on the loss amount. Under the current fraud table, this offense would result in an offense level of level 7 for loss because the current fraud loss table provides a one-level increase for loss amounts in excess of $2,000 (but less than $5,000).

More than Minimal Planning: Section 2F1.1(b)(2) currently provides a two-level increase if the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim. The proposal deletes this enhancement from the consolidated guideline. The more than minimal planning enhancement is deleted due to the potential overlap between this enhancement and the sophisticated means enhancement. The scheme to defraud more than one victim enhancement is deleted for two reasons: (1) If the adjustment were retained unmodified in a consolidated guideline, it would apply to cases currently sentenced under § 2B1.1 where it is not currently applicable; and (2) in its current form it might be hard to justify providing a two-level increase in every case in which there is more-than-one victim, particularly in the face of the new Chapter Three adjustment in the vulnerable victim guideline (§ 3A1.1) that provides (only) a two-level increase if the offense involved ''a large number of vulnerable victims.''

As an alternative to the scheme to defraud more than one victim enhancement, this amendment provides an enhancement based on the number of victims, to provide additional punishment for offenses involving multiple victims. The victim table proposes building in the current ''mass-marketing'' enhancement as an alternative way of triggering the two-level increase provided if there were more than 4 and less than 50 victims. The amendment proposes that if the proposed victim table is adopted, and a victim enhancement is applicable in a given case, then the enhancement under 3A1.1(b)(2) for ''a large number of vulnerable victims'' could not also apply in that case.

Theft of Undelivered U.S. Mail: The current ''floor'' offense level of level 6 for the theft of undelivered United States mail is proposed to be deleted because the proposal raises the base offense level from level 4 to 6 for such offenses, making the floor unnecessary. However, if the Commission adopts the enhancement providing for a two-level reduction if loss is less than $2,000, it might be necessary to retain this floor of level 6.

In the Business of Receiving and Selling Stolen Property: Section 2B1.1(b)(4)(B) provides a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property. The proposed amendment addresses an issue that has arisen in case law regarding what conduct qualifies a defendant for the 4-level enhancement.

In determining the meaning of ''in the business of'', three circuits apply what has been coined the ''fence test'' in which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Three other circuits have adopted the ''totality of the

circumstances test'' that focuses on the ''regularity and sophistication'' of the defendant's operation. Though the factors considered by all of these circuits are similar, the approaches are different.

The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant's operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant's operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant's connections with thieves and purchasers of the stolen items, and the use of technology and communications.

The totality of the circumstances test involves consideration of the circumstances in each case with particular emphasis on the regularity and sophistication of the defendant's operation, looking at such factors as the amount of income generated through fencing activities, the value of the property handled, the defendant's past activities, the defendant's demonstrated interest in continuing or expanding the operation, the use of technology and communication, and the defendant's connections with thieves and purchasers of stolen property.

This amendment adopts the totality of the circumstances test, basing application of the enhancement on the circumstances surrounding the defendant and his business as opposed to the effect the fencing operation has in encouraging others to commit crimes.

College Scholarship Fraud

Subsection (b)(9)(D) implements the the directive in section 3 of the College Scholarship Fraud Prevention Act of 1999, Pub. L. 106–420. The directive requires the Commission to amend the 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.

The amendment adds an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. This proposed enhancement is targeted at 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.

Risk of Bodily Injury Enhancement: The proposal provides for two substantive changes with respect to the enhancement involving conscious or reckless risk of serious bodily injury. First, it increases the ''floor'' offense level from level 13 to level 14. Second, it inserts ''death'' before the term ''or serious bodily injury'' because, as a practical matter, a risk of serious bodily injury is likely also to entail a risk of death. Including ''of death'' also will provide consistency throughout the *Guidelines Manual.* Currently, ''risk of death or serious bodily injury'' appears in a number of other guidelines as either an alternative base offense level, specific offense characteristic, or invited upward departure (*see, e.g.,* § 2A2.2 comment (n.3); § 2K1.4(a)(1)(2); § 2Q1.4(b)(1)). The fraud guideline is the only guideline in which risk of serious bodily injury appears as a sentencing factor without a reference to ''risk of death''.

This enhancement stems from a 1988 congressional directive in which the Commission was instructed to amend the fraud guideline to provide an appropriate enhancement for a fraud offense that creates a conscious or reckless risk of serious bodily injury. The Commission was further instructed to consider the appropriateness of a minimum enhancement of two offense levels for this conduct. The legislation did not require a ''floor'' offense level.

The proposal increases the ''floor'' from level 13 to level 14 to promote proportionality between this and other guidelines covering similar conduct. Within the current theft and fraud guidelines, there are three specific offense characteristics that have a higher floor offense level than the current risk of bodily injury enhancement: (1) ''Chop shops'': level 14; (2) jeopardizing the solvency of a financial institution: level 24; and (3) personally receiving more than $1 million from a financial institution: level 24 (congressionally directed minimum).

Other conceptually similar offense conduct under various guidelines is graded as follows:

(1) Reckless voluntary manslaughter (§ 2A1.4): level 14

(2) Operating a common carrier under influence of drugs or alcohol, no death or serious bodily injury resulting (§ 2D2.3): level 13

(3) Arson creating a substantial risk of death or serious bodily injury (§ 2K1.4): level 20

(4) Immigration smuggling offense creating a substantial risk of death or serious bodily injury (§ 2L1.1): 2-level enhancement, ''floor'' of level 18

(5) Environmental offenses resulting in risk of death or serious bodily injury (§§ 2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4): Offense level varies from level 17 to level 24.

Gross Receipts Enhancement: The proposed amendment presents two options for modifying this enhancement, which currently provides a 4-level increase and a floor offense level of level 24 for a defendant who personally derives more than $1 million in gross receipts from an offense that affected a financial institution.

The gross receipts enhancement derives from a 1990 congressional directive requiring a minimum offense level of level 24 if the defendant derived more than $1 million in gross receipts from certain offenses that affected financial institutions. The Commission had received and implemented a related directive the previous year requiring that the guidelines provide a ''substantial period of incarceration'' for certain specific offenses that ''substantially jeopardize the safety and soundness of a federally insured financial institution.'' In each case, the Commission constructed an enhancement that was considerably broader and more severe than the directive required. In part, this was the Commission's way of responding to the increases in statutory maximum penalties for financial institution offenses that Congress enacted in 1989 and 1990. The Commission had modestly increased the penalties for all fraud offenses with substantial monetary losses in 1989. Rather than increase the loss table again, or adopt a generally applicable enhancement for fraud against financial institutions, the Commission elected to use the two congressionally directed enhancements as mechanisms for ensuring more stringent penalties for the more severe forms of those offenses.

Option 1 deletes the 4-level increase for deriving more than $1 million in gross receipts from the offense but retains the ''floor'' offense level of level 24 for such conduct (in order to retain compliance with the congressional directive). The 4-level increase is deleted under the assumption that a loss

table will be adopted that builds in increases for relatively high dollar losses; the deletion would prevent double-counting for the fact of a high dollar loss. Option 2 retains the current floor offense level but reduces the 4-level enhancement to 2 levels.

Sentencing Data: Due to the structure of this enhancement and the Commission's data collection methods it is impossible to determine which offenders received increases for jeopardizing a financial institution and which offenders received increases for gross receipts in excess of $1,000,000. Nevertheless, 33 fraud offenders (0.5 %) received an increase under this enhancement.

Additional Cross References

(A) This proposal adds a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute is used to reach conduct that is more specifically addressed in another Chapter Two guideline [if the resulting offense level is greater].

Currently, Application Note 14 in the fraud guideline instructs the user to move to another, more appropriate Chapter Two guideline under circumstances in which: (1) The defendant is convicted of a broadly applicable fraud statue (*e.g.,* 18 U.S.C. § 1001), and (2) the convicted conduct is more appropriately covered by another Chapter Two guideline specifically tailored to that conduct. In essence, this note is not a cross reference, but rather a reminder of the principles enunciated in § 1B1.2 regarding application of the guideline most appropriate for the convicted conduct. Moreover, unlike the more typical cross reference, under this instruction the user locates and applies the more appropriate guideline, even if it yields an offense level lower than would have been obtained under the fraud guideline.

Experience over the years demonstrates that this application note is not well known or understood, and hence, not applied consistently. One way of possibly addressing these problems would be to convert the application note into a cross reference. The more highly visible approach of incorporating the instruction directly into the guideline should ensure more consistent application, without changing the basic policy of using the cross reference to move to the guideline most appropriate for the conduct of which the defendant was convicted.

Proposed Amendment (Part A)

Chapter Two, Part F, is amended in the heading by striking ''—Offenses Involving Fraud or Deceit''; and by striking §§ 2F1.1 and 2F1.2 in their entirety.

Chapter Two is amended by striking the heading to Part B; by striking the heading to Subpart 1; by striking the Introductory Commentary to such subpart; and by striking §§ 2B1.1 and 2B1.3 in their entirety and inserting the following:

''Part B—Basic Economic Offenses

1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, Fraud and Insider Trading

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligation of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded [$2000][$5,000], increase the offense level as follows:

[Loss Table Options—See Part B of this amendment]

(2) If the offense—

(A) (i) involved more than 4, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.

(3) If the theft was from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(6) If the offense involved theft to, damage of, or destruction of property from a national cemetery, increase by 2 levels.

[(7) If the loss was $2,000 or less, decrease by 2 levels.]

(8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines [; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels]. If the resulting offense level is less than level 10, increase to level 10.

(9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(10) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) 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,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level 14, increase to level 14.

(12) If the offense involved (A) the conscious or reckless risk of death or 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 14, increase to level 14.

(13) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

[Option 1: (14) If (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level is less than level 24, increase to level 24.]

[Option 2: (14) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels. If the resulting offense level is less than level 24, increase to level 24.]

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

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

(3) If (A) none of subdivisions (1) or (2) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the count of conviction establishes an offense more aptly covered by another guideline in Chapter Two, apply that other guideline [if the resulting offense level is greater].

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (a)(5) the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1030(a)(5), 1031, 1341–1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved), 1708, 1831, 1832, 2113(b), 2312–2317; 29 U.S.C. § 501(c). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline.—

'Financial institution'' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. ''Union or employee pension fund'' and ''any health, medical, or hospital insurance association,'' as used above, primarily include large pension funds that serve many individuals (*e.g.,* pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons.

'Firearm' and ''destructive device'' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Foreign instrumentality' and ''foreign agent'' are defined in 18 U.S.C. § 1839(1) and (2), respectively.

'From the person of another' refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

'Mass-marketing' means 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. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

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

'Trade secret' is defined in 18 U.S.C. § 1839(3).

2. [Definition of Loss—See Part C of this amendment]

3. Controlled substances should be valued at their estimated street value.

[4. Enhancement for Business of Receiving and Selling Stolen Property.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4).

(B) Factors to Consider.—The following is a non-inclusive list of factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4):

(i) The regularity or sophistication of the defendant's activities;

(ii) The value and size of the inventory of stolen property maintained by the defendant;

(iii) The extent to which the defendant's activities encouraged or facilitated other crimes; or

(iv) The defendant's past activities involving stolen property.]

5. Application of Subsection (b)(8).—

(A) In General.—The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.

(B) Misrepresentation Defendant Was Acting On Behalf of Charitable Institution.—Subsection (b)(8)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

(C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (*e.g.*, a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—

For the purposes of subsection (b)(8)(D)—

'Financial assistance' means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purposes of financing an education.

'Institution of higher education' has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).]

(E) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

6. Application of Subsection (b)(9).—

(A) Definition of United States.—'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(9)(C), ''sophisticated means'' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in 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.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

7. Application of Subsection (b)(10).—

(A) Definitions.—

'Counterfeit access device' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. 'Telecommunications service' has the meaning given that term in 18 U.S.C. § 1029(e)(9).

'Device-making equipment' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also includes (i) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (ii) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). 'Scanning receiver' has the meaning given that term in 18 U.S.C. § 1029(e)(8).

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

'Produce' includes manufacture, design, alter, authenticate, duplicate, or assemble. 'Production' includes manufacture, design, alteration, authentication, duplication, or assembly.

