UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1) proposed temporary, emergency guideline amendments increasing penalties for alien smuggling and fraudulent use of government-issued documents; (2) proposed temporary, emergency guideline amendments imposing penalties for involuntary servitude, peonage, and slave trade offense; (3) proposed temporary, emergency guideline amendments increasing the penalties for offenses involving list I chemicals; and (4) proposed non-emergency amendments to sentencing guidelines and commentary. Request for Comment. Notice of hearing.

SUMMARY: The Sentencing Commission hereby gives notice of the following actions: (1) pursuant to its authority under sections 203, 211, and 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Commission is preparing to promulgate amendments to §§ 2L1.1, 2L2.1, 2L2.2, and 2H4.1 and accompanying commentary; (2) pursuant to its authority under section 302 of the Comprehensive Methamphetamine Control Act of 1996, the Commission is preparing to promulgate amendments to § 2D1.11 and accompanying commentary; and (3) pursuant to section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994 (a) and (p)), the Commission is considering promulgating certain other non-emergency amendments to the sentencing guidelines and commentary. The Commission may submit the latter, non-emergency amendments to the Congress not later than May 1, 1997.

This notice sets forth the emergency and other proposed amendments and a synopsis of the issues addressed by the amendments as well as additional issues for comment. 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 alternative proposals and that the Commission invites comment and suggestions for appropriate policy choices; for example, a proposed enhancement of [3–5] levels means a proposed enhancement of either three, four, or five levels. Similarly, a proposed enhancement of [4] levels indicates that the Commission is considering, and invites comment on, alternative policy choices. Second, the Commission has highlighted certain issues for comment and invites suggestions for specific amendment language.

DATES: (1) Emergency Amendments. Comment on the several emergency amendments set forth in this notice should be received by the Commission not later than February 4, 1997. After considering any public comment, the Commission plans to address possible promulgation of the emergency amendments at its meeting scheduled for February 11, 1997, at the Commission's offices in the Thurgood Marshall Federal Judiciary Building (meeting time to be determined).

(2) Non-Emergency Amendments. Comment on the non-emergency amendments and issues set forth in this notice should be received not later than March 17, 1997. The Commission has scheduled a public hearing on the proposed non-emergency amendments for March 17, 1997, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E,. Washington, D.C. 20002–8002.

A person who desires to testify at the public hearing should notify Michael Courlander, Public Information Specialist, at (202) 273–4590 not later than March 3, 1997. Written testimony for the hearing must be received by the Commission not later than March 10, 1997. Submission of written testimony is a requirement for testifying at the public hearing.

ADDRESSES: Public Comment should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2–500, Washington, D.C. 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273–4590.

Authority: 28 U.S.C. 994 (a), (o), (p), (x).

Richard P. Conaboy,

Chairman.

Emergency Amendments

Section 2D1.11 Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

1. Synopsis of Proposed Amendment: This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996. That section raises the statutory maximum penalties under 21 U.S.C. 841(d) and 960(d) from ten to twenty years' imprisonment. The Act also instructs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. 841(d) (1) and (2) and 960(d) (1) and (3). These offenses involve the possession and importation of listed chemicals knowing, or having reasonable cause to believe, the chemicals will be used to unlawfully manufacture a controlled substance. In carrying out these instructions, the Act requires that the offense levels be calculated proportionately on the basis of the quantity of controlled substance that reasonably could be manufactured in a clandestine setting using the quantity of list I chemical possessed, distributed, imported, or exported.

Current Operation of the Guidelines: Offenses involving violations under the above statutes are covered under § 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical). This guideline uses a Chemical Quantity Table to determine the base offense level. The guideline also has a cross reference to § 2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking) for cases involving the actual manufacture, or attempt to manufacture, a controlled substance.

The Chemical Quantity Table was developed in two steps. First, the amount of listed chemical needed to produce a quantity of controlled substance in the Drug Quantity Table in § 2D1.1 was determined. The amount of listed chemical was based on 50% of theoretical yield.[1] The 50% figure was used because, after much study, this figure was determined to be a fair estimate of the amount of controlled substance that typically could be produced in a clandestine laboratory.

Second, the offense level in § 2D1.11 was adjusted downward by eight levels from the level in the Drug Quantity § 2D1.1. There were several reasons for these adjustments. One, the listed chemical offenses involved an intent to manufacture a controlled substance, not the actual manufacture, or attempt to manufacture, a controlled substance. For cases involving an actual or attempted manufacture of a controlled substance, § 2D1.11 contains a cross reference to § 2D1.1. Another reason for the reduction in offense level from the offense levels in § 2D1.1 was the fact that statutes covering listed chemicals had maximum sentences of ten years' imprisonment, whereas some of the controlled substance offenses had

[1] Theoretical yield is the amount of a controlled substance that could be produced in a perfect reaction. It is based on a chemical equation/mathematical formula and does not occur in reality.

maximum sentences of life imprisonment. If the offense level was not reduced in § 2D1.11, almost all of the cases would have resulted in sentences at or exceeding the statutory maximum. A third reason was that it is more difficult to make an accurate determination of the amount of finished product based on only one listed chemical as opposed to several listed chemicals and/or lab equipment. By not reducing the offense level, there would have been the possibility that the person who had only one precursor would get a higher offense level than someone who actually manufactured the controlled substance.

The proposed amendment raises the penalties for list I chemicals by two levels. The top of the Chemical Quantity Table for list I chemicals will now be at level 30. The offense level for list II chemicals remains the same. With the new statutory maximum of 20 years, the guidelines will now be able to better take into account aggravating adjustments such as those for role in the offense. Additionally, the increased statutory maximum will allow for higher sentences for cases convicted under this statute that involve the actual manufacture of a controlled substance.

Proposed Amendment: Section 2D1.11(d) is amended by deleting subsections (d) (1)—(9) and inserting in lieu thereof the following:

''(d) Chemical Quality Table*

Listed chemicals and quantity	Base offense level
(1) List I Chemicals	Level 30
17.8 KG or more of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
20 KG or more of Ephedrine;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
44 KG or more of Hydriodic Acid;	
320 KG or more of Isoafrole;	
4 KG or more of Methylamine;	
1500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
12.6 KG or more of Nitroethane;	
200 KG or more of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
200 KG or more of Phenylpropanolamine;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
20 KG or more of Pseudoephedrine;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;	
(2) 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 6 KG but less than 20 KG of Ephedrine;	
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 Isoafrole;	
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;	
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 60 KG but less than 200 KG of Phenylpropanolamine;	
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 6 KG but less than 20 KG of Pseudoephedrine;	
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	
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 KG of Methyl Ethyl Ketone;	
10 KG or more of Potassium Permanganate;	
1300 KG or more of Toluene.	
(3) List I Chemicals	Level 26.

Listed chemicals and quantity	Base offense level
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 2 KG but less than 6 KG of Ephedrine; 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 Isoafrole; 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 20 KG but less than 60 KG of Phenylpropanolamine; 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 2 KG but less than 6 KG of Pseudoephedrine; 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.	
(4) 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 1.4 KG but less than 2 KG of Ephedrine; 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 Isoafrole; 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 14 KG but less than 20 KG of Phenylpropanolamine; 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 1.4 KG but less than 2 KG of Pseudoephedrine; 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.	
(5) List I Chemicals	Level 22.

Listed chemicals and quantity	Base offense level
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 800 G but less than 1.4 KG of Ephedrine;	
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 Isoafrole;	
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 8 KG but less than 14 KG of Phenylpropanolamine;	
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 800 G but less than 1.4 KG of Pseudoephedrine;	
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.	
(6) 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 200 G but less than 800 G of Ephedrine;	
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 Isoafrole;	
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 2 KG but less than 8 KG of Phenylpropanolamine;	
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 200 G but less than 800 G of Pseudoephedrine;	
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.	
(7) List I Chemicals	Level 18.

Listed chemicals and quantity	Base offense level
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 160 G but less than 200 G of Ephedrine; 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 Isoafrole; 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 1.6 KG but less than 2 KG of Phenylpropanolamine; At least 80 G but less than 100 G of Piperidine; At least 2.56 KG but less than 3.2 KG of Piperonal; At least 12.8 G but less than 16 G of Propionic Anhydride; At least 160 G but less than 200 G of Pseudoephedrine; 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.	
(8) List I Chemicals	Level 16.
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 120 G but less than 160 G of Ephedrine; 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 Isoafrole; At least 24 G but less than 32 G of Methylamine; 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 1.2 KG but less than 1.6 KG of Phenylpropanolamine; 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 120 G but less than 160 G of Pseudoephedrine; 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.	
(9) List I Chemicals	Level 14.

Listed chemicals and quantity	Base offense level
At least 2.7 KG but less than 3.6 KG of Anthranilic Acid; At least 80.25 G but less than 107 G of Benzaldehyde; At least 90 G but less than 120 G of Benzyl Cyanide; At least 90 G but less than 120 G of Ephedrine; At least 900 MG but less than 1.2 G of Ergonovine; At least 1.8 G but less than 2.4 G of Ergotamine; At least 90 G but less than 120 G of Ethylamine; At least 198 G but less than 264 G of Hydriodic Acid; At least 1.44 G but less than 1.92 KG of Isoafrole; At least 18 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 900 G but less than 1.2 KG of Norpseudoephedrine; At least 90 G but less than 120 G of Phenylacetic Acid; At least 900 G but less than 1.2 KG of Phenylpropanolamine; At least 45 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 90 G but less than 120 G of Pseudoephedrine; At least 1.44 G 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.	
(10) List I Chemicals	Level 12.
Less than 2.7 KG of Anthranilic Acid; Less than 80.25 G of Benzaldehyde Less than 90 G of Benzyl Cyanide; Less than 90 G of Ephedrine; Less than 900 MG of Ergonovine; Less than 1.8 G of Ergotamine; Less than 90 G of Ethylamine; Less than 198 G of Hydriodic Acid; Less than 1.44 G of Isoafrole; Less than 18 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 900 G of Norpseudoephedrine; Less than 90 G of Phenylacetic Acid; Less than 900 G of Phenylpropanolamine; Less than 45 G of Piperidine; Less than 1.44 KG of Piperonal; Less than 7.2 G of Propionic Anhydride; Less than 90 G of Pseudoephedrine; Less than 1.44 G 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.	

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 4(a) by deleting ''three kilograms'' and inserting in lieu thereof ''300 grams''; by deleting ''24'' each time it appears and inserting in lieu thereof ''26''; and by deleting ''14'' and inserting in lieu thereof ''16''.

Section 2L1.1—Alien Smuggling

2. Synopsis of Proposed Amendment: This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 203 directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens.

The legislation directs the Commission to:

''(A) increase the base offense level for such offenses at least 3 offense levels above the applicable level in effect on the date of the enactment of this Act;

(B) review the sentencing enhancement for the number of aliens involved (U.S.S.G. 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act;

(C) impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; * * * [and an additional enhancement for 2 or more priors];

(E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection (i) murders or otherwise causes death, bodily injury, or serious bodily injury to a defendant; (ii) uses or brandishes a firearm or other dangerous weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

(F) consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child * * * ''

The amendment provides for a higher base offense level as required by the legislation. In addition, the amendment provides for new specific offense characteristics outlined in the legislation and adjusts the current specific offense characteristics as directed by the legislation. Finally, the amendment provides for clarifying commentary.

Proposed Amendment: Section 2L1.1(a)(1) is amended by deleting ''20'' and inserting in lieu thereof ''[23–25]''.

Section 2L1.1(a)(2) is amended by deleting ''9'' and inserting in lieu thereof ''[12–14]''.

Section 2L1.1(b) is amended by deleting:

''(1) If the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2), decrease by 3 levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of unlawful aliens smuggled, transported, or harbored	Increase in level
(A) 6–24	Add 2.
(B) 25–99	Add 4.
(C) 100 or more	Add 6.

(3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8.''

and inserting in lieu thereof:

''(1) If the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child, decrease by [2–3] levels.

(2) If the offense involved the smuggling, transporting, or harboring of three or more unlawful aliens, increase as follows:

Number of unlawful aliens smuggled, transported, or harbored	Increase in level
(A) 3–5	Add 1.
(B) 6–11	Add 3.
(C) 12–24	Add 5.
(D) 25–99	Add 7.
(E) 100 or more	Add 9.

(3) [Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]

[Option 2: If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by 2 levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]

(4) (A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level [22–24], increase to level [22–24];

(B) if a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level [20–22], increase to level [20–22];

(C) if a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level [18–20], increase to level [18–20].

[Option 1: (D) if the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level [18–20], increase to level [18–20]].

[Option 2: (5) If the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level [18–20], increase to level [18–20].

(6) If any person died or sustained bodily injury as a result of the offense, increase the offense level accordingly:

(1) Bodily Injury	Add 2 levels.
(2) Serious Bodily Injury	Add 4 levels.
(3) Permanent or Life-Threatening Bodily Injury.	Add 6 levels.
(4) Death	Add 8 levels.

(c) Cross Reference.

If any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder guideline from Chapter two, Part A, Subpart 1.''

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 5 by deleting ''dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or''.

The Commentary to § 2L1.1 captioned ''Application Notes is amended by inserting the following additional notes:

''[7. Under subsections (b)(4)(A) and (b)(4)(B), the defendant is accountable if (A) the defendant discharges, brandishes, or otherwise uses a firearm, or (B) another person discharges, brandishes, or otherwise uses a firearm and the defendant is aware of the presence of the firearm. Under subsection (b)(4)(C), the defendant is accountable if the defendant or another person possesses a dangerous weapon during the offense.]

8. Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

9. Reckless conduct triggering the adjustment from subsection(b)(5) can vary widely. Such conduct may include, but is not limited to, transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition. If the reckless conduct triggering the adjustment in subsection (b)(4)(C) includes only conduct related to fleeing from a law enforcement officer, do not apply an adjustment from § 3C1.2 (Reckless Endangerment During Flight). [Do not apply the adjustment in subsection (b)(4)(D) if the reckless

conduct that created a substantial risk of death or serious bodily injury includes only conduct related to weapon possession or use.]

10. An 'immigration and naturalization offense'' means any offense covered by Chapter 2, Part L.

11. For purposes of this section, the term ''child'' is defined at section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)) and ''spouse'' is defined at section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).''

The Commentary to § 2L1.1 captioned ''Background'' is amended by deleting the following:

''A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit. The offense level increases with the number of unlawful aliens smuggled, transported, or harbored.''

The Commentary to § 2L1.1 captioned ''Background'' is amended by inserting the following after ''In large scale'':

''smuggling or harboring''.

Section 2L2.1 and 2L2.2—Immigration Document Fraud

3. Synopsis of Proposed Amendment: This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility act of 1996. Section 211 directs the Commission to amend the guidelines for offenses related to the fraudulent use of government issued documents. The Commission is directed to:

''(A) increase the base offense level for such offenses at least 2 offense levels above the level in effect on the date of the enactment of this Act;

(B) review the sentencing enhancement for the number of documents or passports involved (U.S.S.G. 2L2.1(b)(2)), and increase the upward enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act;

(C) impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; . . . [and an additional enhancement for 2 or more priors];''

The amendment provides for a higher base offense level as required by the legislation. In addition, the amendment provides for a new specific offense characteristic for defendants who have one or more prior convictions for the same or similar conduct—as outlined in the legislation—and adjusts the current specific offense characteristics as directed by the legislation and consistent with other guidelines. Finally, the amendment provides for clarifying commentary.

Proposed Amendment: Section 2L2.1 is amended by deleting ''9'' and inserting in lieu thereof ''[11–13]''.

Section 2L2.1(b) is amended by deleting:

''(1) If the defendant committed the offense other than for profit, decrease by 3 levels.

(2) If the offense involved six or more documents or passports, increase as follows:

Number of documents/passports	Increase in level
(A) 6–24	Add 2.
(B) 25–99	Add 4.
(C) 100 or more	Add 6.''

and insert in lieu thereof:

''(1) [Option 1: If the defendant committed the offense other than for profit and had not been convicted of an immigration and naturalization offense prior to the commission of the instant offense, decrease by 3 levels.]

[Option 2: If the offense involves documents only related to the defendant's spouse or child, decrease by [2–3] levels.]

(2) If the offense involved three or more documents or passports, increase as follows:

Number of documents/passports	Increase in level
(A) 3–5	Add 1.
(B) 6–11	Add 3.
(C) 12–24	Add 5.
(D) 25–99	Add 7.
(E) 100 or more	Add 9.''

Section 2L2.1(b) is amended by inserting the following additional subdivision:

''(3) [Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]

[Option 2: If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by 2 levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]''

The Commentary to § 2L2.1 captioned ''Application Notes'' is amended by inserting the following additional notes:

''4. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. An ''immigration and naturalization offense'' means any offense covered by Chapter 2, Part L.

6. For purposes of this section, the term ''child'' is defined at section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)) and ''spouse'' is defined at section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).''

Section 2L2.2(a) is amended by deleting ''6'' and inserting in lieu thereof ''[8–10]''.

Section 2L2.2(b) is amended by deleting ''Characteristic'' and inserting in lieu thereof ''Characteristics''; and by inserting the following new subdivision:

''(2) [Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]

[Option 2: If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by 2 levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]''

The Commentary to § 2L2.2 captioned ''Application Note'' is amended by deleting and inserting in lieu thereof ''Notes''; and by inserting the following additional notes:

''2. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. An 'immigration and naturalization offense' means any offense covered by Chapter 2, Part L.''.

Section 2H4.1—Involuntary Servitude

4. Synopsis of Proposed Amendment: This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility act of 1996. Section 218 directs the

Commission to review the guideline for peonage, involuntary servitude and slave trade offenses and amend the guideline, as necessary, to:

''(A) reduce or eliminate any unwarranted disparity * * * between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnapping offenses and alien smuggling;

(B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses and adequately reflect the heinous nature of such offenses; and

(C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve, (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude.''

The amendment generally tracks the structure of the kidnapping guideline.

Section 2H4.1 is amended by deleting the section in its entirety and replacing in lieu thereof the following:

''§ 2H4.1. Peonage, Involuntary Servitude, and Slave Trade

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

(1) [18–24]

(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by [4–6] levels; (B) if any victim sustained serious bodily injury, increase by [2–4] levels.

(2) If a dangerous weapon was used, increase by [2–4] levels.

(3) If any victim was held in a condition of servitude or peonage for (A) more than one year, increase by [3–5] levels; (B) between 180 days and one year, increase by [2–4] levels; (C) more than thirty days but less than 180 days, increase by [1–3] level.

(4) If any other offense was committed during the commission of or in connection with the servitude, peonage, or slave trade offense, increase to the greater of:

(A) 2 plus the offense level as determined above, or

(B) 2 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581–1588.

Application Notes:

1. Under subsection (b)(4), 'any other offense * * * committed during the commission of or in connection with the servitude, peonage, or slave trade offense' means any conduct that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 4). See the Commentary in § 2H1.1 for an explanation of how to treat a count of conviction which sets forth more than one ''other'' offense.

2. Definitions of 'serious bodily injury' and 'permanent or life-threatening bodily injury' are found in the Commentary to § 1B1.1 (Application Instructions).

3. 'A dangerous weapon was used' means that a firearm was discharged, or a 'firearm' or 'dangerous weapon' was 'otherwise used'' (as defined in the Commentary to § 1B1.1 (Application Instructions)).

4. If the offense involved the holding of more than 10 victims in a condition of involuntary servitude or peonage, an upward departure may be warranted.

Background: This section covers statutes that prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the minimum base offense level is [18–24].''.