'Unauthorized access device' has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) Subsection (b)(10)(C)(i).—This subsection applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(C) Examples of Conduct Under (b)(10)(C)(i).—Examples of conduct to which this subsection should apply are as follows:

(i) A defendant obtains an individual's name and social security number from a source (*e.g.,* from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(ii) A defendant obtains an individual's name and address from a source (*e.g.,* from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(D) Nonapplicability of subsection (b)(10)(C)(i):—Examples of conduct to which this subsection should not apply are as follows:

(i) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(ii) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(E) Subsection (b)(10)(C)(ii).—This subsection applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

(F) Upward Departure.—In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

(i) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(ii) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.

(iii)The defendant produced or obtained numerous means of identification with respect to one

individual and essentially assumed that individual's identity.

(G) Counterfeit Access Devices.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means.

8. Chop Shop Enhancement.—For purposes of (b)(11), a minimum offense level is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or 'chop shop') to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. ''Vehicles'' refers to all forms of vehicles, including aircraft and watercraft.

9. Substantially Jeopardized the Safety and Soundness of a Financial Institution.—For the purposes of subsection (b)(13), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

10. Application of Subsection of (b)(14).—

In General.—For the purposes of (b)(14), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

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

11. Cross References.—

(A) General Fraud Statutes.—Subsection (c)(3) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline [and the resulting offense level is greater]. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

(B) Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than § 2F1.1.

12. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

13. Upward Departure in Cases Involving Theft of Information from a Protected Computer.—In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.

14. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).

15. Upward Departure in Cases Involving Access Devices.—Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

16. Vulnerable Victims.—

(A) In General.—Except as provided in subdivision (b)(2)(B), if the fraud exploited vulnerable victims, an enhancement shall apply. *See* § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).

(B) Nonapplicability of § 3A1.1(b)(2) in Certain Cases.—If subsection (b)(2)[(B)] applies, an enhancement under § 3A1.1(b)(2) shall not apply.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[Loss Background Commentary—See Part C]

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is

used as an alternative to 'loss' in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.

Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(10)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (*i.e.,* produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (*i.e.,* produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.,* a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.,* harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(13) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(14) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104–132.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (f) in its entirety.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 4 in the second paragraph by striking ''For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively.''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended in Note 2 by striking ''more than minimal planning,''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended by adding at the end the following:

''4. 'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended in Note 1 by striking '''More than minimal planning'', ''firearm,''' and inserting ''''Firearm,' ''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud).''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''4. 'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.''.

Issues for Comment

(1) The Commission invites comment on whether and how the rules on inchoate and partially completed offenses, as currently expressed in § 2X1.1, § 1B1.2 application note 7, § 2B1.1 application note 2 (last paragraph), and § 2F1.1 application Note 10, should apply under the proposed revised and consolidated economic crime guideline (§ 2B1.1) and the proposed revised definition of ''loss.'' If the current rules are retained, how might they be revised to make their application clearer, simpler, and more consistent? Alternatively, should the current rules be replaced with permissive, encouraged downward departure commentary? If the current rules are modified in regard to offenses sentenced under the revised, consolidated guideline, what conforming changes should be made in § 2X1.1 to ensure similar treatment for similar offense conduct not subject to the revised consolidated guideline?

(2) The Commission also requests comment on whether, and if so, to what

extent it should provide an enhancement for the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archaeological, or historical significance. As one means of providing an enhancement, should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair? *See, e.g., United States* v. *Shumway,* 47 F.3d 1413, 1424 (10th Cir. 1997). Alternatively, should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision? Should the Commission also consider amending the current enhancement for damage to, or destruction of, property of a national cemetery in §§ 2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?

Part B. Loss Tables for Consolidated Guideline and § 2T4.1 (Tax Table)

Synopsis of Proposed Amendment: This amendment proposes three options for a loss table for the consolidated guideline, § 2B1.1, and two options for a loss table for § 2T4.1 (Tax Table). If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses.

Regarding the tables for both guidelines, each option attempts to compress the loss table by (generally) moving from one-level to two-level increments, thus increasing the range of losses that correspond to an individual increment. This is designed to minimize fact-finding and the appearance of false precision.

Proposed Amendment (Part B)

Sections 2B1.1(b)(1), as amended by Part A of this amendment, is further amended to read as follows:

Option One

''(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $2,000 or less	no increase.
(B) More than $2,000	add 1.
(C) More than $5,000	add 2.
(D) More than $10,000	add 4.
(E) More than $20,000	add 6.
(F) More than $40,000	add 8.
(G) More than $80,000	add 10.
(H) More than $200,000	add 12.
(I) More than $500,000	add 14.
(J) More than $1,200,000	add 16.
(K) More than $2,500,000	add 18.
(L) More than $7,500,000	add 20.
(M) More than $20,000,000	add 22.
(N) More than $50,000,000	add 24.
(O) More than $100,000,000	add 26.''.

Option Two

''(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase.
(B) More than $5,000	add 2.
(C) More than $10,000	add 4.
(D) More than $30,000	add 6.
(E) More than $70,000	add 8.
(F) More than $120,000	add 10.
(G) More than $200,000	add 12.
(H) More than $400,000	add 14.
(I) More than $1,000,000	add 16.
(J) More than $2,500,000	add 18.
(K) More than $7,000,000	add 20.
(L) More than $20,000,000	add 22.
(M) More than $50,000,000	add 24.
(N) More than $100,000,000	add 26.''.

Option Three

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase.
(B) More than $5,000	add 2.
(C) More than $10,000	add 4.
(D) More than $20,000	add 6.
(E) More than $40,000	add 8.
(F) More than $80,000	add 10.
(G) More than $160,000	add 12.
(H) More than $400,000	add 14.
(I) More than $1,000,000	add 16.
(J) More than $2,500,000	add 18.
(K) More than $7,5000,000	add 20.
(L) More than $20,000,000	add 22.
(M) More than $50,000,000	add 24.
(N) More than $125,000,000	add 26.''.

Section 2T4.1 is amended by striking the table in its entirety and inserting the following:

Option One

Tax loss (apply the greatest)	Offense level
(A) $2,000 or less	6.
(B) More than $2,000	8.
(C) More than $5,000	10.
(D) More than $12,500	12.
(E) More than $30,000	14.
(F) More than $80,000	16.
(G) More than $200,000	18.
(H) More than $500,000	20.
(I) More than $1,200,000	22.
(J) More than $2,500,000	24.
(K) More than $7,500,000	26.
(L) More than $20,000,000	28.
(M) More than $50,000,000	30.
(N) More than $100,000,000	32.''.

Option Two

''Tax loss (apply the greatest)	Offense level
(A) $5,000 or less	6
(B) More than $5,000	8
(C) More than $10,000	10
(D) More than $30,000	12
(E) More than $70,000	14
(F) More than $120,000	16
(G) More than $200,000	18
(H) More than $400,000	20
(I) More than $1,000,000	22
(J) More than $2,500,000	24
(K) More than $7,000,000	26
(L) More than $20,000,000	28
(M) More than $50,000,000	30
(N) More than $100,000,000	32.''.

Part C. Revised Definition of Loss for Offenses Sentenced Pursuant to § 2B1.1, the Consolidated Guideline

Synopsis of Proposed Amendment: The proposed amendment provides two major options to create one definition of loss for offenses sentenced pursuant to § 2B1.1 (Larceny, Embezzlement and Other Forms of Theft) and § 2F1.1 (Fraud and Deceit). Each option is designed to resolve circuit conflicts, address case law and application issues, and to promote consistency in application. To the extent practicable, each of the proposed definitions retains existing language and concepts that have not proven problematic. The first option was prepared by the Commission and is intended to invite comment on the major issues related to the definition of loss, including those presented in the second option. The second option was prepared by the Criminal Law Committee (CLC) of the Judicial Conference and is included for publication in its entirety in recognition of the years of effort that the members of that committee have put into the preparation of a new definition of loss.

The proposed amendment would accomplish the following purposes:

(1) Combine the loss definitions in the commentary to the theft and fraud guidelines into one definition with a simplified format;

(2) Provide definitions for key concepts of loss, including ''actual loss'', ''pecuniary harm'', and ''intended loss'';

(3) Provide two options for a causation standard: (A) ''but for'' causation standard (and an example) plus reasonable foreseeability; and (B)

combine current loss concepts from §§ 2B1.1 and 2F1.1 and make clear ''but for'' causation is required but without concept of reasonable foreseeability;

(4) Clarify the concept of intended loss in terms of the applicability of any credits or offsets, and to resolve a circuit conflict to provide that intended loss includes unlikely or impossible losses that are intended;

(5) Provide two options for when loss should be measured: (A) at the time of sentencing; and (B) when the offense was detected;

(6) Provide three options for what should be considered the time of detection: (A) when the offense is discovered by a victim or governmental agency; (B) when the defendant should have known the offense was detected [or about to be detected]; and (C) at the earlier of those two occurrences;

(7) Provide two options regarding inclusion of interest: (A) to explicitly exclude interest; and (B) to provide for the inclusion of only that interest that is accrued and unpaid that was bargained for as part of a lending transaction involved in the offense;

(8) Exclude certain costs incurred by the government and victims in connection with prosecution and criminal investigation of the offense;

(9) Provide for exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection;

(10) Provide an option for certain exceptions to what constitutes ''economic benefits'': (A)(i) benefits of ''de minimis'' value; or (ii) benefits that are substantially different from what the victim intended to receive; and (B) services fraudulently rendered by defendants posing as licensed professionals and for goods falsely represented as approved by a regulatory agency or for which regulatory approval was obtained by fraud;

(11) Provide two options for excluding certain benefits transferred to victims of investment fraud schemes, both of which would resolve a circuit conflict: (A) Exclude gain to an individual investor in the scheme from being used to offset the loss to other individual investors in the scheme; and (B) exclude benefits transferred to victims designed to lure additional investments in the scheme from being used to offset the loss;

(12) Provide greater clarity regarding the flexibility that judges have in estimating loss;

(13) Provide four options for the use of gain: (A) Allow the use of gain as one of the factors to be used in estimating loss; (B) allow use of pecuniary gain as an alternative measure of loss if the gain is greater than loss; (C) provide for use of gain when loss cannot reasonably be determined or when gain is greater than loss; and (D) allow use of gain as an alternative when loss cannot reasonably be determined but the gain can be determined;

(14) Provide that the special loss rules establish a minimum loss rule in the specific context described;

(15) Further revise the special rule on determining loss in cases involving diversion of government program benefits to resolve an apparent circuit conflict;

(16) Reformat and clarify the provisions dealing with departures, including a bracketed option that would permit a downward departure where the loss exceeds the greater of the [defendant's] actual or intended [personal] gain; and

(17) Reposition into the background commentary examples from the current rules on inclusion of consequential damages in offenses involving product substitution and government contract fraud, consistent with option one regarding a causation standard.

Proposed Amendment (Part C)

Option One (Commission Proposal)

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Part A of this amendment, is further amended by inserting after Note 1 the following:

''2. For purposes of subsection (b)(1).—

(A) General Rule.—Subject to the exclusions in subdivision (B), loss is the greater of actual loss or intended loss.

[Option 1: 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew, or under the circumstances of the particular case, reasonably should have known, likely would result, in the ordinary course of events, from that conduct. For example, in 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' is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

For example, defendant H pays defendant D $500 to inspect a home defendant H has contracted to purchase. Defendant D does not actually conduct an inspection, but rather mails defendant H a fraudulent inspection report stating that the property is free of all defects. Two days before closing, an underground oil tank—which must be removed before the sale may close—is discovered on the property. Due to the resulting unavoidable delay caused by the need to remove the tank, the closing must be postponed. Because defendant H's lease on his present residence expired on the original closing date, defendant H must locate temporary housing at additional cost. Further, defendant H loses the financing he had obtained and must procure new financing, at a higher interest rate, from another bank. On his way to the new bank to complete the paper work for the new loan, defendant H is in an automobile accident resulting in damage to the vehicle and injuries to defendant H. The $500 paid for the inspection report is includeable in loss as a direct loss. The increased rental payment for temporary housing and the cost resulting from the higher interest rates are also included in loss because they follow in the ordinary course and, therefore, are foreseeable. However, although the damage incurred in the automobile accident would not have occurred but for the fraud, it nevertheless did not follow in the ordinary course of events and was not foreseeable by a reasonable person in the defendant's position. Accordingly, it is not included in loss.]