Issue for Comment: Section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directs the Commission to ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve a large number of victims. The Commission seeks comment on whether the current enhancements provided under the guidelines' multiple count provisions are sufficient to ensure appropriately enhanced sentences when peonage, involuntary servitude, or slave trade offenses involve a large number of victims or whether a new specific offense characteristic for a large number of victims is needed.

Non-Emergency Amendments

Section 3A1.4 Terrorism

5. Synopsis of Proposed Amendment: This amendment proposes to make permanent the emergency amendment promulgated by the Commission to implement section 730 of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104–132; 110 Stat. 1214). That section gave the Commission emergency authority, under section 21(a) of the Sentencing Act of 1987, to amend the sentencing guidelines so that the Chapter 3 adjustment in § 3A1.4, relating to international terrorism, applies more broadly to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code. By vote of the Commission, the emergency amendment became effective November 1, 1996. However, under the terms of section 21(a) of the Sentencing Act of 1987, the emergency amendment will no longer be in effect after submission of the next report to Congress under 28 U.S.C. § 994(p) unless in the next report, the Commission submits (and Congress does not disapprove) an amendment to make it permanent.

Proposed Amendment: Section 3A1.4 is amended in the title by deleting ''International''.

Section 3A1.4(a) is amended by deleting ''international'' and inserting in lieu thereof ''a federal crime of''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended in Note 1 in the first sentence by deleting ''international'' and inserting in lieu thereof ''a federal crime of''; and in the second sentence by deleting ''International'' and inserting in lieu thereof ''Federal crime of''; and by deleting ''2331'' and inserting in lieu thereof ''2332b(g)''.

Section 1B1.1 Application Instructions

6. Synopsis of Proposed Amendment: This is a two-part amendment to § 1B1.1 (Application Instructions). First, the amendment corrects a technical error in § 1B1.1(b). Second, the amendment expands the definition of ''offense'' to specify what is meant by the term ''instant offense.'' This term is used to distinguish the current or ''instant'' offense from prior criminal offenses. Currently, this term is not defined and has repeatedly raised questions about its application. This amendment defines this term to mean the offense of conviction and relevant conduct, unless a different meaning is expressly stated or is otherwise clear from the context.

Two conforming amendments are necessary. The first conforming amendment adds commentary defining the term ''instant offense'' in relation to § 3C1.1. Section 3C1.1 requires more extensive commentary regarding this term because of the variety of situations covered by this guideline. The second conforming amendment makes explicit that, with respect to §§ 4B1.1 and 4B1.2, the ''instant offense'' is the offense of conviction. Currently, § 4B1.1 expressly states this in subdivision (2), but not in subdivision (1).

Proposed Amendment: Section 1B1.1(b) is amended by inserting '', cross references, and special instructions'' immediately following ''characteristics''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(l) by inserting as the second sentence ''The term 'instant' is used in connection with 'offense' when, in the context, it is necessary to distinguish the current or 'instant' offense from prior criminal offenses.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by inserting the following additional note at the end:

''8. 'During the investigation or prosecution of the instant offense' means during, and in relation to, the investigation or prosecution of the federal offense of which the defendant is convicted and any offense or related civil violation, committed by the defendant or another person, that was part of the same investigation or prosecution, whether or not such offense resulted in conviction or such violation resulted in the imposition of civil penalties. It is not necessary that the obstructive conduct pertain to the particular count of which the defendant was convicted.

'During the sentencing of the instant offense' means during, and in relation to, the sentencing phase of the process, including the preparation of the presentence report.''.

Section 4B1.1 is amended by deleting ''of the instant offense'' and inserting in lieu thereof ''the defendant committed the instant offense of conviction''.

Section 4B1.2(3) is amended by inserting ''of conviction'' immediately before ''subsequent''.

Section 1B1.2 Applicable Guidelines

7. Synopsis of Proposed Amendment: This amendment amends § 1B1.2 (Applicable Guidelines) and the Statutory Index to clarify that, except as otherwise provided in the Introduction to the Statutory Index, the Statutory Index will specify the Chapter Two offense guideline most applicable to an offense of conviction.

Proposed Amendment: The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 by deleting ''The Statutory Index (Appendix A) provides a listing to assist in this determination.'' and inserting in lieu thereof ''Except as otherwise provided in the Introduction to the Statutory Index, the Statutory Index specifies the offense guideline section(s) in Chapter Two most applicable to the offense of conviction.''; by inserting ''in the Statutory Index'' immediately following ''referenced''; by inserting ''more than one offense guideline section may be referenced in the Statutory Index for that particular statute and'' immediately following ''offense guidelines,''; by inserting ''of the referenced'' immediately following ''determine which''; and by deleting ''section'' immediately before ''applies'' and inserting in lieu thereof ''sections''.

The Introduction to Appendix A is amended in the first paragraph by inserting ''Therefore, as a general rule, when determining the guideline section from Chapter Two most applicable to the offense of conviction for purposes of § 1B1.1, use the guideline referenced for that statute in this index.'' after the first sentence; deleting ''If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See § 1B1.2.)''; and by inserting ''referenced'' immediately before ''for the substantive''.

The Introduction to Appendix A (Statutory Index) is amended by moving the second paragraph to the end of the first paragraph.

The Introduction to Appendix A (Statutory Index) is amended by deleting the second (formerly the third) paragraph as follows:

''For those offenses not listed in this index, the most analogous guideline is to be applied. (See § 2X5.1.)''.,

And inserting in lieu thereof:

''However, there are exceptions to the general rule set forth above. If the statute of conviction (1) is not listed in this index; or (2) is listed in this index but the guideline section referenced for that statute is no longer appropriate to cover the offense conduct charged because of changes in law not yet reflected in this index, use the most analogous guideline. (See § 2X5.1.)''.

Section 1B1.3 Relevant Conduct

8. Synopsis of Proposed Amendment: This amendment incorporates into § 1B1.3 (Relevant Conduct) the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), that when two controlled substance transactions are conducted more than one year apart, the fact that the same controlled substance was involved in both transactions is insufficient, without more, to demonstrate that the transactions were part of the ''same course of conduct'' or ''common scheme or plan''.

Proposed Amendment: The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 9(B) by deleting ''For example, where'' and inserting in lieu thereof ''If''; and by inserting after the fourth sentence ''For example, if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information, is insufficient to show that they are part of the same course of conduct or common scheme or plan.'' after the fourth sentence.

9. Synopsis of Proposed Amendment: This amendment addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1 of this amendment excludes the use of acquitted conduct as a basis for determining the guideline range. Option 1 has two suboptions, either or both of which could be added. Option 1(A) adds the bracketed language, in the guideline and application note, providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for upward departure.

Option 2 is derived from a ''compromise'' proposal suggested several years ago by the Commission's Practitioners' Advisory Group. It excludes acquitted conduct from consideration in determining the guideline range unless such conduct is established by the ''clear and convincing'' standard, rather than the less exacting ''preponderance of the evidence'' standard generally applicable to the determination of relevant conduct.

Option 3 expressly provides what currently is arguably implicit in the Relevant Conduct guideline: that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct and included in determining the guideline range if those standards are met. However, the amended commentary invites a discretionary downward departure to exclude such conduct if the use of that conduct to enhance the sentence raises substantial concerns of fundamental fairness. It also states what should be the obvious appropriate floor for such a downward departure.

Proposed Amendment: [Option 1A: Section 1B1.3 is amended by inserting the following new subsection:

''(c) Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section unless it is independently established by evidence not admitted at trial.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by renumbering Note 10 as Note 11 and by inserting the following as new Note 10:

''10. Subsection (c) provides that conduct (i.e., acts and omissions) of

which the defendant has been acquitted after trial ordinarily shall not be considered in determining the guideline range. In applying this provision, the court should be mindful that evidence not admissible at trial properly may be considered at sentencing and that application of the guidelines often may involve determinations somewhat different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in § 2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement. Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the weapon enhancement in § 2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable.''.]

[Option 1B: Section 1B1.3 is amended by inserting the following new subsection:

''(c) Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by renumbering Note 10 as Note 11 and by inserting the following as new Note 10:

''10. Subsection (c) provides that conduct (i.e., acts and omissions) of which the defendant has been acquitted after trial shall not be considered in determining the guideline range. In applying this provision, the court should be mindful that application of the guidelines often may involve determinations somewhat different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in § 2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement.

Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the weapon enhancement in § 2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable. Although acquitted conduct may not be used in determining the guideline range, such conduct may provide a basis for an upward departure.''.]

[Option 2

Section 1B1.3 is amended by inserting the following new subsection:

''(c) Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section unless such conduct is established by clear and convincing evidence.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by renumbering Note 10 as Note 11 and by inserting the following as new Note 10:

''10. Subsection (c) provides that conduct (i.e., acts and omissions) of which the defendant has been acquitted after trial shall not be considered in determining the guideline range unless, considering the evidence admitted at trial and any additional evidence presented at sentencing, such conduct is established by clear and convincing proof.

In determining whether conduct necessarily was rejected by an acquittal, the court should be mindful that application of the guidelines often may involve determinations different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in § 2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement. Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the weapon enhancement in § 2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable.''.]

[Option 3

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by renumbering Note 10 as Note 11 and by inserting the following note as new Note 10:

''10. Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall be considered under this section if it otherwise qualifies as relevant conduct within the meaning of this section. However, if the court determines that, considering the totality of circumstances, the use of such conduct as a sentencing enhancement raises substantial concerns of fundamental fairness, a downward departure may be considered. Such a downward departure should not result, in the absence of other appropriate factors, in a sentence lower than the minimum sentence in the guideline range that would apply if such conduct were not considered.''.]

Section 1B1.5 Interpretation of References to Other Offense Guidelines

10. Synopsis of Proposed Amendment: This amendment simplifies the operation of Chapter Two cross references in two ways: (1) by amending § 1B1.5 (Interpretation of References to Other Offense Guidelines) to provide that only Chapter Two offense levels (not Chapter Two offense levels and Chapter Three adjustments) must be considered in determining whether a cross reference will result in a greater offense level than that provided in the Chapter Two guideline that contains the cross reference provision; and, (2) by amending § 2X1.1 to replace the three-level reduction for certain offenses involving attempts, solicitation and, conspiracy with a downward departure provision (see accompanying memorandum). This amendment also corrects a technical error in Application Note 1 of § 1B1.5.

(1) Amendment of § 1B1.5— Approximately 32 guideline subsections involving numerous cross references contain a requirement that the cross reference applies only if it results in the greater offense level. Currently, to determine the ''greater offense level,'' a comparison is required taking into account both the Chapter Two offense levels and any applicable Chapter Three adjustments. The inclusion of the Chapter Three adjustments in the comparison significantly increases the complexity of this task.

This amendment simplifies the guidelines by restricting the comparison to the Chapter Two offense levels, unless a different procedure is expressly specified. The amendment, together with existing guideline language, provides a different procedure with respect to §§ 2C1.1, 2C1.7, 2E1.1, 2E1.2 because they are the only four offense guidelines in which the inclusion of Chapter Three adjustments in the comparison is likely to make a difference. Although it is possible that there may be a difference under some

other guideline section under some unusual circumstance, such differences will occur extremely rarely, if at all.

Sections 2E1.1 and 2E1.2 currently expressly provide for a comparison (of the offense level applicable to the underlying activity and the alternative base offense level) including Chapter Three adjustments. There may be cases, for example, in which abuse of a position of trust is accounted for in the offense level applicable to the underlying racketeering activity. If Chapter Three adjustments (including § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)) are not included in the comparison, then abuse of a position of trust would be taken into account only in the offense level applicable to the underlying activity and not with respect to the alternative base offense level.

Likewise, §§ 2C1.1 and 2C1.7 currently do not expressly provide for a comparison including Chapter Three adjustments, although under current § 1B1.5 such a comparison is called for. Cases under §§ 2C1.1 and 2C1.7 would have a different result using a Chapter Two comparison versus a Chapter Two and Three comparison only where the Chapter Two offense level from § 2C1.1 or 2C1.7 was the same as that for the underlying offense, and a 2-level adjustment from § 3B1.3 would apply to the underlying offense (an adjustment from § 3B1.3 does not apply to an offense level from § 2C1.1 or § 2C1.7). In such case, a 2-level difference would result: that conduct would already be taken into account under §§ 2C1.1 and 2C1.7 but would not be taken into account in the comparison of the offense level from the underlying offense because the Chapter Three adjustment would not be included. However, such cases should occur relatively infrequently. In FY 1995, there were 220 cases sentenced under § 2C1.1 altogether and 26 cases sentenced under 2C1.7.

To address the cases described above, this amendment requires, as an express exception to the general rule provided for in the amendment, that the comparisons made in §§ 2C1.1, 2C1.7, 2E1.1, and 2E1.2 include Chapter Three adjustments. Application notes are added to §§ 2C1.1 and 2C1.7 expressly requiring a Chapter Three comparison (and the application notes in §§ 2E1.1 and 2E1.2 that require the same are retained), without any substantive change.

(2) Amendment of § 2X1.1—This amendment also proposes deletion of the three-level reduction under § 2X1.1(b) (1), (2), or (3), for attempts, conspiracies, or solicitations not covered by a specific offense guideline, in which the defendant has not completed all the acts necessary for the substantive offense and was not ''about to complete all such acts but for the apprehension or interruption by some similar event beyond the defendant's control.'' In place of the three-level reduction, this amendment provides for the possibility of a downward departure under such circumstances. The arguments for eliminating the provisions are: (1) A large number of cases that go to § 2X1.1 theoretically are required to be considered for the reduction, but only a small number qualify for it; (2) on its face the provision should be expected to apply rarely; and (3) the concerns manifested in the provisions can be dealt with adequately through departure. On the other hand, if the three-level reduction is replaced by a departure provision, in the rare case when the requirements for a reduction under subsection (b) are met, the defendant will not have a right to the reduction but must rely on the sentencing judge's exercise of the discretion to depart.

In FY 1995 there were 1,568 cases in which the highest guideline applied was § 2X1.1(a). Of these, 33 (or 2%) received the three-level reduction under subsection (b) (17 for attempt, 13 for conspiracy, and 3 for solicitation). The affirmance rate of appeals of these findings has been very high (90.5% in FY 1995, 85% in FY 1994, and 94.4% in FY 1993).

Proposed Amendment: Section § 1B1.5(d) is amended by deleting ''final offense level (i.e., the greater offense level taking into account the Chapter Two offense level and any applicable Chapter Three adjustments)'' and inserting in lieu thereof ''Chapter Two offense level, except as otherwise expressly provided''.

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 1 by deleting '', (2),'' and inserting in lieu thereof ''and'' immediately after ''§ 2D1.2(a)(1)'' and by deleting ''and § 2H1.1(a)(1),''.

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 2 by deleting in the second sentence ''greater final''; by deleting ''(i.e., the greater offense level''; by deleting ''both'' and inserting in lieu thereof ''only''; and by deleting ''and any applicable Chapter Three adjustments).''

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 2 by deleting the second and third sentences and inserting the following in lieu thereof:

'', unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, see the Commentary to §§ 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe); 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise).''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

7. For the purposes of determining whether to apply the cross references in this section, the ''resulting offense level'' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A–D).''.

The Commentary to § 2C1.7 captioned ''Application Notes'' is amended by inserting the following additional note:

''6. For the purposes of determining whether to apply the cross references in this section, the ''resulting offense level'' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A–D).''.

Section § 2X1.1 is amended by deleting subsection (b) in its entirety and redesignating subsection (c) as subsection (b).

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended by deleting Note 4 in its entirety and inserting the following in lieu thereof:

''4. This guideline applies to attempts, solicitations, or conspiracies that are not covered by a specific offense guideline. In cases to which this guideline applies, a downward departure of up to three levels may be warranted if the defendant is arrested well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. A downward departure would not be appropriate under this section in cases in which the defendant or a co-conspirator completed all the acts such person believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event

beyond the person's control. A downward departure also would not be appropriate in cases involving solicitation if the statute treats solicitation of the substantive offense identically with the substantive offense, i.e., the offense level in such cases should be the same as that for the substantive offense.''.

The Commentary to § 2X1.1 captioned ''Background'' is deleted in its entirety.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by deleting Note 7 in its entirety.

The Commentary to § 2A4.1 captioned ''Application Notes'' is amended in Note 5 by deleting '', subject to a possible 3-level reduction under § 2X1.1(b))''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by deleting Note 9 in its entirety.

Section 1B1.10 Retroactivity of Amended Guideline Range

11. Synopsis of Proposed Amendment: This amendment responds to recent litigation, including a circuit conflict and inquiries regarding the operation of § 1B1.10 and related statutory provisions.

The amendment clarifies Commission intent that the designation of an amendment for retroactive application to previously sentenced, imprisoned defendants authorizes only a reduction in the term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2) (which, in turn, speaks only to modification of a term of imprisonment) and does not open any other components of the sentence (e.g., the term of supervised release) to modification. The amendment further clarifies that the amount of reduction in the prison sentence, subject to the constraints of the amended, reduced guideline range and the amount of time remaining to be served, is within the sound discretion of the court.

Proposed Amendment: Section 1B1.10 is amended in the title by deleting ''Retroactivity'' and inserting in lieu thereof ''Reduction in Term of Imprisonment as a Result''.

Section 1B1.10(b) is amended by deleting ''sentence'' the first time it appears and inserting in lieu thereof ''the term of imprisonment'', by deleting ''sentence'' the next time it appears and inserting in lieu thereof ''term of imprisonment'', and by inserting '', except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served'' immediately before the period at the end of the sentence.

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended by inserting the following additional note at the end:

''3. The determination of whether to grant a reduction in a term of imprisonment under 18 U.S.C. § 3582(c)(2) and the amount of such reduction are within the sound discretion of the court, subject to the limitations in subsection (b).''.

The Commentary to § 1B1.10 captioned ''Background'' is amended in the third paragraph by inserting ''to determine an amended guideline range under subsection (b)'' immediately before the period at the end of the sentence; and by inserting the adding at the end the following new paragraph:

''The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.''.

Section 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transmitting, or Possessing Stolen Property

12. Synopsis of Proposed Amendment: (a) Source and Purpose—This amendment addresses a significant interpretive problem involving a specific offense characteristic in the Theft (§ 2B1.1) and Fraud (§ 2F1.1) guidelines. The problem occurs in connection with the specific offense characteristic under § 2B1.1(b)(6)(B) and § 2F1.1(b)(6)(B), which provides an enhancement of four levels (approximate 50 percent increase) and a floor offense level of 24 (51–63 months for a first offender), if the offense ''affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense.'' The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted). Staff review of the Theft and Fraud guidelines has raised this matter for possible Commission attention.

(b) Number of affected cases—FY '95 monitoring data are unable to distinguish cases that received the similar enhancement for substantially jeopardizing the safety and soundness of a financial institution (under § 2B1.1(b)(6)(A) and § 2F1.1(b)(6)(A)) from this particular enhancement under paragraph (B). One or the other enhancement was applied in 37 (0.6%) of 6,019 fraud cases and 28 (0.9%) of 3,142 theft (§ 2B1.1) cases. This amendment could decrease the frequency with which this particular enhancement is given. The amendment proposes to delete the four-level enhancement in paragraph (B), while retaining the minimum offense level of 24 (because that is all the directive requires). This could affect as many as 27 of the fraud cases (i.e., 27 of the fraud cases received a 4-level enhancement while 10 were affected by the floor of 24) and 2 of the theft cases (i.e., 2 of the 28 cases received a 4-level enhancement while 26 were affected by the floor of 24).