[Option 2: 'Actual loss' means the pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Pecuniary harm' includes the value of the property taken, damaged, or destroyed, and the value of money and services unlawfully taken. Ordinarily, in a case in which property is taken or destroyed, the loss is the fair market value of the particular property at issue. If the market value is difficult to ascertain or inadequately measures harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.]

'Intended loss' means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3. 'Intended loss' includes intended harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)[so long as the intended loss reasonably would have resulted if the

facts were as the defendant believed them to be].

[Option 1:

(B) Time of measurement.—Loss ordinarily should be measured at the time of sentencing, except as provided herein.]

[Option 2:

(B) Time of measurement.—Loss ordinarily should be measured at the time the offense was detected. An offense is detected [Option 2A: When the offense is discovered by a victim or a governmental agency.] [Option 2B: When the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.] [Option 2C: The earlier of when an offense is discovered by a victim or a governmental agency or the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.]

(C) Exclusions from Loss.—

[Option 1: (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other opportunity costs.]

[Option 2: (i) Interest of any kind, except if it is bargained for as part of a lending transaction that is involved in the offense. In such a case, the court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.

[(iii) The value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected.]

(I) For purposes of this subdivision.—

''Economic benefit'' [includes][means] money, property, or services performed.

''Transferred'' means pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

(II) The value of any ''economic benefit'' transferred to the victim by the defendant ordinarily shall be measured at the time the offense was detected.

(III) However, in a case involving collateral pledged by a defendant, the ''economic benefit'' of such collateral to the victim for purposes of this subdivision is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the 'economic benefit' of the collateral is its value at the time of sentencing.

[(IV) However, loss shall not be reduced by the value of:

(1) [benefits of de minimis value transferred by the defendant to the victim(s)][economic benefit transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive]; or

(2) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.]

[Option 1:(V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, the loss shall not be reduced by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.,* the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).]

[Option 2:(V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the benefit transferred to victims designed to lure additional 'investments' in the scheme.]

(D) Estimation of Loss.—In order to determine the applicable offense level, the court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

[Option 1:(v) The gain from the offense.]

[Option 2:

(E) Pecuniary Gain.—The court shall use the defendant's pecuniary gain as an alternative measure of loss if the pecuniary gain is greater than loss (which may be zero).

''Pecuniary gain'' has the meaning given that term in Application Note 3(h) of the Commentary to § 8A1.2 (Application Instructions—Organizations) (*i.e.,* the before-tax profit resulting from the relevant conduct of the offense).]

[Option 3:

(E) Pecuniary Gain.—The court shall use the defendant's pecuniary gain as an alternative measure of loss if (i) loss cannot reasonably be determined; or (ii) gain is greater than loss.

'Pecuniary gain' has the meaning given that term in Application Note 3(h) of the Commentary to § 8A1.2 (Application Instructions—Organizations) (*i.e.,* the before-tax profit resulting from the relevant conduct of the offense).]

[Option 4:

(E) Gain.—The Court shall use the defendant's gain if loss cannot reasonably be determined. For purposes of this application note, ''gain'' means the proceeds from the illegal activity.]

[(F) Special Rules.—The following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, ''counterfeit access device'' and ''unauthorized access device'' have the meaning given those terms in Application Note 15.

(ii) Government Benefits.—In a case involving government benefits (*e.g.,* grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits

obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, the loss is $50.

In a case involving a Davis-Bacon Act violation (*i.e.,* a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required and actual wages paid.

In the case of a loan (*e.g.,* a student educational loan), the value of the benefits shall be considered to be not less than the amount of savings in interest over the life of the loan compared to alternative loan terms for which the applicant would have qualified.]

(G) Departure Considerations.—

(i) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(I) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(II) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

(III) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss for purposes of subsection (b)(1).

(IV) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

(V) The offense endangered the solvency or financial security of one or more victims.

(ii) Downward Departure Considerations. There also may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted.

(I) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.

[(II)The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.]''.

The Commentary to § 2B1.1 captioned ''Background Commentary'', as amended by Part A of this proposed amendment, is further amended by inserting the following after the second paragraph:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

[Except as excluded above, both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in 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 is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense [, and any lost revenue due to interruption of service]. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.]''.

Option Two (Criminal Law Committee Proposal)

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Part A of this amendment, is further amended by inserting after Note 1 the following:

''2. For purposes of subsection (b)(1)—

(A) General Rule.—Loss is the greater of the actual loss or the intended loss.

'Actual loss' means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances of the particular case, reasonably should have known likely would result in the ordinary course of events from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Intended loss' means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3, even if that harm would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an intended insurance fraud in which the claim exceeded the insured value), so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be.

(B) Exclusions from Loss.—Loss does not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.

(C) Credits In Determining Loss.—

(i) Loss shall be determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected. However, loss shall not be reduced by the value of:

(a) benefits of de minimis value transferred by the defendant to the victim(s).

(b) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.

(ii) In a case involving a fraudulent investment scheme, such as a 'Ponzi scheme,' the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor's principal investment (*i.e.,* the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).

(iii) For purposes of this subsection: (A) 'economic benefit' means money, property, or services performed; and (B) 'transferred' includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

(D) Time of measurement: Loss should ordinarily be measured at the time the offense was detected.

(i) For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.

(ii) Except as provided in subsection (D)(iii), the value of any 'economic benefit' transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.

(iii) However, in a case involving collateral pledged by a defendant, the 'economic benefit' of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the 'economic benefit' of the collateral is its value at the time of sentencing.

(E) Estimation of Loss. The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account and using as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(F) Gain. The court shall use the defendant's gain as an alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined.

(G) Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (*see* 15 U.S.C. 1602(k)), stolen or counterfeit access devices (*see* 18 U.S.C. 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, number or code shall be not less than $500.

(ii) Diversion of Government Program Benefits. In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses. For example, if the defendant was the lawful recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, the loss is $50.

(iii) Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (*i.e.,* a violation of 40 U.S.C. 276a, criminally prosecuted under 18 U.S.C. 1001), the actual loss is the difference between the legally required and actual wages paid.

(H) Departure Considerations.

(1) Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, 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 is warranted:

(a) A primary objective of the offense was an aggravating, non-monetary objective, such as to inflict emotional harm.

(b) The offense resulted in or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

(c) The offense created a risk of substantial loss beyond the loss determined above.

(d) The offense endangered the solvency or financial security of one or more victims.

(e) The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.

(2) Downward Departure Considerations. There may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:

(a) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.

(b) The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates the culpability of the defendant.''.

The Commentary to § 2B1.1 captioned ''Background'', as amended by Part A of this amendment, is further amended by inserting after the second paragraph the following:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. For example, in 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' is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.''.

Part D. Referring Guidelines for Theft and Fraud

Synopsis of Proposed Amendment: The following proposed amendments are intended to be made in conjunction with a change to the loss tables in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit). The amendments provide a 1-level increase in several guidelines that refer to the loss tables for cases in which the loss is more than $2,000 but not more than $5,000. This increase would be provided to avoid a 1-level decrease that would otherwise occur for offenses involving losses of more than $2,000 but not more than $5,000 because the proposed table does not provide the first increase for loss amount until loss exceeds $5,000.

Proposed Amendments (Part D)

Section 2B2.3(b) is amended by striking subdivision (3) in its entirety and inserting the following:

''(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B3.3(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2B4.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2B5.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2B5.3(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2B6.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2C1.1(b)(2) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2C1.2(b)(2) is amended by striking subdivision (A) in its entirety and inserting the following:

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

Section 2C1.6(b) is amended by striking subdivision (1) in its entirety and inserting the following:

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

Section 2C1.7(b)(1) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2E5.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2G2.2(b)(2)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.1(b)(1)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.2(b)(2) is amended by striking ''at § 2F1.1 (b)(1)'' and inserting ''in § 2B1.1 (Theft, Property Destruction, and Fraud).''.

Section 2Q2.1(b)(3) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that

amount, [but in no event more than [18] levels]; or''.

Section 2S1.3(a) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Part E. Technical and Conforming Amendments

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the fourth paragraph by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2F1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 5 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Chapter Two, Part B, Subpart 1, is amended by inserting after § 2B1.3 the following:

''§ 2B1.4. Insider Trading

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) Increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the gain resulting from the offense.

Commentary

Statutory Provisions: 15 U.S.C. 78j and 17 CFR 240.10b–5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note

1. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary ''tippee.''

Background: This guideline applies to certain violations of Rule 10b–5 that are commonly referred to as 'insider trading.' Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.

Certain other offenses, *e.g.*, 7 U.S.C. 13(e), that involve misuse of inside information for personal gain also may appropriately be covered by this guideline.''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B5.3 captioned ''Background'' is amended in the second sentence of the first paragraph by striking ''guidelines'' and inserting ''guideline''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended by striking Note 2 in its entirety and inserting the following:

''2. The 'Increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount,' as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2C1.7 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended los'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2H3.3(a) is amended in subdivision (2) by inserting ''or destruction'' after ''theft''; and by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2H3.3(a) is amended by striking subdivision (3) in its entirety.

The Commentary to § 2H3.3 captioned ''Background'' is amended by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2K1.4(a) is amended in subdivision (3) by striking ''§ 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud).''.

Section 2K1.4(a) is amended by striking subdivision (4) in its entirety.

Section 2K1.4(b)(2) is amended in subdivision (2) by striking ''(4)'' and inserting ''(3)''.

Section 2N2.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''theft, property destruction, and'' after ''involved'' and by striking ''(*e.g.*, theft, bribery, revealing trade secrets, or destruction of property)'' and inserting ''(*e.g.*, bribery).''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 4 by striking ''2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2N3.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N3.1 captioned ''Background'' is amended in the first paragraph by striking ''the guideline for fraud and deception, § 2F1.1,'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2Q1.6(a)(2) is amended by striking ''§ 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2T1.6(b)(1) is amended by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

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

''4. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the

defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. ''Fiduciary of the benefit plan'' is defined in 29 U.S.C. 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. 501(a)), an adjustment under this section for an abuse of a position of trust will apply.''.

Section 3D1.2(d) is amended by striking ''2B1.3'' and inserting ''2B1.4''; and by striking ''§§ 2F1.1, 2F1.2;''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in the third paragraph of Note 6 by striking '', and would include, for example, larceny, embezzlement, forgery, and fraud''.

Section 3D1.3(b) is amended by striking ''(*e.g.*, theft and fraud)''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''(*e.g.*, theft and fraud)''; and by striking ''In addition, the adjustment for 'more than minimal planning' frequently will apply to multiple count convictions for property offenses.''.

The Commentary to § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended by striking Illustration 2 in its entirety and by redesignating Illustrations 3 and 4 as illustrations 2 and 3, respectively.

The Commentary to § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended in Illustration, as redesignated by this amendment, 3 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''; and in the last sentence by striking ''§ 2F1.1'' after ''or'' and inserting ''2B1.1''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(i) by striking ''§§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 8C2.1(a) is amended by striking ''2B1.3'' and inserting ''2B1.4'' and by striking ''§§ 2F1.1; 2F1.2;''.

The Commentary to § 8C2.1 captioned ''Application Notes'' is amended in Note 2 by striking wherever it appears ''§ 2F1.1 (Fraud and Deceit)'' each place it appears and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6b(A) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6b(C) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6c by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6h by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6o by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(3) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(4) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(d) by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(f) by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 23 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 270 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 2024(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 2024(c) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 12 U.S.C. 631 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 50 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77e by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77q by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77x by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 78j by striking ''2F1.1'' and inserting ''2B1.1''; and by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 78ff by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 80b–6 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 158 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(c) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 714m(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 714m(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1281 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1644 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1681q by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1693n(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 114 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 117c by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 123 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 146 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 413 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 433 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 831t(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 831t(c) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 32(a), (b) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 33 by striking ''2B1.3''and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 37 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 43 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 112(a) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 152 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 153 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 155 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 225 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 285 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 286 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 287 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 288 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 289 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 332 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 335 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 470 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 471 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 472 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 473 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 474 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 474A by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 476 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 477 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 478 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 479 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 480 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 481 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 482 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 483 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 484 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 485 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 486 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 488 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 491 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 493 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 494 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 495 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 496 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 497 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 498 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 499 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 500 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 501 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 502 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 503 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18

U.S.C. 505 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 506 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 507 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 508 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 509 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 510 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 513 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 514 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 642 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 656 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 657 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 659 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 663 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 665(a) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 666(a)(1)(A) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 709 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 712 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 911 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 914 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 915 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 917 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 970(a) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1001 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1002 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1003 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1004 by striking '', 2F1.1''; and by inserting ''2B1.1,'' before ''2B5.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1005 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1006 by striking '', 2F1.1''; and by inserting ''2B1.1,'' before ''2B5.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1007 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1010 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1011 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1012 by inserting ''2B1.1,'' before ''2C1.3'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1013 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1014 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1015 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1016 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1017 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1018 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1019 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1020 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1021 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1022 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1023 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1025 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1026 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1028 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1029 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(4) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(5) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(6) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1031 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1032 by inserting ''2B1.1,'' before ''2B4.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1033 by striking ''2F1.1,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1035 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1341 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1342 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1343 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1344 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1347 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1361 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1362 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1363 by striking ''2B1.3'' and inserting ''2B1.1.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1366 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1422 by inserting ''2B1.1,'' before ''2C1.2''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1702 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1703 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1704 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1705 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1706 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1708 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1712 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1716C by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1720 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1728 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1852 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1853 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1854 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1857 by striking '' 2B1.3,'' and inserting ''2B1.1,''

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1861 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1902 by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1919 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1920 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1923 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1992 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2071 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2072 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2073 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2197 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2272 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2275 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2276 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2280 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2281 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2314 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2315 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2332a by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1434 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1435 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1436 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1919 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 2316 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(a) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(d) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 21 U.S.C. 333(a)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 1980(g) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 2197(n) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 4221 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 25 U.S.C. 450d by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26 U.S.C. 7208 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26

U.S.C. 7214 by inserting ''2B1.1,'' before ''2C1.2'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26 U.S.C. 7232 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 29 U.S.C. 1141 by inserting ''2B1.1,'' before ''2B3.2'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 38 U.S.C. 787 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 38 U.S.C. 3502 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 41 U.S.C. 423(e) by inserting ''2B1.1,'' before ''2C1.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 408 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307a–7b by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383(d)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383a(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383a(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1395nn(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1395nn(c) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1396h(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1713 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1760(g) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1761(o)(1) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1761(o)(2) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3220(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3220(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3426 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3791 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3792 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3795 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 5157(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 45 U.S.C. 359(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 46 U.S.C. 1276 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 121 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 11903 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 11904 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 14912 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 16102 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 60123(d) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 80116 by striking ''2F1.1''and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 80501 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. App. § 1687(g) by striking ''2B1.3'' and inserting ''2B1.1''.

Part F: Computing Tax Loss Under § 2T1.1

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict regarding how tax loss under § 2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation, (2) diverts that unreported corporate income for the defendant's personal use, and (3) fails to report, and to pay personal income taxes on, that income. The proposed amendment clarifies that the amount of the tax loss is the aggregate amount of federal income tax that would have due by both the corporation and the individual defendant.

More specifically, the circuits are split on which methodology should be used to calculate tax loss in these cases. Two circuits use a sequential calculation method the aggregate tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. *See United States* v. *Harvey*, 996 F.2d 919 (7th Cir. 1993); *United States* v. *Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998). In contrast, one circuit holds that the court should determine the aggregate tax loss by adding the corporate federal income tax that would have been due on the total amount of unreported income and the personal federal income tax that would have been due on that total amount. *See United States* v. *Cseplo*, 42 F.3d 36 (6th Cir. 1994).

The amendment adopts the *Harvey* approach, clarifying the existing rule in Application Note 7 of § 2T1.1 that ''if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together''.

The amendment also clarifies that the loss in § 2T1.1 refers to federal, and not state and local, tax loss. The alternative interpretation of this provision would greatly complicate the guideline because of the multitude of state and local tax rates and provisions.

The amendment also adds an application note to § 2T1.1 clarifying that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under § 3D1.2(c). This application note is consistent with the longstanding view of the staff as to how such counts should be treated for grouping purposes.

Proposed Amendment (Part F)

Section § 2T1.1(c)(1) is amended in by adding at the end the following:

''(D) If the offense involved (i) conduct described in paragraphs (A), (B), or (C); and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.''.

Section 2T1.1(c)(2) is amended by inserting ''(A)'' before ''If''; and by adding at the end the following:

''(B) If the offense involved (i) conduct described in paragraph (A), and; (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following paragraph:

''Tax loss'' means federal tax loss; it does not include state or local tax loss.''.

The Commentary to § 2T1.1 is amended in Note 7 by adding at the end the following:

''Accordingly, in a case in which a defendant fails to report income derived from a corporation on either the defendant's individual tax return or the corporate tax return, the tax loss is the aggregate amount due to the treasury from the offenses taken together. For example, the defendant, the sole owner of a corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to his own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume that the applicable tax rate is 34% and the applicable individual tax rate is 28%. The tax loss attributable to the defendant's corporate tax returns is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is based on the unreported $100,000 in income less the $34,000 in corporate tax on these same funds. This avoids double counting because the $34,000 in corporate tax reduces the defendant's effective income from $100,000 to $66,000. The tax loss attributable to the defendant's individual tax return is $18,480 ($66,000 multiplied by 28%). Consequently, the aggregate tax loss for the offenses, taken together, is $52,480 ($34,000 plus $18,480).''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. If the defendant is sentenced for a count charging an offense from which the defendant derived income and a count charging a tax offense involving that criminally derived income, the counts are to be grouped together as closely related counts under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). Such counts are to be grouped together whether or not the amount of criminally derived income is sufficient to warrant the enhancement under subsection (b)(1).''.

Issues for Comment

(1) The proposed amendment uses a sequential method to determine tax loss in cases in which the defendant is both the individual and the corporate tax payer. Commission invites comment on whether § 2T1.1 instead should be amended to provide that, in such cases, the aggregate tax loss is the sum of (A) the total amount of unreported income multiplied by the corporate tax rate; and (B) the total amount of unreported income multiplied by the individual tax rate.

(2) The Commission also invites comment on whether the definition of ''tax loss'' should include interest and penalties in evasion-of-payment tax cases. Such cases are distinguishable from evasion-of-assessment tax cases.

(3) The Commission also invites comment on whether the ''sophisticated concealment'' enhancement in §§ 2T1.1(b)(2) and 2T1.4(b)(2) should be revised to conform to the ''sophisticated means'' enhancement in § 2F1.1(b)(6)(C), including imposition of a minimum of offense level of level 12.

Proposed Amendment: Aggravating and Mitigating Factors in Fraud and Theft Cases

13. *Synopsis of Proposed Amendment:* This amendment proposes two options to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases. Option One provides for a four-level increase if the offense involved significantly aggravating factors, a two-level increase if the offense involved aggravating factors, a two-level decrease if the offense involved mitigating factors, and a four-level decrease if the offense involved significantly mitigating factors. Option One provides a non-exhaustive list of aggravating and mitigating factors for the court to consider in determining whether, on balance and after weighing the presence and intensity of the factors, the offense involves significantly aggravating, aggravating, mitigating, or significantly mitigating factors. In contrast, Option Two provides for a two-level increase if the offense involved certain aggravating factor(s) and no mitigating factors or if the aggravating factor(s) present in the case outweigh all mitigating factors present in the case, and a two-level decrease if the offense involved certain mitigating factors and no aggravating factors or if the mitigating factor(s) present in the case outweigh all aggravating factors present in the case. Option Two provides an exhaustive list of aggravating and mitigating factors that may trigger application of the enhancement.

An issue for comment follows regarding whether any of the factors in the existing specific offense characteristics in the fraud (§ 2F1.1), theft (§ 2B1.1), and property destruction (§ 2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a specific offense characteristic within the guideline.

Proposed Amendment

Option 1

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

''(8) If the offense involved—

(A) Aggravating circumstances, increase by 2 levels;

[(B) Significantly aggravating circumstances, increase by 4 levels;]

(C) Mitigating circumstances, decrease by 2 levels;

[(D) Significantly mitigating circumstances, decrease by 4 levels.]

[In cases falling between (A) and (B), increase by 3 levels; in cases falling between (C) and (D), decrease by 3 levels.]''.

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Amendment 12, is further amended by adding at the end the following:

''17. (A) Whether an offense involved aggravating circumstances or significantly aggravating circumstances is based on consideration of the presence and intensity of aggravating factors, such as the following:

(i) The offense caused or risked reasonably foreseeable, substantial non-monetary harm;

(ii) False statements were made for the purpose of facilitating some other crime;

(iii) The offense caused reasonably foreseeable, physical or psychological harm or emotional trauma;

(iv) The offense endangered national security or military readiness;

(v) The offense caused a loss of confidence in an important institution;

(vi) The offense involved the knowing endangerment of the solvency of one or more victims;

(vii) The offense involved more than [10][25] victims;

(viii) The offense involved the destruction or damage to irreplaceable items of cultural, historical or archeological significance;

[(ix) The loss amount determined above was at or near the highest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].

(B) Whether an offense contains mitigating circumstances or significantly mitigating circumstances is based on consideration of the presence and intensity of mitigating factors such as the following:

(i) The defendant, prior to detection of the offense, made significant efforts to limit the pecuniary harm caused by the crime;

(ii) [The defendant's attempted offense was impossible or extremely unrealistic;]

(iii) The defendant's actual or intended gain was substantially less than the loss determined above;

(iv) The offense was not committed for commercial advantage or financial gain;

(v) The offense was committed because of extreme financial hardship [caused by extraordinary unforseen circumstances not caused by the defendant and beyond the defendant's control] [caused by excessive costs for the life sustaining needs of the defendant or his immediate family];

(vi) The offense involved minimal or no planning;

[(vii) The loss amount determined above was at or near the lowest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].

(C) In a case involving both aggravating and mitigating factors, the court will determine, after consideration of all of the factors, whether the case involves, on balance, aggravating[, significantly aggravating,] or mitigating[, or significantly mitigating] circumstances.

(D) When applying this section, the court must make specific findings regarding the offense characteristics, and clearly articulate the factors and weight given those factors, that the court is relying on to determine whether the offense involved aggravating circumstances, [significantly aggravating circumstances,] mitigating circumstances [or significantly mitigating circumstances]. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed above.

(E) Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with aggravating circumstances, while the defendant bears the burden of persuasion in establishing the factors associated with mitigating circumstances.

(F) Application of this section does not preclude consideration of any of these factors, for the purposes of an upward or downward departure, even though the reason for the departure has been taken into consideration in determining the guideline range, if the court determines that the factor is present to an unusual or extraordinary degree.''.

Option 2

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

''(8) If the offense—

(A) Involved (i) at least one qualifying aggravating factor and no qualifying mitigating factors; or (ii) one or more qualifying aggravating factors the seriousness of which outweigh the mitigating effect of all qualifying mitigating factors present in the offense, increase by 2 levels; or

(B) Involved (i) at least one qualifying mitigating factor and no qualifying aggravating factors; or (ii) one or more qualifying mitigating factors the mitigating effect of which outweigh the seriousness of all qualifying aggravating factors present in the offense, decrease by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Amendment 12, is further amended by adding at the end the following:

''17. For purposes of subsection (b)(8):

'Qualifying aggravating factor' means any of the following:

(A) the offense involved [a large number of] [more than 10] victims, and subsection (b)(3) is not applicable;

(B) The offense [involved the knowing endangerment of the solvency of one or more victims] [caused one or more victims to suffer insolvency or substantial financial hardship]; and subsection (b)(7) does not apply;

(C) The offense caused reasonably foreseeable, substantial non-monetary harm (*e.g.*, physical or psychological harm or emotional trauma);

(D) The defendant's conduct was unusually heinous, cruel, brutal or degrading to a victim;

(E) The offense was committed for the purpose of facilitating another crime;

(F) The offense endangered public health or safety, national security, or military readiness;

(G) The offense (i) substantially disrupted an important government function; or (ii) caused a loss of confidence in an important institution and the enhancement in subsection (b)(7)(A) does not apply; or

(H) The offense involved destruction or substantial damage to unique property of environmental, cultural, historical, or archeological significance.