(c) Scope of Amendment—This amendment would continue to apply the enhancement to a broader spectrum of cases than minimally required under the congressional directive. However, the commentary would state that the offense must be perpetrated against one or more financial institutions and the defendant's $1 million must be derived entirely from one or more financial institutions. The definition for ''gross receipts'' in the commentary would be amended to clarify that ''gross receipts from the offense'' includes property under the control of, or in the custody of, the financial institution for a second party, e.g., a depositor. The Background Commentary would also be amended to reflect the Commission's intent to implement the congressional directive more broadly.

Proposed Amendment: Section § 2B1.1(b)(6) is amended by deleting ''(A)''; by deleting ''; or'' immediately following ''institution'' and inserting in lieu thereof a '','' ; and by deleting subsection (B) in its entirety.

Section § 2B1.1 is amended by inserting the following additional subsection:

''(7) If (A) obtaining or retaining the gross receipts of one or more financial institutions was an object of the offense, (B) the defendant derived more than $1,000,000 in gross receipts from such institutions, and (C) the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by inserting at the beginning the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or

under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of such offense. See 18 U.S.C. §§ 982(a)(4), 1344.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by deleting in the second sentence (formerly the first sentence) ''from the offense,''; by deleting ''(6)(B)'' immediately following ''(b)''; and by deleting ''generally'' immediately following ''(7),''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by deleting the third sentence (formerly the second sentence) in its entirety.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the sixth paragraph by deleting ''Subsection'' and inserting in lieu thereof ''Subsections''; by deleting ''(A)'' immediately following ''(b)(6)'' and inserting in lieu thereof ''and (b)(7)''; by deleting ''implements'' and inserting in lieu thereof ''implement''; by deleting ''instruction'' and inserting in lieu thereof ''instructions''; and by inserting ''and section 2507 of Public Law 101–647, respectively'' immediately following ''101–73''.

Section 2F1.1(b)(6) is amended by deleting ''(A)''; by deleting ''; or'' immediately following ''institution'' and inserting in lieu thereof a '','' ; and by deleting (B) in its entirety.

Section 2F1.1(b) is amended by inserting the following additional subsection:

''(7) If (A) obtaining or retaining the gross receipts of one or more financial institutions was an object of the offense, (B) the defendant derived more than $1,000,000 in gross receipts from such institutions, and (C) the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 16 by deleting in the first sentence ''from the offense,''; by deleting ''(6)(B)'' immediately following ''(b)''; and by deleting ''generally'' immediately following ''(7),''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 16 by deleting the second sentence in its entirety.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 16 by inserting at the beginning the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of such offense. See 18 U.S.C. §§ 982(a)(4), 1344.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the seventh paragraph by deleting ''Subsection'' and inserting in lieu thereof ''Subsections'';

By deleting ''(A)'' immediately following ''(b)(6)'' and inserting in lieu thereof ''and (b)(7)'';

By deleting ''implements'' and inserting in lieu thereof ''implement'';

By deleting ''instruction'' and inserting in lieu thereof ''instructions'';

And by inserting ''and section 2507 of Public Law 101–647, respectively'' immediately following ''101–73''.

Section 5A1.1 Sentencing Table

13. Synopsis of Proposed Amendment: This is a two-part amendment. First, this amendment incorporates the Sentencing Table into a new guideline at § 5A1.1, in response to questions about the legal status of the Sentencing Table. By incorporating the Sentencing Table into a guideline, this amendment also uses a construct for the Sentencing Table that is consistent with the construct used for other tables in the Guidelines Manual, such as the Drug Quantity Table in § 2D1.1.

Second, this amendment addresses an arguably unwarranted ''cliff'' in the Sentencing Table between offense levels 42 and 43. Under the current table, offense level 42 prescribes guideline ranges of 360 months to life imprisonment for each criminal history category. Offense level 43, in comparison, prescribes a guideline sentence of life for each criminal history category.

There is evidence that the Commission initially intended to preserve level 43 and its resulting life sentence requirement for the most egregious law violators; i.e., those convicted of first degree murder, including felony murder, and treason. Note, for example, the wording of Application Note 1 to § 2A1.1: ''The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing.'' However, in providing for a sentencing table with a continuous series of offense levels, the Commission actually made it possible for those most serious categories of criminals to be subject to offense levels less than 43 (and, hence, to guideline ranges that do not require a life sentence), if mitigating guideline adjustments apply. Conversely, the continuous nature of the Sentencing Table also can result in defendants who commit less inherently serious crimes; i.e., those carrying base offense levels less than 43, receiving an offense level of 43 (and, hence, a required life sentence) as a result of applicable aggravating guideline adjustments (e.g., aggravating role, weapon enhancement). Prior to a 1994 amendment reducing the quantity-based offense level in the drug table from 42 to 38, this latter situation occurred more frequently than it occurs now.

Nevertheless, in those infrequent cases, when a defendant whose base offense level is less than 43 becomes subject to guideline enhancements that result in a final, adjusted offense level of 43 or more, a ''mandatory'' guideline sentence of life imprisonment may not be warranted. In the last several years, a number of judges have written or called the Commission to express concern about what they see as an anomalous, unwarranted ''cliff'' between level 42 (range of 360 months to life) and level 43 (life), particularly in the case of a very young defendant who has a remaining life expectancy exceeding 30 years. Those who have contacted the Commission about this sentencing table phenomenon have pointed out that, for younger defendants, there may be a definite qualitative as well as a quantitative difference between a sentence of 30 or more years and a non-parolable sentence of life. In some of these cases, the applicability of a guideline enhancement of one or two offense levels can turn a very lengthy, deserved sentence into a life sentence that may not be warranted and, according to some who have commented, may even raise Eighth Amendment concerns.

The second part of this amendment addresses this concern by making level 42 the offense level upper limit in the sentencing table, unless the defendant was subject to an offense level of 43 as a result of the application of § 2A1.1 (First Degree Murder), § 2M1.1 (Treason), or other guideline provision that elevates the offense level to level 43 because of the death of a person. In such cases, level 43 and its associated life sentence would continue to apply. This approach preserves level 43 for the most egregious cases while providing a range of 360 months to life for all other cases that reach level 42 through guideline enhancements.

This amendment can be expected to affect a relatively small number (perhaps 30–40) of cases, based on FY 1995 monitoring data. In FY 1995, 80 defendants received a final offense level of 43. Of these, 28 would not be affected because level 43 was received via § 2A1.1 (First Degree Murder); (there

were no § 2M1.1 (Treason) cases.) Of the 52 remaining defendants at final offense level 43, 34 received a life sentence. The amendment could be expected to impact approximately this number of defendants, some of whom might still receive a life sentence because the judge elected to impose it.

Proposed Amendment: The Commentary to § 2A1.1 captioned ''Application Notes'' is amended in Note 1 by deleting ''life imprisonment is the appropriate punishment for premeditated killing'' and inserting in lieu thereof ''a defendant who commits premeditated murder should be sentenced at the highest offense level under the Sentencing Table (subject to any applicable adjustments from Chapter Three)'' ; and by deleting the second, third, and fourth sentences.

Chapter Five—Determining the Sentence is amended in Part A—Sentencing Table by deleting ''The Sentencing Table used to determine the guideline range follows:'' and inserting in lieu thereof:

''§ 5A1.1 Sentencing Table

(a) The Sentencing Table used to determined the guideline range is set forth in subsection (b).''.

Chapter Five—Determining the Sentence is amended in Part A—Sentencing Table by inserting ''(b)'' in the title of the Sentencing Table.

The Commentary to Sentencing Table is amended in Note 2 by deleting ''An offense level of more than 43 is to be treated as an offense level of 43.'' and inserting the following in lieu thereof:

''A total offense level of more than 42 is to be treated as an offense level of 42. However, if the final offense level is 43 or more as a result of the application of § 2A1.1 (First Degree Murder), § 2M1.1 (Treason), or another guideline provision (including a cross reference to § 2A1.1) that increases the offense level to level 43 because the offense involved first degree murder or resulted in death, the offense level is to be treated as an offense level of 43.''.

Section 2B3.1 Robbery

14. Synopsis of Proposed Amendment: (a) Source and Purpose—This amendment addresses a split among the circuit courts regarding the application of the ''express threat of death'' enhancement in § 2B3.1 (Robbery).

The majority, relying on the Commission's discussion in Application Note 6, holds that the enhancement applies when the combination of the defendant's actions and words would instill in a reasonable person in the position of the immediate victim (e.g., a bank teller) a greater amount of fear than necessary to commit the bank robbery. Pursuant to this approach, the enhancement applies even when the defendant's statement does not indicate distinctly an intent to kill the victim; it is sufficient that the victim infers from the defendant's conduct that a threat of death was made. See United States v. Robinson, 86 F.3d 1197, 1202 (D.C. Cir. 1996) (enhancement applies if (1) a reasonable person in the position of the immediate victim would very likely believe the defendant made a threat and the threat was to kill; and (2) the victim likely thought his life was in peril); United States v. Murray, 65 F.3d 1161, 1167 (4th Cir. 1995) (''any combination of statements, gestures, or actions that would put an ordinary victim in reasonable fear for his or her life is an express threat of death''); United States v. France, 57 F.3d 865, 868 (9th Cir. 1995) (''[a]n express threat need not be specific in order to instill the requisite level of fear in a reasonable person''); United States v. Hunn, 24 F.3d 994 (7th Cir. 1994) (combination of defendant's note and his gesture that he was pointing a gun through his pocket at the teller would be understood by a reasonable victim as a death threat); United States v. Bell, 12 F.3d 139 (8th Cir. 1993) (upholding enhancement based on demand note's statement ''Make any sudden moves alert anyone I'll pull the pistol in this purse and the shooting will start!''); United States v. Smith, 973 F.2d 1374, 1378 (8th Cir. 1992) (combination of threatening statements to teller and gesture that defendant had a gun instilled greater fear than necessary to commit the robbery).