'Qualifying mitigating factor' means any of the following:

(A) Prior to detection of the offense, the defendant remedied, or made every reasonable effort to remedy, the harm resulting from the offense;

(B) The defendant's attempted offense (i) did not involve a government 'sting' operation; (ii) was highly improbable of success; and (iii) did not result in actual loss;

(C) The defendant neither intended to profit, nor actually profited, from the offense, and the offense was not committed for the purpose of inflicting non-monetary harm; or

(D) The defendant committed the offense in order to avoid a perceived greater harm, other than the avoidance or mitigation of personal financial hardship, (*e.g.*, the defendant committed the offense in order to fund medical treatment for a gravely ill family member).

Subsection (b)(8) applies in cases in which qualifying aggravating factors or qualifying mitigating factors are present to such a degree that an increase or a decrease in the sentence, respectively, is appropriate. An increase or a decrease in the sentence pursuant to subsection (b)(8) shall not apply in a case in which both qualifying aggravating factors and qualifying mitigating factors are present, but the seriousness of the qualifying aggravating factors is equal to the mitigating effect of the qualifying mitigating factors.

Application of subsection (b)(8) does not preclude consideration of any of the factors listed in such subsection for purposes of an upward or downward departure if the court determines that

the factor is present to an unusual or extraordinary degree.''.

Issue for Comment: The Commission invites comment whether any of the factors in the existing specific offense characteristics in the fraud (§ 2F1.1), theft (§ 2B1.1), and property destruction (§ 2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a separate specific offense characteristic within the guideline.

Proposed Amendment: Sentencing Table Amendment and Alternative to Sentencing Table Amendment

14. *Synopsis of Proposed Amendment:* In August 2000, the Commission indicated that one of its policy priorities would be to begin a review of the guidelines relating to Criminal History. *See* 65 FR 50034, 50035 (Aug. 16, 2000). As part of that long range review and as part of a review of the Economic Crime Package set forth in Amendment #12, the Commission is publishing part I of this amendment (*i.e.,* the proposed Sentencing Table amendment) as one item that may facilitate public discussion and inform Commission consideration about related issues. The Sentencing Table amendment proposes to change the Sentencing Table in Chapter Five by expanding each of Zones B and C by two levels in Criminal History Categories I and II.

The second part of this amendment, intended as an alternative to the Sentencing Table amendment, proposes a new guideline, which would be added at the end of Chapter Three or in Chapter Five immediately following the Sentencing Table. It provides a two-level reduction in offense level for certain less serious economic offenses, in furtherance of the statutory command in 28 U.S.C. 994(j). The eligibility criteria generally parallel those determined by Congress under 18 U.S.C. 3553(f) to gain relief from applicable controlled substance mandatory minimums. Certain additional requirements are added in order to more fully define the categories of first offenders who have not been convicted of a ''crime of violence or an otherwise serious offense.'' Importantly, eligibility for the reduction also hinges on making, or committing to make, full restitution.

Proposed Amendment

Option 1 (Sentencing Table Amendment)

The Sentencing Table in Chapter Five, Part A, is amended by increasing Zone B by two levels in Criminal History Category I (so that Zone B contains offense levels 9, 10, 11, and 12 in Criminal History Category I); by increasing Zone B by two levels in Criminal History Category II (so that Zone B contains offense levels 6, 7, 8, 9, 10, and 11 in Criminal History Category II); by increasing Zone C by two levels in Criminal History Category I (so that Zone C contains offense levels 13, 14, 15, and 16 in Criminal History Category I); and by increasing Zone C by two levels in Criminal History Category II (so that Zone C contains offense levels 12, 13, 14, and 15 in Criminal History Category II).

Option 2 (Alternative to Sentencing Table Amendment)

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

''§ 5A1.2. Adjustment for Certain Less Serious Economic Crimes

If each of subsections (a) through (f) applies, decrease the offense level by 2 levels—

(a) The defendant's Chapter Two offense level is determined solely by applying one or more of the following offense guidelines in Chapter Two:

(1) §§ 2B1.1, 2B1.3, 2B2.1, 2F1.1, 2N2.1, 2N1.3, 2S1.1, 2S1.2, 2S1.3, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T2.1, 2T2.2, 2T3.1;

(2) § 2X1.1 (if the Chapter Two offense level for the substantive offense or offenses is determined solely from a guideline in subsection (a)(1));

(3) § 2X2.1, § 2X3.1, § 2X4.1 (if the Chapter Two offense level for the underlying offense is determined solely from a guideline in subsection (a)(1));

(4) § 2X5.1 (if the Chapter Two offense level is determined solely from a guideline in subsection (a)(1) determined to be sufficiently analogous).

(b) The defendant has no criminal history points;

(c) The defendant did not use violence or a threat of violence or possess or use a firearm or other dangerous weapon;

(d) The offense did not involve bodily injury or a conscious or reckless risk of serious bodily injury;

(e) The defendant did not receive an increase in offense level under any of the following guideline sections:

(1) § 2B1.1(b)(4)(B)—(b)(7);
(2) § 2F1.1(b)(4)—(b)(8);
(3) § 2S1.1(b)(1);
(4) § 2S1.2(b)(1)(A);
(5) § 2S1.3(b)(1);
(6) § 2T1.1(b)(1) or (b)(2);
(7) § 2T1.4(b)(1) or (b)(2);
(8) Chapter Three, Parts A, B, or C;
(9) § 4B1.3; and

(f) The defendant, prior to sentencing, (1) voluntarily makes full restitution; or (2)(A) notifies the government and the court that the defendant agrees to make full restitution as determined by the court, (B) fully cooperates with the government and the court in determining the amount of such restitution; and (C) makes partial restitution to the extent able to do so.

Commentary

Application Notes:

1. For the purposes of this guideline—

'Dangerous weapon' and 'firearm,' as used in subdivision (2), 'bodily injury,' 'offense,' and 'serious bodily injury,' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Full restitution' means the amount of restitution required by law under 18 U.S.C. 3663.

'No criminal history points,' means the defendant has zero criminal history points as determined under § 4A1.1 (Criminal History Category).

'Substantive offense' has the meaning given that term in § 2X1.1, Application Note 3.

2. If the Chapter Two offense guideline for a count is not listed in subsection (a) above, but the applicable guideline results in the determination of the Chapter Two offense level solely by use of one or more listed guidelines, the defendant qualifies for a reduction under this guideline. For example, where the conduct set forth in a count of conviction ordinarily referenced to § 2E5.3 (an offense guideline not listed in subsection (a)) establishes § 2F1.1 (Fraud and Deceit) as the applicable offense guideline (an offense guideline listed in subsection (a)), this guideline would apply because the actual offense level is determined under § 2F1.1 (Fraud and Deceit).''.

Proposed Amendment: Firearms Table

15. *Synopsis of Proposed Amendment:* This proposed amendment presents two options for implementing the recommendation of the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in § 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.

Option 1 amends the firearms table in § 2K2.1 to provide an additional one-level increase for offenses that involve 100–199 firearms, and an additional two-level increase for offenses that involve more than 200 firearms. The ATF reports that these increases are needed to provide adequate and proportionate punishment in cases that involve large numbers of firearms. Under the current table, a defendant who trafficked in 200 firearms receives

the same six-level enhancement as a defendant who trafficked in 50 firearms. According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under § 2K2.1 for trafficking more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the encouraged upward departure provided in Application Note 15 to § 2K2.1.

Option 1 also makes a conforming change to Application Note 16 regarding upward departures.

Option 2 amends the table to provide increases of two level increments and compresses the table by providing a wider range for the number of firearms for each increase. Compressing the table in this manner diminishes some of the fact-finding required to determine how many firearms were involved in the offense.

Proposed Amendment

Option 1

Section 2K2.1(b)(1)(F) is amended by striking ''50 or more'' and inserting ''50–99''; and by striking the period at the end and inserting the following:

''(G)100–199 add 7
(H)200 or more add 8.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 16 by striking ''significantly'' and inserting ''substantially''; and by striking ''fifty'' and inserting ''200''.

Option 2

Section 2K2.1(b)(1) is amended in the table by striking subdivisions (A) through (F) in their entirety and inserting the following:

''(A) 3–7 add 2
(B) 8–24 add 4
(C) 25–99 add 6
(D) 100–199 add 8
(E) 200 or more add 10.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 16 by striking ''significantly'' and inserting ''substantially''; and by striking ''fifty'' and inserting ''200''.

Proposed Amendment: Prohibited Person Definition

16. *Synopsis of Proposed Amendment:* This proposed amendment modifies the definition of ''prohibited person'' in §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to refer to the relevant prohibited persons statutes for explosive and firearm offenses, respectively. (There is no statutory definition of ''prohibited person''.) The relevant statutory provision for § 2K1.3 is 18 U.S.C. 842(i), and for § 2K2.1, the relevant statutory provisions are 18 U.S.C. 922(g) and (n).

The proposed amendment also clarifies that the relevant time to determine whether a person qualifies as a ''prohibited person'' is as of the time the defendant committed the instant offense. This clarification is consistent with the proposed amendment on prior felonies, which provides that increased base offense levels are only applied if the defendant committed the instant offense subsequent to sustaining certain felony convictions.

Proposed Amendment

Section 2K1.3(a)(1) and (a)(2) are amended by striking ''; or'' each place it appears and inserting a semi-colon.

Section 2K1.3(a) is amended by striking the text of subdivision (3) in its entirety and inserting the following:

''16, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 3 in its entirety and inserting the following:

''For purposes of subsection (a)(3), 'prohibited person' means any person designated in 18 U.S.C. § 842(i).''.

Sections 2K2.1(a)(1), (a)(2), and (a)(3) are amended by striking ''; or'' each place it appears and inserting a semi-colon.

Section 2K2.1(a)(4)(B) is amended by striking ''is'' after ''(i)'' and inserting ''was''; by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''; and by striking ''or'' after ''922(d);''.

Section 2K2.1(a)(5) is amended by striking ''or'' after ''§ 922(d);''.

Section 2K2.1(a)(6) is amended by striking ''is'' after ''(A)'' and inserting ''was''; by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''; and by striking ''or'' after ''§ 922(d));''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking the text of Note 6 in its entirety and inserting the following:

''For purposes of subsections (a)(4)(B) and (a)(6), a 'prohibited person' is any person designated in 18 U.S.C. 922(g) or 922(n).''.

Proposed Amendment: Prior Felonies

17. *Synopsis of Proposed Amendment:* This proposed amendment resolves a circuit conflict regarding whether a crime committed after the commission of the instant offense of felon in possession of a firearm, but sentenced before sentencing on the instant offense, is counted as a ''felony conviction'' for purposes of determining the defendant's base offense level. The proposed amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a ''felony conviction''. Accordingly, the proposed amendment clarifies, in § 2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction(s). In so doing, the proposed amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§ 4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).

The proposed amendment also makes conforming changes to § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Proposed Amendment

Section 2K1.3(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;'';

Section 2K1.3(a)(2) is amended by striking ''had one prior felony conviction of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 2 in its entirety and inserting the following:

''For purposes of this guideline—

'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 9 by inserting before the first paragraph the following:

''For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). *See* § 4A1.2(a)(2); § 4A1.2, comment. (n.3).''.

Section 2K2.1(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(2) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(3) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(4)(A) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or''.

Section 2K2.1(a) is amended in subdivision (4)(B) by striking ''; or'' after ''922(d)'' and inserting a semi-colon; in subdivision (5), by striking the ''; or'' after ''921(a)(30)'' and inserting a semi-colon; and in subdivision (6) by striking ''; or'' after ''§ 922(d)'' and inserting a semi-colon.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Note 5 in its entirety and inserting the following:

''5. For purposes of this guideline—

'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 15 by inserting before the first paragraph the following:

''For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). *See* § 4A1.2(a)(2); § 4A1.2, comment. (n.3).''.

Proposed Amendment: Immigration

18. *Synopsis of Proposed Amendment:* This amendment modifies § 2L1.2(b)(1) (Unlawful Entering or Remaining in the United States) to provide more graduated sentencing enhancements based on the seriousness of the prior aggravated felony conviction. Subsection (b)(1)(A) currently provides a 16-level enhancement if the defendant was previously deported after a criminal conviction, and the conviction was for an aggravated felony.

The Commission has received comment that § 2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. This occurs for two primary reasons. First, 8 U.S.C. 1101(a)(43) and, by reference, § 2L1.2, defines aggravated felony very broadly. Second, subsection (b)(1) neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies.