The minority holds that only what the defendant does or says, not what the victim infers, should be used to assess whether an express threat of death was made within the meaning of the robbery guideline. United States v. Alexander, 88 F.3d 427, 431 (6th Cir. 1996) (''a defendant's statement must distinctly and directly indicate that the defendant intends to kill or otherwise cause the death of the victim''); United States v. Tuck, 964 F.2d 1079 (11th Cir. 1992) (same); see also United States v. Hunn, 24 F.3d at 999–1000 (Easterbrook, J., dissenting). The Sixth Circuit also held that the commentary examples and the Commission's underlying intent at Application Note 6 are not controlling because they are inconsistent with the plain meaning of ''express'' in § 2B3.1(b)(2)(F). United States v. Alexander, 88 F.3d at 431 (referring to Stinson v. United States, 508 U.S. 36 (1993)).

(b) Policy Considerations—The major policy consideration is how strictly the Commission intends for the threat of death enhancement to apply; i.e., must the defendant explicitly threaten death in order for the enhancement to apply.

(c) Number of Affected Cases—In FY 1995, the enhancement is applied in 169 out of 1,488 cases (or 11.4% of the cases) sentenced under the robbery guideline.

(d) Amendment Options—This amendment adopts the majority view and clarifies the Commission's intent to enhance offense levels for defendants whose intimidation of the victim exceeds that amount necessary to constitute an element of a robbery offense. The amendment deletes the reference to ''express'' in § 2B3.1(b)(2)(F) and provides for a two-level enhancement ''if a threat of death was made''.

Proposed Amendment: Section § 2B3.1(b)(2)(F) is amended by deleting ''an express'' and inserting in lieu thereof ''a''.

Option 1:

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended in Note 6 by deleting ''An express'' and inserting in lieu thereof ''A '' '';

By deleting the second sentence in its entirety and inserting in lieu thereof ''Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply.'';

And by deleting in the third sentence ''the underlying'' and inserting in lieu thereof ''this''.

Option 2:

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended in Note 6 by deleting ''An express'' and inserting in lieu thereof ''A '' '';

By deleting the second sentence in its entirety and inserting in lieu thereof ''Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply.'';

By deleting in the third sentence ''the underlying'' and inserting in lieu thereof ''this''; and by deleting ''significantly greater fear than that necessary to constitute an element of the offense of robbery'' and inserting in lieu thereof ''a fear of death''.

15. Synopsis of Proposed Amendment: This amendment addresses the Carjacking Correction Act of 1996, Pub.L. 104–217; 110 Stat. 3020. Section 2 of that Act amends 18 U.S.C. § 2119(2), which (A) makes it unlawful to take a motor vehicle by force and violence or by intimidation, with intent to cause death or serious bodily harm, and (B) provides for a term of

imprisonment of not more than 25 years if serious bodily injury results. As amended by the Carjacking Correction Act of 1996, 18 U.S.C. § 2119(2) includes aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the meaning of ''serious bodily injury''. Therefore, a defendant will be subject to the 25-year statutory maximum under 18 U.S.C. § 2119(2) if the defendant commits a carjacking and rapes the carjacking victim during the carjacking.

In addition, this amendment amends § 2B3.1(b)(1) to provide cumulative enhancements if the offense involved bank robbery and carjacking. Currently, § 2B3.1 provides a 2-level enhancement either for bank robbery or for carjacking; it does not provide separate enhancements for those factors.

Two options are presented. Option 1 is a fairly narrow response to the Act. It amends Application Note 1 of § 2B3.1 (Robbery, Extortion, and Blackmail), the guideline which covers carjacking offenses under 18 U.S.C. § 2119 (and only that guideline) to provide that ''serious bodily injury'' includes aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242.

Option 2 is a broader response to the Act. It expands the definition of ''serious bodily injury'' under § 1B1.1. Option 2 makes this broader definition generally applicable to Chapter Two offense guidelines which contain a ''serious bodily injury'' enhancement. The sexual abuse guideline, § 2A3.1, in turn is amended to make clear that, for purposes of that guideline, the ''serious bodily injury'' enhancement covers conduct other than aggravated sexual abuse and sexual abuse, which are inherent in the conduct covered by that guideline.

Option 2 also clarifies the guideline definition of serious bodily injury by inserting the word ''protracted'' immediately preceding the word ''impairment''. Statutes defining serious bodily injury consistently use the term ''protracted'' before ''impairment'' (e.g., 18 U.S.C. §§ 831, 1365, 1864; 21 U.S.C. § 802). Without use of the term ''protracted'', even a temporary impairment such as a ''sprained wrist'' would fall within the definition of serious bodily injury, as would the throwing of sand or pepper in someone's face to temporarily impair vision. Finally, Option 2 removes two sentences of commentary that are unhelpful.

[Option 1

Section 2B3.1(b)(1) is amended by deleting ''(A)'' immediately following ''If'', and by deleting ''or (B) the offense involved carjacking,''.

Section 2B3.1 is amended by renumbering subdivisions (5) and (6) as subdivisions (6) and (7) respectively and inserting the following as a new subdivision (5):

''(5) If the offense involved carjacking, increase by 2 levels.''.

Section 2B3.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''For purposes of this guideline—'' immediately before ''Firearm,'' and inserting ''In addition, 'serious bodily injury—' includes conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.'' immediately after ''Instructions).''.

[Option 2

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(b) by deleting ''As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(j) by inserting ''protracted'' immediately before ''impairment''; and by deleting ''As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.'' and inserting in lieu thereof '' 'Serious bodily injury' includes conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''For purposes of this guideline'' immediately before '''Permanent''; and by inserting the following as the last sentence:

''However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by inserting the following as the last paragraph:

''The means set forth in 18 U.S.C. § 2241 (a) or (b)'' are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by deleting Note 2 in its entirety; and by renumbering Notes 3–7 as Notes 2–6 respectively.

Section 2B3.1(b)(1) is amended by deleting ''(A)'' immediately after ''If''; by deleting ''or (B) the offense involved carjacking,'' immediately before ''increase''.

Section 2B3.1(b) is amended by renumbering subdivisions (5) and (6) as subdivisions (6) and (7) respectively, and by inserting the following as a new subdivision (5):

''(5) If the offense involved carjacking, increase by 2 levels.''.

Section 2B5.1 Offenses Involving Counterfeit Bearer Obligations of the United States

16. Synopsis of Proposed Amendment: This is a three-part amendment. First, this amendment addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996. That section requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C.§ 470. The amendment adds a specific offense characteristic in § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to provide a two-level enhancement if the offense occurred outside the United States.

Second, this amendment moves the coverage of offenses involving altered bearer instruments of the United States from § 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States). Currently, § 2B5.1 covers counterfeit bearer obligations of the United States. Section 2F1.1 covers altered bearer obligations of the United States. The offense level in § 2B5.1 is one-level higher than sophisticated fraud (i.e., fraud and more than minimal planning) under § 2F1.1 throughout the range of loss values. There are two reasons for moving offenses involving altered bearer instruments of the United States from § 2F1.1 to § 2B5.1: (A) theoretical consistency, and (B) simplicity of guideline operation.

(A) Theoretical Consistency. The higher offense level for offenses involving counterfeit bearer obligations of the United States reflects the lower

level of scrutiny realistically possible in transactions involving currency and the absence of any requirement that the person passing the currency produce identification. Under this rationale, however, altered bearer obligations of the United States seem to belong with counterfeit bearer obligation of the United States, rather than with other counterfeit or altered instruments.

(B) Simplicity of Guideline Operation. As a practical matter, the distinction between an altered instrument and a counterfeit instrument is not always clear. For example, if a genuine one-dollar bill is bleached and a photocopy of a twenty-dollar bill made using the genuine note paper, is the resulting twenty-dollar bill a counterfeit bill or an altered bill? In one recent case, a defendant made photocopies of twenty-dollar bills, then cut out the presidential picture of genuine twenty-dollar bills and switched pictures (using the genuine picture with the photocopied bill and the photocopied picture with the otherwise genuine bill). Is the photocopied bill with the genuine presidential picture a counterfeit or an altered instrument? This amendment simplifies the guidelines by handling this conduct in the same offense guideline, thus avoiding any difference based upon such very fine distinctions.

Third, this amendment clarifies the operation of § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) in two respects to address issues raised in litigation. It deletes a phrase in Application Note 3 concerning photocopying a note that could lead to the inappropriate conclusion that an enhancement from subsection (b)(2) does not apply even to sophisticated copying of notes. It also adds an application note to provide expressly that items clearly not intended for circulation are not counted under subsection (b)(1).

Proposed Amendment: Section 2B5.1 is amended in the title by inserting ''or Altered'' immediately following ''Counterfeit''.

Section 2B5.1(b) (1) and (b)(2) are both amended by inserting ''or altered'' immediately following ''counterfeit''.

Section 2B5.1(b) is amended by inserting the following new subdivision at the end:

''(4) If the offense was committed outside the United States, increase by 2 levels.''.

The Commentary to § 2B5.1 captioned ''Statutory Provision'' is amended by deleting ''471'' and inserting in lieu thereof ''470''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by deleting Note 2, renumbering Note 1 as Note 2 and inserting the following as the new Note 1:

''1. For purposes of this guideline, ''United States'' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.'';

In Note 2 (formerly Note 1) by inserting ''or altering'' immediately following ''counterfeiting'';

By renumbering Note 3 as Note 4 and inserting the following as the new Note 3:

''3. For the purposes of subsection (b)(1), do not count items that clearly were not intended for circulation (e.g., items that are so defective that they are unlikely to be accepted even if subjected to only minimal scrutiny). However, partially completed items that would have been completed but for the discovery of the offense should be counted for purposes of such subsection.'';

And in Note 4 (formerly Note 3) by deleting ''merely photocopy notes or otherwise''.

The Commentary to § 2B5.1 captioned ''Background'' is amended by inserting ''alters bearer obligations of the United States or'' immediately before ''produces''.