The proposed amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony. In addition, the amendment contains two options for providing increased punishment for the most serious aggravated felonies. Under Option One, the 16-level enhancement would be triggered not only by the period of imprisonment actually served but also by all aggravated felonies involving death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense, regardless of the period of imprisonment actually served by the defendant. Alternatively, Option Two would encourage an upward departure in such cases, which could result in an increase greater than the 16-level enhancement for these most serious aggravated felonies.

The Commission invites comment as to whether the 16-level enhancement provided by subsection (b)(1) should be graduated on some basis other than period of imprisonment actually served, perhaps by extending the approach taken by Option 1 throughout the other tiers. In addition, the Commission invites comment as to whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering subsection (b)(1).

Proposed Amendment

Chapter Two, Part L, Subpart 1, is amended by striking § 2L1.2 in its entirety and inserting the following:

''§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in

the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, apply the greater):

(A) If the conviction was for an aggravated felony; and—

(i) (I) The defendant actually served a period of imprisonment of at least ten years for such conviction [Option 1: or

(II) The aggravated felony involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense],

increase by 16 levels;

(ii) The defendant actually served a period of imprisonment of at least five years but less than ten years, increase by [10][12] levels;

(iii) The defendant actually served a period of imprisonment of at least two years but less than five years, increase by [8] levels; or

(iv)(I) The defendant actually served a period of imprisonment of less than two years, or (II) the sentence imposed was only a term of probation or other sentence alternative to a term of imprisonment, or a combination of probation and other sentence alternative to a term of imprisonment, increase by [6] levels.

(B) If the conviction was for (i) any felony other than an aggravated felony; or (ii) three or more misdemeanors that are crimes of violence or controlled substance offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. 1326. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

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

'Aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Controlled substance offense'—

(A) Means an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; and

(B) Includes—

(i) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (*see* 21 U.S.C. 841(d)(1));

(ii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (*see* 21 U.S.C. 843(a)(6));

(iii) Maintaining any place for the purpose of facilitating an offense described in subdivision (A) (*see* 21 U.S.C. 856);

(iv) Using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (*see* 21 U.S.C. 843(b)); and

(v) The offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i), (ii), (iii), or (iv).

'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

'Misdemeanor' means any federal, state, or local offense punishable by imprisonment for a term of imprisonment of one year or less.

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

'Serious drug trafficking offense' has the meaning given that term in Application Note 1 of the Commentary to § 5K2.20 (Aberrant Behavior).

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1):

(A) A defendant shall be considered to be deported if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(B) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.

(C) A defendant shall be considered to have remained in the United States following a removal order issued after a conviction if the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

(D) The period of imprisonment that the defendant actually served for the aggravated felony includes, in the case of a defendant who escaped from imprisonment, time the defendant would have served if the defendant had not escaped.

3. Computation of Criminal History Points.—Prior felony and misdemeanor convictions taken into account under subsection (b) also are counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Departure Provisions.—

[Option Two:

(A) Upward Departure Provisions.—There may be cases in which subsection (b)(1) applies but the applicable enhancement understates the seriousness of the aggravated felony taken into account under that subsection. In such cases, an upward departure may be warranted. For example an upward departure may be warranted if the aggravated felony involved any of the following:

(i) Serious bodily injury, as defined in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions), or death.

(ii) The discharge or other use of a firearm or a dangerous weapon.

(iii) A serious drug trafficking offense, as defined in Application Note 1 of the Commentary to § 5K2.20 (Aberrant Behavior).]

(B) Downward Departure Provisions.—A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal.''.

Issues for Comment: The Commission invites comment regarding whether the enhancement in § 2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?

The Commission also invites comment on whether the enhancement in § 2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, *e.g.,* fifteen years, or the counting rules provided by § 4A1.2 (Definitions and Instructions for Computing Criminal History).

Proposed Amendment: Nuclear, Biological, and Chemical Weapons

19. *Synopsis of Proposed Amendment:* This is a two-part amendment.

First, in response to the sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997 that guideline penalties are inadequate for certain offenses involving the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies, the proposed

amendment increases by four levels the base offense levels in §§ 2M5.1 (the guideline covering the evasion of export controls) and 2M5.2 (the guideline covering the exportation of arms, munitions, and military equipment without a license). A four-level increase is proposed for those offenses in subsection (a)(1) of both §§ 2M5.1 and 2M5.2 to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, the Statutory Index is proposed to be amended to refer one of the offenses, 50 U.S.C. 1701 (which currently is not referenced in the Statutory Index), to both §§ 2M5.1 and 2M5.2.

Second, the proposed amendment substantially revises § 2M6.1 (the guideline covering the unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) in order to incorporate into that guideline two relatively new offenses, 18 U.S.C. 175, relating to biological weapons, and 18 U.S.C. 229, relating to chemical weapons. Specifically, the amendment proposes to modify § 2M6.1 in the following ways:

(1) It provides two alternative base offense levels. The first base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization. This incorporates into the base offense level the 12-level enhancement currently found in the guideline for such intent and does not change the overall offense level for these offenses. ''Foreign terrorist organizations'' are added because Congress has found that such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. It is anticipated that this base offense level will apply to cases as apparently originally contemplated by the guideline, *i.e.,* the acquisition of nuclear material from defense, or even civilian, nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security, as well as to cases that implicate the national security but involve biological and chemical weapons.

The proposed amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. This is intended to cap the very high offense level attendant to this base offense level and also to preclude the possibility of a downward adjustment if the offense involved only a threat. However, if death results, the cross reference allows for the possibility of a higher offense level through application of the first degree murder guideline.

It is anticipated that the second base offense level, of level [28][30], will apply in most cases, specifically those cases that do not threaten the national security of the United States.

(2) It provides a six-level decrease, in subsection (b)(1), if the offense involved only a threat to use a nuclear, biological, or chemical weapon or material, and there was no conduct evidencing an intent to carry out the threat. After review of the cases and meeting with representatives of the Department of Justice and the Federal Bureau of Investigations, it became apparent that the least culpable offenders, and the least serious of these offenses, are those that involve non-credible threats. The extent of the adjustment (*i.e.,* six levels) mirrors in reverse the six-level increase in the threatening communications guideline, § 2A6.1, if the conduct involved an actual intent to carry out the threat.

(3) It provides, in brackets, a two-level enhancement, in subsection (b)(2), if the offense involved particularly dangerous types of nuclear, chemical, and biological weapons and materials. Those weapons and materials are defined in the guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement acknowledges the distinctions already made in international treaties, provisions of title 18, United States Code, the relevant regulatory schemes, and by representatives of the Department of Justice and the Federal Bureau of Investigations, that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.

(4) It provides an enhancement, in subsection (b)(3), if any victim sustained serious bodily injury or death. This enhancement is modeled after the enhancement found in § 2N1.1, the guideline covering tampering with consumer products. Like that guideline, the amendment provides commentary (in the background) stating that the base offense level reflects that the offense typically will involve a risk of serious bodily injury or death or will cause or intend to cause bodily injury.

(5) It provides two options for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of funds for clean up and decontamination efforts. Option One provides for a four-level enhancement in such cases. Option Two provides for an upward departure provision.

(6) It provides two cross references, if the resulting offense level is greater, if death resulted (in which case the first or second degree murder guideline would apply) or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after cross references found in § 2N1.1, the guideline for tampering with consumer products.

(7) It provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.

(8) It amends the Statutory Index to refer 18 U.S.C. 175 and 229 to § 2M6.1 and to delete a number of guideline references for 18 U.S.C. 2332a and instead provide a reference for that offense to §§ 2K1.4 (in the case of weapons of mass destruction that are explosive devices and 2M6.1 (in the case of other weapons of mass destruction).

Three issues for comment follow the proposed amendment.

Proposed Amendment

Section 2M5.1 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) [26,] if national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or

(2) 14, otherwise.''.

Section 2M5.2(a)(1) is amended by striking ''22'' and inserting ''[26]''.

The heading to Chapter Two, Part M, is amended by adding at the end ''And Weapons of Mass Destruction''.

The heading to Chapter Two, Part M, Subpart 6, is amended by striking ''Atomic Energy'' and inserting '' Nuclear, Biological, And Chemical Weapons And Materials, And Other Weapons of Mass Destruction''.

Chapter Two, Part M, is amended by striking § 2M6.1 in its entirety and inserting the following:

''§ 2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Chemical Weapons, or Other Weapons of Mass Destruction

(a) Base Offense Level:

(1) [42], if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization; or

(2) [28][30], otherwise.

(b) Specific Offense Characteristics:

If subsection (a)(2) applies, and:

(1) If the offense (A) involved a threat to use a nuclear weapon, nuclear material, nuclear byproduct material, biological agent, chemical weapon, or other weapon of mass destruction; and (B) did not involve any conduct evidencing an intent or ability to carry out the threat, decrease by [6] levels.

[(2) If the offense involved (A) a select biological agent; (B) a listed precursor or a listed toxic chemical; (C) nuclear material or nuclear byproduct material; or (D) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (A), (B), or (C), increase by [2] levels.]

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

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

(c) Cross References:

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

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

(d) Special Instruction:

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 229, 831, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

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

Biological agent has the meaning given that term in 18 U.S.C. 178(1).

Chemical weapon has the meaning given that term in 18 U.S.C. 229F(1).

Foreign terrorist organization (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1219). National of the United States has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

Listed precursor or listed toxic chemical means a precursor or toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. *See* 18 U.S.C. 229F(6)(B), (8)(B). Precursor has the meaning given that term in 18 U.S.C. 229F(6)(A). Toxic chemical has the meaning given that term in 18 U.S.C. 229F(8)(A).

Nuclear byproduct material has the meaning given that term in 18 U.S.C. 831(f)(2).

Nuclear material has the meaning given that term in 18 U.S.C. 831(f)(1).

Select biological agent means a biological agent or toxin identified by the Secretary of Health and Human Services on the select agent list established pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 CFR part 62. Toxin has the meaning given that term in 18 U.S.C. 178(2).

Weapon of mass destruction (A) has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D); and (B) includes any radiological dispersal device, regardless of whether the radioactive material contained in that radiological dispersal device was nuclear material, nuclear byproduct material, or other radioactive material (such as low-grade medical, industrial, or research radioactive waste). Radiological dispersal device means any device, including any weapon or equipment, other than a nuclear explosion, specifically designed to disseminate radioactive material in order to cause property destruction, damage, or bodily injury by means of the radiation produced by the decay of the radioactive material.

2. Inapplicability of Subsection (b) to Subsection (a)(1) Cases.—If subsection (a)(1) applies, do not apply subsection (b).

3. Applicability of Subsections (b)(2) and (b)(4) in Threat Cases.—The application of subsection (b)(1) in a case involving a threat shall not preclude the application of either subsection (b)(2) or subsection (b)(4) in such a case.

4. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under subsection (a), subsections (a) and (b), or subsection (c).

5. Inapplicability of § 3A1.4 in Certain Cases.—If subsection (a)(1) applies because the offense was committed with the intent to aid an international foreign terrorist organization, do not apply § 3A1.4 (Terrorism).

6. Departure Provisions.—

(A) Upward Departure Provisions.—There may be cases in which the offense level determined above substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of circumstances in which an upward departure may be warranted:

(i) The offense posed a substantial risk of death or serious bodily injury to numerous victims (*e.g.,* chlorine gas was released in a crowded movie theater).

(ii) The offense caused extreme psychological injury. *See* § 5K2.3 (Extreme Psychological Injury).

(iii) The offense caused substantial property damage or monetary loss. *See* § 5K2.5 (Property Damage or Loss).

[Option Two: (iv) The offense resulted in substantial disruption of public, governmental, or business functions or services, or the response to the offense required a substantial expenditure (*e.g.,* to provide environmental decontamination of the affected area). *See, e.g.,* § 5K2.7 (Disruption of Governmental Function).]

(B) Downward Departure Provision.—There may be cases in which the offense level determined above substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, in the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

Background: The base offense level reflects that this offense typically poses a risk of death or serious bodily injury

to one or more victims; or causes, or is intended to cause, bodily injury.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. § 155'' the following:

''18 U.S.C. § 1752M6.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 228'' the following:

''18 U.S.C. § 2292M6.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2332a by striking ''2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3,'' and by inserting '', 2M6.1'' after ''2K1.4''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''50 U.S.C. App. 462'' the following:

''50 U.S.C. App. § 1701 2M5.1, 2M5.2''.

Issues for Comment

(1) The Commission invites comment on whether the above proposal appropriately addresses the offenses in 18 U.S.C. 175, relating to biological weapons, and in 18 U.S.C. 229, relating to chemical weapons. Specifically, are these offenses more appropriately addressed through a guideline that incorporates into the base offense level any or all of the aggravating factors that may be associated with these offenses (*e.g.,* the inherent psychological harm, the risk of bodily harm, and the economic harm associated with cleanup and decontamination efforts), or is it preferable to address these harms as specific offense characteristics?

(2) The Commission also invites comment on how threats to use nuclear, biological, or chemical weapons should be punished under the guidelines. Should there be a greater differentiation in punishment under proposed § 2M6.1 between offenses that involve only the threatened use of such weapons (whether or not the defendant engaged in conduct evidencing an intent or ability to carry out the threat) and other conduct punished under that guideline? Alternatively, should the threatened use of such weapons be punished under § 2A6.1 (Threatening or Harassing Communications), and if so, how severely should such conduct be punished in relation to other types of threats punished under that guideline?

(3) How should attempts, conspiracies, and solicitations to commit an offense under 18 U.S.C. 175 or 229 be covered under the guidelines? Should such attempts, conspiracies, and solicitations be expressly covered by the proposed new guideline, § 2M6.1, or should § 2X1.1 (Attempt, Solicitation, or Conspiracy) apply?

Proposed Amendment: Money Laundering

20. *Synopsis of Proposed Amendment:*

Overview

The proposed amendment consolidates the two current money laundering guidelines, §§ 2S1.1 and 2S1.2, and applies to convictions under either 18 U.S.C. 1956 or 1957. The primary feature of the consolidated amendment structure is that it ties offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. The amendment accomplishes this objective by separating money laundering offenders, regardless of the statute of conviction, into two categories for purposes of determining the base offense level. The base offense level is determined differently, depending on whether the defendant is a ''direct'' or a ''third party'' money launderer (money launderers who commit the underlying offense which generated the criminal proceeds versus money launderers who did not commit the underlying offense). Specific offense characteristics are included in this proposed amendment to increase the total offense level in order to assure greater punishment for those money laundering defendants whose conduct is considered more serious and harmful to the societal interests which the money laundering laws are designed to protect.

Base Offense Level

Subsection (a) provides two distinct methods for determining the base offense level, depending on whether the defendant is a ''direct'' money launderer or a ''third party'' money launderer. Subsection (a)(1) sets the base offense level for ''direct'' money launderers at the offense level for the underlying offense from which the laundered funds were derived (*i.e.,* the base offense level and all applicable specific offense characteristics for the underlying offense), if the offense level for the underlying offense can be determined. A data analysis of a representative sample of 259 money laundering cases conducted by the Commission indicated that subsection (a)(1) would apply to 86 percent of defendants sentenced under the guideline (*i.e.,* ''direct'' money launderers comprise 86 percent of the money laundering defendants).

This proposed amendment excludes from application of subsection (a)(1) offenders who otherwise would be accountable for the underlying offense solely on the basis of § 1B1.3(a)(1)(B) (*i.e.,* jointly undertaken criminal activity). However, this limitation has minimal practical consequence. Commission data indicate that less than one percent of defendants who would not be categorized as ''direct'' money launderers because of this limitation would be subject to subsection (a)(1) if it were expanded to include defendants who would be otherwise accountable for the underlying offense under § 1B1.3(a)(1)(B). The Commission invites comment as to whether application of subsection (a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of § 1B1.3(a)(1)(B).

For ''third party'' money launderers (*i.e.,* defendants who did not commit or would not be accountable for the underlying offense under § 1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level eight, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit). Subsection (a)(2) also applies to ''direct'' money laundering defendants for whom subsection (a)(1) would apply but the offense level for the underlying offense is impossible or impracticable to determine.

Under the structure of this proposed amendment, there may be some cases in which the ''third party'' money launderers will receive a higher base offense level than the offenders who committed the underlying offense. This conceivably could occur in cases in which the underlying offense that generated the criminally derived proceeds is a fraud or other economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1, and the loss calculation is less than the value of the laundered funds. For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense, but laundered all of the $200,000. In such a case, the value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the ''third party'' money laundering defendant may receive a higher base offense level than the Chapter Two offense level for the offender who committed the fraud.

Three options in Application Note 3 are presented for addressing this type of case. Option 1 provides that a downward departure may be warranted in such a case, but limits the extent of such a departure to the offense level for

the underlying offense conduct that would result if the base offense level were determined using subsection (a)(1). Option 2 creates a rule that the value of the funds is the lesser of either the actual value of the laundered funds or the value of the loss as calculated for purposes of § 2F1.1(b)(1). Option 3 provides no specific provision to address this type of case.

An analysis conducted by the Commission indicates that this type of case will rarely occur. In its sample of 259 cases, Commission identified no cases in which the loss amount was less than the value of laundered funds. In fact, this issue can arise only in ''third party'' money laundering cases, which comprise only 14 percent (36 of 259 cases) of the money laundering cases in the representative sample. Furthermore, in the overwhelming majority—89 percent—of those 36 ''third party'' cases, the underlying offense was a drug offense, which does not give rise to this problem. In its sample, the Commission identified only three ''third party'' money laundering cases for which the underlying offense was a fraud or other economic crime.

Adjustments

In addition to the base offense level, the proposed amendment contains a number of adjustments. Consistent with the approach of tying the base offense level to the underlying offense that generated the criminally derived funds, subsection (b)(1) provides a [2][4][6] level enhancement for ''third party'' money launderers who know or believe that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor.

Subsection (b)(2) provides four alternative enhancements, with the greatest applicable enhancement to be applied. Subsection (b)(2)(A) provides a [2][3][4] level increase if the defendant is a ''third party'' money launderer who is ''in the business'' of laundering funds. This adjustment reflects the view that, similar to a professional ''fence'' (see § 2B1.1(b)(4)(B)), defendants who routinely engage in laundering funds on behalf of third parties and who gain financially from engaging in such transactions warrant additional punishment because they encourage the commission of additional underlying criminal offenses. Application Note 6 directs the court to consider the totality of the circumstances in determining whether a defendant was in the business of laundering funds and provides a non-exhaustive list of factors to be considered in making this determination. The Commission invites comment as to whether eligibility for this enhancement should be expanded to include ''direct'' money launderers who launder the criminal derived proceeds of others, in addition to their own criminally derived proceeds.

Subsection (b)(2)(B) provides a [2][3] level enhancement if any of the laundered funds were used [or intended to be used] to [significantly] [materially] promote further criminal conduct. Application Note 5 limits applicability of this enhancement to the use of laundered funds to further criminal conduct in addition to, or beyond, the criminal conduct from which the laundered funds were derived, as opposed to underlying offenses that were completed at the time of the laundering. This enhancement attempts to provide increased punishment for two types of offense conduct: (1) Cases in which the defendant uses criminally derived funds to cause criminal conduct in addition to or beyond the criminal conduct that initially generated the criminally derived funds that are the subject of the money laundering conviction; or (2) cases in which the defendant reinvests all or some of the laundered funds back into an ongoing criminal scheme to finance the continued operation or expansion of the criminal scheme.

Subsection (b)(2)(C) provides a [2][3] level enhancement if the offense involved ''sophisticated concealment.'' Application Note 6 defines ''sophisticated concealment'' as especially complex or especially intricate offense conduct where the defendant takes deliberate steps to conceal the nature, location, source, ownership, or control of the criminally derived funds to make the transaction more difficult to detect. Application Note 6 also provides examples of conduct that typically constitutes sophisticated concealment. The Commission invites comment as to whether the applicability of this enhancement should be expanded to include all forms of concealment, even if the concealment is not sophisticated.

Subsection (b)(2)(D) provides a [1][2] level enhancement if the defendant launders funds with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code (title 26, United States Code). A conviction under the relevant subsection of 18 U.S.C. 1956 is required for the enhancement to apply. The Commission invites comment as to whether the proposed guideline should include such an enhancement, absent additional aggravating money laundering conduct.

Subsection (b)(3) provides a [1] level increase if the defendant is a ''direct'' money launderer, none of the enhancements under subsection (b)(2) apply, and the value of the laundered funds is greater than $10,000. This enhancement is intended to ensure that defendants who also commit the underlying offense receive some incremental punishment for the money laundering offense, even if ineligible for any of the other enhancements that reflect more aggravated money laundering offense conduct. The Commission specifically invites comment as to whether the proposed guideline should contain such an enhancement.

Subsection (b)(4) provides a [2] level decrease for cases in which three conditions are met: (1) The defendant did not commit the underlying offense that generated the criminally derived funds; (2) the defendant was convicted under 18 U.S.C. 1957 only; and, (3) none of the other enhancements apply. This downward adjustment recognizes that section 1957 offenses, with no aggravating factors, may be considered less serious than section 1956 offenses because the statutory maximum of the former is half (10 years) that of the latter (20 years), and because the government is not required to prove that the section 1957 defendant knew that the offense from which the laundered funds were derived was a specified unlawful activity (*see* 18 U.S.C. 1957(c)).

Application Note 7 provides that in a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, such counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue. Providing for grouping under § 3D1.2(c) may make appropriate a conforming amendment to Application Note 5 of § 3D1.2 to provide that grouping under § 3D1.2(c) also applies in cases in which the base offense level from the guideline applicable to one count specifically incorporates the offense level applicable to the other related count. In such cases, the conduct that forms the basis for the base offense level in one count is the same aggravating conduct that forms the basis for the offense level of the other count.

The proposed amendment provides that convictions under 18 U.S.C. 1960 (Illegal Money Transmitting Businesses; failure to obtain appropriate licenses or

comply with registration requirements for money transmitting businesses) be referenced to § 2T2.2 (Regulatory Offenses). The Commission invites comment as to whether such violations are more appropriately referenced to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements). Finally, the proposed amendment provides that convictions under 31 U.S.C. § 5326 relevant to structuring violations be referenced to § 2S1.3 (Structuring Transactions).

Proposed Amendment

Chapter Two, Part S, Subpart 1 is amended by striking §§ 2S1.1 and 2S1.2 and their accompanying commentary in their entirety and inserting the following:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under § 1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics:

(1) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence [as defined under § 4B1.2(a)(1) (Definitions of Terms Used in § 4B1.1)]; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by [2][4][6] levels.

(2) (Apply the greatest):

(A) If [(i) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (ii)] the defendant was in the business of laundering funds, increase by [2][3][4] levels.

(B) If any of the laundered funds were used [or were intended to be used] to [significantly] [materially] promote further criminal conduct, increase by [2][3] levels.

(C) If the offense involved sophisticated concealment, increase by [2][3] levels.

[(D) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D), increase by [1][2] levels.]

[(3) If (A) subsection (a)(1) applies; (B) subsection (b)(2) does not apply; and (C) the value of the laundered funds is greater than $10,000, increase by [1] level.]

[(4) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; (B) the defendant is convicted under 18 U.S.C. 1957; and (C) none of the enhancements in subsections (b)(1) and (b)(2) apply, decrease by [2] levels.]

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957.

Application Notes:

1. Definitions.—For purposes of this guideline:

'Crime of violence' has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in § 4B1.1).

'Criminally derived funds' means any funds derived [or represented to be derived] from conduct constituting a criminal offense.

'Laundered funds' means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. 1956 or 1957.

'Laundering funds' means the making of a transaction, financial transaction, monetary transaction, or transmission, or the transporting of, property, funds, or a monetary instrument in violation of 18 U.S.C. 1956 or 1957.

'Sexual exploitation of a minor' means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse sexual abuse, or abusive sexual contact, involving a minor. 'Minor' means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

(A) Multiple Underlying Offenses.—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Guidelines).

(B) Defendants Otherwise Accountable.—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be otherwise accountable for the underlying offense under § 1B1.3(a)(1)(A) (Relevant Conduct). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Non-Applicability of Enhancements—If subsection (a)(1) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of any of the enhancements in subsection (b) of this guideline, do not apply the subsection (b) enhancement under this guideline.