Section 2F1.1 is amended in the title by inserting ''Altered or'' immediately following ''than''.

Section 2D1.6 Use of Communication Facility in Committing Drug Offense

17. Synopsis of Proposed Amendment: This amendment clarifies the operation of §§ 2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy), 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise), and 2E1.3 (Violent Crimes in Aid of Racketeering Activity) in a manner consistent with the operation of § 1B1.2 (Applicable Guidelines) governing the selection of the offense guideline section. This amendment addresses a circuit conflict by specifying that the ''underlying offense'', for purposes of these guidelines, is determined on the basis of the conduct of which the defendant was convicted. Compare United States v. McCall, 915 F.2d 811 (2d Cir. 1990) with United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993). In addition, this amendment deletes an application note from §§ 2E1.1, 2E1.2, and 2E1.3 that is unnecessary and is not included in other sections of the Guidelines Manual.

Proposed Amendment: The Commentary to § 2D1.6 captioned ''Application Notes'' is amended by deleting ''Note'' and inserting in lieu thereof ''Notes'', by renumbering Note 1 as Note 2, by inserting the following as new Note 1:

''1. 'Offense level applicable to the underlying offense'' means the offense level determined by using the offense guideline applicable to the controlled substance offense that the defendant was convicted of using a communication facility to commit, cause, or facilitate.''.

The Commentary to § 2E1.1 captioned ''Application Notes'' is amended in Note 1 by deleting ''Where there is more than one underlying offense'' and inserting in lieu thereof ''The 'offense level applicable to the underlying racketeering activity' under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of § 1B1.2 (Applicable Guidelines)(i.e., on the basis of the conduct of which the defendant was convicted). In the case of more than one underlying offense (for this determination, apply the provisions of Application Note 5 of the Commentary to § 1B1.2 as if in a conspiracy case)''; by inserting ''apply Chapter Three, Parts A, B, and C to subsection (a)(1), and'' immediately following ''level,'', by deleting ''both (a)(1) and'' and inserting in lieu thereof ''subsection''; by deleting Note 3, and by renumbering the remaining notes accordingly.

The Commentary to § 2E1.2 captioned ''Application Notes'' is amended in Note 1 by deleting ''Where there is more than one underlying offense'' and inserting in lieu thereof ''The 'offense level applicable to the underlying crime of violence or other unlawful activity' under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of § 1B1.2 (Applicable Guidelines) (i.e., on the basis of the conduct of which the defendant was convicted). In the case of more than one underlying offense (for this determination, apply the provisions of Application Note 5 of the Commentary to § 1B1.2 as if in a conspiracy case)'',

The Commentary to § 2E1.3 captioned ''Application Notes'' is amended by deleting ''Notes'' and inserting in lieu thereof ''Note''; in Note 1 by adding the following as the first sentence:

''The 'offense level applicable to the underlying crime or racketeering activity'' under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of § 1B1.2 (Applicable

Guidelines)(i.e., on the basis of the conduct of which the defendant was convicted).'';

And by deleting Note 2.

Fraud, Theft, and Tax Offenses

Chapter Two, Parts B, F, and T (Theft, Fraud, and Tax)

18. Synopsis of Proposed Amendment: This amendment makes the following changes to guideline §§ 2B1.1, 2F1.1, and 2T4.1: (1) Eliminates the more-than-minimal-planning enhancement in §§ 2B1.1 and 2F1.1 and other guidelines, and builds a corresponding increase into the loss tables, and creates a two-level enhancement like the one in § 2T4.1 for offenses involving ''sophisticated means''; (2) increases the base offense level of § 2B1.1 (the theft guideline) and revises the loss tables in §§ 2B1.1, 2F1.1, and 2T4.1 (theft, fraud, and tax offenses, respectively); (3) changes the current one-level increments in the loss tables in §§ 2B1.1, 2F1.1, and 2T4.1 (to two-level increments or a combination of one and two-level increments); (4) increases the severity of the loss tables in §§ 2B1.1, 2F1.1, and 2T4.1 at higher loss amounts; (5) adds telemarketing enhancements to §§ 2B1.1 and 2F1.1; (6) adds a cross reference in § 2F1.1 for offenses involving arson; and (7) makes conforming technical changes.

(1) Elimination of More-than-Minimal-Planning Enhancement for Sophisticated Means.

First, the amendment eliminates the specific offense characteristic for more-than-minimal planning from the theft and fraud guidelines (and a number of other guidelines), and phases in a corresponding increase in the loss tables (or, in the case of option 3, into the base offense level). Arguments for revising or eliminating the ''more than minimal planning'' specific offense characteristic include: (I) the workload (and related litigation) burden of the provision is considerable; in each of the over 9,000 cases sentenced under these guidelines, some consideration is given to whether this SOC is applicable; (ii) the definition of more than minimal planning is arguably unclear or ambiguous; (iii) past Commission studies have shown that the provision is applied unevenly, thus contributing to unwarranted disparity; and (iv) the adjustment is applied with such frequency, particularly at higher dollar amounts, that it arguably should be built into the loss table or even the base offense level. (The more-than-minimal planning adjustment is applied in 58.7% of all cases sentenced under § 2B1.1; of all cases under § 2F1.1, it is applied in 82.5% (and over 89% of cases involving loss amounts greater than $10,000)).

The amendment proposes creating a two-level specific offense characteristic in §§ 2B1.1 and 2F1.1 (and other guidelines that currently have a more-than-minimal planning enhancement) that would apply if ''sophisticated means'' were used to impede discovery of the existence or extent of the offense (with a floor of level 12). Replacing the more-than-minimal planning enhancement with one for sophisticated means will increase the fact-finding and application burden compared to just deleting the more-than-minimal planning enhancement. In addition, in the proposed loss table options at levels at or above the point where the two levels from more-than-minimal planning are automatically built into the loss table, defendants who would receive the new two-level enhancement for sophisticated means would effectively receive an additional two-level increase, in addition to any others provided in this amendment. It is unclear how many cases would be affected by this new enhancement. In conjunction with the addition of this enhancement, it is proposed that the current specific offense characteristic involving use of foreign bank accounts found at subsection (b)(5) (providing a floor of 12 for such offenses), be deleted and incorporated into the definition of ''sophisticated means'' for all guidelines that currently have a more-than-minimal planning enhancement. In FY 1995, of the 6,019 cases sentenced under § 2F1.1, 3 (.05%) received the enhancement for use of foreign bank accounts.

(2) Amendments to Loss Tables.

Three options are presented for changes to the loss tables for the theft and fraud guidelines. A corresponding change is proposed to the tax loss table in § 2T4.1 (for options 1 and 2; if option 3 is chosen, a conforming tax loss table will be prepared). Depending on the option chosen, the necessity of factual findings for the lowest loss amounts is eliminated by building these loss amounts into the base offense level.

Options 1 and 2 of this proposal provide identical base offense levels of 6 for the theft and fraud guidelines. Option 3 provides a base offense level of 8.

(3) Loss Tables—Two-level Increments.

Second, in options one and three the loss tables are changed from the current one-level increments to two-level increments, so that broader ranges of dollar loss are assigned to a particular offense level increase. Option two generally retains one-level increments, but provides two-level increments for losses above $2,000 and $5,000, and for loss increments above $5,000,000. Option two retains cutting points that are very similar to the current loss tables, but has no consistent pattern in the selection of the cutting points.

Several arguments suggest use of two-level increments in the loss tables, as proposed in Options One and Three: (i) Reduction in probation officer and judicial workload (broader loss ranges will produce fewer ''cutting points''; for example, a two-level loss table—with no other changes—would go from 18 to 10 cutting points); (ii) increased consistency with other offense guidelines (most alternative base offense levels and specific offense characteristics increase by at least two-level increments; for example, the drug table); and (iii) a table with two-level increments is less mechanistic and lessens the appearance of false precision compared to the current structure. On the other hand, one-level increments provide a smoother increase in levels relative to loss amounts, with a minimized ''cliff'' effect and somewhat greater proportionality.

(4) Loss Tables—Increased Severity at Higher Loss Amounts.

Fourth, all three options provide for increases in the severity levels assigned to the higher loss amounts, in addition to the increase built into the table (or base offense level) in response to the elimination of the more-than-minimal planning adjustment.

There are several reasons why consideration should be given to raising the severity levels for cases involving the largest loss amounts. First, the draft report of the Commission-sponsored ''just punishment'' study suggests that respondents identified certain kinds of cases that may warrant greater punishment for higher loss amounts than currently provided by the loss tables in the theft and fraud guidelines: embezzlement or theft cases involving bank officials or postal workers; fraudulent solicitation for a nonexistent charity; fraud involving false mortgage application with no intent to repay; and forgery or fraud involving stolen credit cards or writing bad checks.

Second, the draft results of the Federal Judicial Center survey of federal district court judges and chief probation officers reveal sentiment that §§ 2B1.1 and 2F1.1 under punish defendants whose offenses involve large monetary losses.

Third, the Department of Justice and the Criminal Law Committee of the Judicial Conference have recommended that consideration be given to raising the severity levels at higher loss

amounts for theft and fraud cases to more appropriately punish large-scale offenders.

(5) Telemarketing Enhancements.

The fifth change proposed by this amendment is to add specific offense characteristics to § 2F1.1 for offense conduct involving telemarketing. In the 1994 omnibus crime bill, Congress raised the statutory maximum for telemarketing offenses by five years (18 U.S.C. § 2326(1)), and by ten years for such offenses that victimized ten or more persons over age 55 or targeted persons over the age of 55 (18 U.S.C. § 2326(2)). This amendment provides a two-level increase in § 2F1.1 for offenses involving telemarketing, and an additional, cumulative 2-level increase if the offense victimized 10 or more persons over the age of 55, or targeted persons over the age of 55.

(6) Cross Reference—Arson.