3. Application of Subsection (a)(2).—

(A) In General.—Subsection (a)(2) applies to cases in which (A) the defendant did not commit the underlying offense; or (B) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

[Value of Funds—Option 1:

(C) Value of Laundered Funds for Certain Defendants.—There may be

cases in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit); and (D) the value of the laundered funds under subsection (a)(2) is substantially greater than the value of the loss or other monetary amount attributable to the underlying offense for purposes of § 2F1.1(b)(1). In such cases, a downward departure may be warranted to ensure that the seriousness of the punishment for the money laundering offense is reasonably related to the seriousness of the punishment that would be warranted for the underlying offense. However, any such downward departure shall not result in an offense level lower than that which would result if the sentence were determined using the base offense level under subsection (a)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the downward departure shall not result in an offense level lower than the sum of the base offense level under § 2F1.1(a) and the enhancement under § 2F1.1(b)(1) for the value of the loss. Accordingly, a downward departure, if warranted, shall not result in an offense level lower than level 9 (§ 2F1.1(a) base offense level of level 6 plus § 2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000).]

[Value of Funds—Option 2:

(C) Value of Laundered Funds for Certain Defendants.—In a case in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; and (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit), the value of the laundered funds is the lesser of the actual value of the laundered funds or the value of the loss or other monetary amount attributable to the underlying offense for purposes of § 2F1.1(b)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The actual value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the value of the laundered funds, for purposes of subsection (a)(2), is $20,000. Accordingly, the base offense level under subsection (a)(2) is the sum of the base offense level under § 2F1.1(a) and the enhancement under § 2F1.1(b)(1) for the value of the loss. Therefore, in this example, the base offense level under subsection (a)(2) is level 9 (§ 2F1.1(a) base offense level of level 6 plus § 2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000.]

[Value of Funds—Option 3: No specific provision]

4. Enhancement for Business of Laundering Funds.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(A).

(B) Factors to Consider.—The court shall consider the following factors in determining whether, under the totality of circumstances, the defendant was in the business of laundering funds for purposes of subsection (b)(2)(A):

(i) The defendant [regularly] [routinely] engaged in acts of laundering funds during an extended period of time.

(ii) The defendant laundered criminally derived funds from multiple sources during an extended period of time.

(iii) The defendant generated a substantial amount of revenue in return for laundering the funds.

(iv) At the time the defendant committed the instant offense, the defendant had one or more prior convictions of an offense under 18 U.S.C. 1956 or 1957, [31 U.S.C. 5313, 5314, 5316, 5324, or 5326] or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. Prior convictions taken into account under subsection (b)(2)(A) also are counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. [Significant][Material] Promotion of Further Criminal Conduct.—In order for subsection (b)(2)(B) to apply, all or part of the laundered funds must have been used to further criminal conduct in addition to or beyond the criminal conduct from which the laundered funds were derived. [Subsection (b)(2)(B) does not apply if the defendant laundered criminally derived proceeds that were generated from an underlying offense that was completed at the time of the laundering.] For example, subsection (b)(2)(B) would apply in a case in which the defendant reinvested (*i.e.*, plowed-back) all or part of the laundered funds from an ongoing, fraudulent telemarketing scheme to finance the continued operation of that scheme but would not apply in a case in which the defendant used all or part of the laundered funds only to finance a lavish lifestyle. Similarly, subsection (b)(2)(B) would apply in a case in which the defendant used laundered funds from an underlying drug offense to purchase additional drugs for distribution but would not apply in a case in which the defendant used those laundered funds to pay for drugs the defendant had already distributed as part of the underlying drug offense.

Subsection(b)(2)(B) does not apply to transactions that only give the defendant access to, or the use of for otherwise legal purposes, the criminally derived funds. For example, subsection (b)(2)(B) does not apply in a case in which the defendant deposits checks that represent the criminally derived proceeds from a fraudulent scheme into an account, and subsequently spends the funds for items that are not inherently illegal or items that do not further additional criminal conduct.

[Subsection (b)(2)(B) does not apply if the value of laundered funds used or intended to be used to promote criminal conduct was de minimis relative to the value of the laundered funds.]

6. Sophisticated Concealment.—For purposes of subsection (b)(2)(C), sophisticated concealment means especially complex or especially intricate offense conduct in which deliberate steps were taken to conceal the nature, location, source, ownership, or control of the criminally derived funds, in order to make the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. 1956 or 1957, or the extent of that violation, difficult to detect.

Sophisticated concealment typically involves hiding assets or hiding transactions, or both, through:

(A) The use of fictitious entities;

(B) The use of shell corporations;

(C) The creation of two or more levels (*i.e.,* layering) of transactions, transportation, transfers, or transmissions, of criminally derived funds that were intended to appear legitimate; or

(D) the transportation, transmission, or transfer of criminally derived funds from or through a place inside the United States to or through a place outside the United States (*e.g.,* an offshore bank account) or from or

through a place outside the United States to or through a place inside the United States. For purposes of this subdivision, United States has the meaning given that term in Application Note 1 of the Commentary to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

7. Grouping of Multiple Counts.—In a case in which the defendant is to be sentenced on a count (or a Group of counts) for the underlying offense from which the laundered funds were derived, the count for the offense under this guideline shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts) with the count for the underlying offense or, in the case of a Group of counts for the underlying offense, with the most serious of the counts comprising the Group, *i.e.,* the count resulting in the greatest offense level.''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting '', 5326'' after ''5324''.

The Commentary to § 2T2.2 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 1960;'' before ''26 U.S.C.''; by striking ''provided'' and inserting ''if''; and by inserting ''; 31 U.S.C. 5326'' after ''taxes''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. 1957'' by striking ''2S1.2'' and inserting ''2S1.1''; By inserting after the line referenced to ''18 U.S.C. 1959'' the following new line:

''18 U.S.C. 1960 2T2.2'';

B-Date: 01-24-01 10:11 striking ''31 U.S.C. 5322 2S1.3''; and by inserting after the line referenced to ''31 U.S.C. 5324'' the following new line:

''31 U.S.C. 5326 2S1.3, 2T2.2''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in the first and second paragraphs of Note 6, by striking the second sentence in its entirety, in each instance.

Section 3D1.2(d) is amended in the second paragraph by striking ''2S1.2,''.

Section 8C2.1(a) is amended by striking ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by striking ''; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)''.

The Commentary to § 8C2.4 captioned ''Background'' is amended in the seventh sentence by striking ''and money laundering''.

Issues for Comment: The Commission invites comment on the following:

(1) Whether application of subsection (a)(1) of proposed § 2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under § 1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under § 1B1.3(a)(1)(A).

(2) Whether proposed § 2S1.1 should include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, the Commission invites comment on whether and, if so, to what extent, proposed § 2S1.1 should include an enhancement if:

(A) The offense involved concealment (coextensive with the meaning of the term under 18 U.S.C. 1956), even if the conduct did not constitute sophisticated concealment.

(B) If the defendant is convicted (A) under 18 U.S.C. 1956(a)(1)(A)(ii); (B) under 18 U.S.C. 1956(a)(1)(B)(ii); (C) under 18 U.S.C. 1956(a)(2)(B)(ii); (D) under 18 U.S.C. 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D).

(C) If subsection (a)(1) applies and (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.

(3) Whether application of subsection (b)(2)(A) (''in the business of laundering funds'') should be expanded to include defendants (1) whose base offense level is determined under subsection (a)(1) and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under § 1B1.3(a)(1)(A).

(4) Whether violations of 18 U.S.C. 1960 (Illegal Money Transmitting Businesses) should be referenced to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements).

Proposed Amendment: Miscellaneous New Legislation and Technical Amendments

21. *Synopsis of Proposed Amendment:* This is a two-part proposed amendment.

First, the proposed amendment addresses miscellaneous legislation enacted during the 106th Congress by (1) adding to Appendix A (Statutory Index) and the statutory provisions of several guidelines references to new statutes; and (2) providing commentary to § 2M3.9 that implements the new consecutive sentencing requirement of 50 U.S.C. 421 (pertaining to the disclosure of information identifying a covert agent). Note that there were no directives to the Commission contained in any of the legislation that created these new offenses.

In each instance, the new Appendix A references are based on a determination that the new offense is sufficiently similar to other offenses covered by the referenced guideline.

The new offenses and proposed guideline references are as follows:

7 U.S.C. 7734—prohibits knowingly importing, exporting, or moving in interstate commerce any plant pest or noxious weed, or knowingly forging any permit authorizing movement of plant pests or noxious weeds. Referenced to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product).

5 U.S.C. 6821—prohibits (A) obtaining or attempting to obtain customer information from a financial institution by false statements, representations, or documents; or (B) requesting another person to obtain customer information knowing the information will be obtained under false pretenses. Referenced to § 2F1.1 (Fraud and Deceit).

18 U.S.C. 38—prohibits falsifying any material fact, or making any fraudulent representation concerning aircraft or space vehicle parts. Referenced to § 2F1.1 (Fraud and Deceit).

18 U.S.C. 842(p)(2)—prohibits any person to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or distribute by any means information pertaining to the manufacture of an explosive, destructive device, or weapon of mass destruction with the intent that the teaching, demonstration, or information will be used for, or in furtherance of any federal crime of violence. Referenced to § 2K1.3 (Unlawful Receipts, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) or § 2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) (if the information pertained to a weapon of mass destruction).

42 U.S.C. 1011—knowingly and willfully making of any false statement or representation of a material fact in an application for benefits established by the Social Security Act. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 30170—prohibits violating 18 U.S.C. 1001 with respect to the reporting requirements of 49 U.S.C. 30166, with the specific intention of misleading the Secretary of Transportation regarding motor vehicle

or motor vehicle equipment safety related defects that have caused death or serious bodily injury to an individual. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 46317(a)—prohibits (1) knowingly and willfully serving or attempting to serve as an airman operating an aircraft without an airman's certificate; or (2) knowingly and willfully employing as an airman to operate an aircraft any individual who does not have an airman's certificate. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 46317(b) prohibits offenses described in 49 U.S.C. 46317(a) that relate to transporting a controlled substance by aircraft or aiding or facilitating a controlled substance violation and that transporting, aiding, or facilitating—

Is punishable by imprisonment of more than one year under Federal or State law; or

Is related to a Federal or state controlled substance law (except simple possession) punishable by imprisonment of more than one year.

Referenced to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking).

Second, the proposed amendment makes technical and conforming changes as follows: (1) Modifies Application Note 3 of the Commentary to § 2J1.6 to improve the transition between the first and second paragraphs; (2) adds a reference to 18 U.S.C. 842(l)–(o) to the Commentary of § 2K1.3; and (3) adds a reference to 7 U.S.C. 6810 to the Commentary of § 2N2.1. (With respect to the latter two technical amendments, the statutory provision was listed in Appendix A (Statutory Index) but not in the Commentary of the respective guidelines.)

Proposed Amendment

The Commentary to § 2D1.1 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. § 46317(b)'' after ''960(a), (b)''.

The Commentary to § 2F1.1 captioned ''Statutory Provisions'' is amended by inserting '', 6821'' after ''1644;''; by inserting ''38,'' after ''18 U.S.C. §§ ''; and by inserting ''; 42 U.S.C. 1011; 49 U.S.C. 30170, 46317(a)'' after ''2315''.

The Commentary to § 2K1.3 captioned ''Statutory Provisions'' is amended by inserting ''(l)–(o), (p)(2), after ''(i),''.

The Commentary to § 2M3.9 captioned ''Application Notes'' is amended by inserting after Note 2 the following:

''3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment.''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''§ 831''; by striking ''where'' and inserting ''if''; and by inserting '', 842(p)(2)'' after '' aforementioned statutory provisions)''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by inserting '', 6810, 7734'' after ''150gg''.

Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''7 U.S.C. 7734 2N2.1
15 U.S.C. 6821 2F1.1
18 U.S.C. 38 2F1.1
18 U.S.C. 842(p)(2) 2K1.3, 2M6.1
42 U.S.C. 1011 2F1.1
49 U.S.C. 30170 2F1.1
49 U.S.C. 46317(a) 2F1.1
49 U.S.C. 46317(b) 2D1.1''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in the first sentence of the second paragraph of Note 3 by striking ''In'' and inserting ''However, in''; and by inserting ''other than a case of failure to appear for service of sentence,'' after ''and the failure to appear,''.

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