The sixth change proposed by the amendment is to add to the fraud guideline a cross reference to § 2K1.4 (Arson, Property Damage by Use of Explosives), if the offense involved arson or property destruction by use of explosives, and if the resulting offense level is greater. Offenses that involve an underlying arson may be charged as frauds. The proposed cross reference better ensures that similar offenses are treated similarly.

(7) Conforming Technical Changes.

The amendment also makes the following technical changes: In § 2B1.1, subsection (b)(3) is proposed for deletion because the floor of 6 for offenses involving the theft of mail is unnecessary given the proposal to increase the base offense level for all offenses under this guideline from 4 to 6; in § 2B1.1, subsection (b)(4)(B) providing a four-level increase for offenses involving receiving stolen property is revised to provide a two-level increase because of the proposed deletion of more than minimal planning (i.e., the current, four-level enhancement is applied in the alternative to a two-level enhancement for more than minimal planning; if the more-than-minimal planning enhancement is subsumed in the loss tables, it is necessary to reduce the four-level enhancement for fencing stolen property to two levels to maintain equipoise). In § 2F1.1, subsection (b)(2)(B), providing an alternative (to the more-than-minimal-planning) two-level increase for a scheme involved the defrauding of more than one victim, is proposed for deletion because the concerns are handled by building the levels for more than minimal planning into the loss table; and the definition of more-than-minimal planning in § 1B1.1, comment. (n.1(f)), is proposed for deletion and replacement by the definition of ''sophisticated means'', with corresponding changes to §§ 2A2.1(b)(1), 2B1.1(b)(4)(A), 2B1.3(b)(3), and 2B2.1(b)(1). The definition of ''sophisticated means'' currently in § 2T1.1 is revised accordingly.

(A) Proposed Amendment

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended by deleting application note 1(f) in its entirety and inserting in lieu thereof:

'' 'Sophisticated means to impede discovery of the offense or its extent,' includes conduct that is more complex or demonstrates greater intricacy or planning than a routine effort to impede discovery of the offense or its extent. An enhancement would be applied, for example where the defendant used transactions through corporate shells or fictitious entities, or used foreign bank accounts or transactions to conceal the nature or extent of the fraudulent conduct.''

* * * * *

Section 2B1.1(a) (Base Offense Level) is amended by deleting ''4'' and inserting in lieu thereof [Options 1 and 2: ''6''; Option 3: ''8''].

Section 2B1.1 is amended by deleting (b)(1) in its entirety, and inserting in lieu thereof, one of the following three options:

Option One

[''(b) Specific Offense Characteristics

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

Loss (apply the greatest)	Increase in level
(A) $5,000 or more	Add 2.
(B) 10,000 or more	Add 4.
(C) 22,500 or more	Add 6.
(D) 50,000 or more	Add 8.
(E) 120,000 or more	Add 10.
(F) 275,000 or more	Add 12.
(G) 650,000 or more	Add 14.
(H) 1,500,000 or more	Add 16.
(I) 3,500,000 or more	Add 18.
(J) 8,000,000 or more	Add 20.
(K) 18,000,000 or more	Add 22.
(L) 40,000,000 or more	Add 24.
(M) 90,000,000 or more	Add 26"].

Option Two

[''(b) Specific Offense Characteristics

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

Loss (apply the greatest)	Increase in level.
(A) More than $2,000	Add 2.
(B) More than 5,000	Add 4.
(C) More than 10,000	Add 5.
(D) More than 20,000	Add 6.
(E) More than 40,000	Add 7.
(F) More than 70,000	Add 8.
(G) More than 120,000	Add 9.
(H) More than 200,000	Add 10.
(I) More than 350,000	Add 11.
(J) More than 500,000	Add 12.
(K) More than 800,000	Add 13.
(L) More than 1,500,000	Add 14.
(M) More than 2,500,000	Add 15.
(N) More than 5,000,000	Add 16.
(O) More than 7,500,000	Add 18.
(P) More than 15,000,000	Add 20.
(Q) More than 25,000,000	Add 22.
(R) More than 50,000,000	Add 24"].

Option Three

[''(b) Specific Offense Characteristics

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

Loss (apply the greatest)	Level of increase.
(A) More than $5,000	Add 2.
(B) More than 20,000	Add 4.
(C) More than 60,000	Add 6.
(D) More than 100,000	Add 8.
(E) More than 250,000	Add 10.
(F) More than 500,000	Add 12.
(G) More than 750,000	Add 14.
(H) More than 1,000,000	Add 16.
(I) More than 3,000,000	Add 18.
(J) More than 7,000,000	Add 20.
(K) More than 12,000,000	Add 22.
(L) More than 20,000,000	Add 24.
(M) More than 40,000,000	Add 26.
(N) More than 80,000,000	Add 28"].

Section 2B1.1 is amended by deleting (b)(3) in its entirety and inserting in lieu thereof:

''If sophisticated means were used to impede discovery of the offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''

Section 2B1.1 is amended by deleting (b)(4)(A) in its entirety and by amending (b)(4)(B) by deleting ''(B)'' and by deleting and changing ''4 levels'' to ''2 levels''.

* * * * *.

Option Three Only

[Section 2F1.1(a) is amended by deleting ''6'' and inserting in lieu thereof ''8''].

Section 2F1.1 is amended by deleting (b)(1) in its entirety, and inserting in lieu thereof, one of the following three options:

Option One

[''(b) Specific Offense Characteristics.

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

Loss (apply the greatest)	Increase in level
(A) $5,000 or more	Add 2.
(B) 10,000 or more	Add 4.
(C) 22,500 or more	Add 6.
(D) 50,000 or more	Add 8.
(E) 120,000 or more	Add 10.
(F) 275,000 or more	Add 12.
(G) 650,000 or more	Add 14.
(H) 1,500,000 or more	Add 16.
(I) 3,500,000 or more	Add 18.
(J) 8,000,000 or more	Add 20.
(K) 18,000,000 or more	Add 22.
(L) 40,000,000 or more	Add 24.
(M) 90,000,000 or more	Add 26''].

Option Two

[''(b) Specific Offense Characteristics.

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

Loss (apply the greatest)	Increase in level
(A) More than $2,000	Add 2.
(B) More than 5,000	Add 4.
(C) More than 10,000	Add 5.
(D) More than 20,000	Add 6.
(E) More than 40,000	Add 7.
(F) More than 70,000	Add 8.
(G) More than 120,000	Add 9.
(H) More than 200,000	Add 10.
(I) More than 350,000	Add 11.
(J) More than 500,000	Add 12.
(K) More than 800,000	Add 13.
(L) More than 1,500,000	Add 14.
(M) More than 2,500,000	Add 15.
(N) More than 5,000,000	Add 16.
(O) More than 7,500,000	Add 18.
(P) More than 15,000,000	Add 20.
(Q) More than 25,000,000	Add 22.
(R) More than 50,000,000	Add 24''].

Option Three

[''(b) Specific Offense Characteristics

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

Loss (apply the greatest)	Level of increase
(A) More than $5,000	Add 2.
(B) More than 20,000	Add 4.
(C) More than 60,000	Add 6.
(D) More than 100,000	Add 8.
(E) More than 250,000	Add 10.
(F) More than 500,000	Add 12.
(G) More than 750,000	Add 14.
(H) More than 1,000,000	Add 16.
(I) More than 3,000,000	Add 18.
(J) More than 7,000,000	Add 20.
(K) More than 12,000,000	Add 22.
(L) More than 20,000,000	Add 24.
(M) More than 40,000,000	Add 26.
(N) More than 80,000,000	Add 28''].

* * * * *

Section 2F1.1 is amended by deleting (b)(5) in its entirety, and by deleting (b)(2) in its entirety, and inserting in lieu thereof:

''If sophisticated means were used to impede discovery of the offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''

Section 2F1.1 is amended by inserting the following:

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

(7) If the offense [involved telemarketing conduct and either] victimized 10 or more persons over the age of 55, or targeted persons over the age of 55, increase by 2 levels.''

Section 2F1.1 is amended by adding the following cross reference as (c)(2):

''(2) If the offense involved arson or property destruction 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.''

* * * * *

Section 2T1.1 is amended by deleting (b)(5) in its entirety and inserting in lieu thereof:

''If sophisticated means were used to impede discovery of the offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''

Section 2T4.1 is amended by deleting the tax table, and inserting in lieu thereof, one of the following two options:

Option One

[''Tax Loss	Level
(A) $5,000 or more	8
(B) 10,000 or more	10
(C) 22,500 or more	12
(D) 50,000 or more	14
(E) 120,000 or more	16
(F) 275,000 or more	18
(G) 650,000 or more	20
(H) 1,500,000 or more	22
(I) 3,500,000 or more	24
(J) 8,000,000 or more	26
(K) 18,000,000 or more	28
(L) 40,000,000 or more	30
(M) 90,000,000 or more	32'']

Option Two

[''Tax Loss (apply the greatest)	Level
(A) $2,000 or less	8
(B) More than 2,000	9
(C) More than 5,000	10
(D) More than 10,000	11
(E) More than 20,000	12
(F) More than 40,000	13
(G) More than 70,000	14
(H) More than 120,000	15
(I) More than 200,000	16
(J) More than 350,000	17
(K) More than 500,000	18
(L) More than 800,000	19
(M) More than 1,500,000	20
(N) More than 2,500,000	21
(O) More than 5,000,000	22
(P) More than 7,500,000	24
(Q) More than 15,000,000	26
(R) More than 25,000,000	28
(S) More than 50,000,000	30'']

Issues for Comment

The following issues for comment are provided to facilitate informed comment on the issues raised by the preceding amendment.

(1) Loss Tables: In addition to requesting input on the options in the proposed amendment, the Commission requests comment on whether §§ 2B1.1 and 2F1.1 should have different base offense levels and different starting points and cutting points for the loss tables. If so, the Commission requests comment on what the respective base offense levels should be (for example, level 6 for § 2B1.1 and level 8 for § 2F1.1), on what loss amount should trigger the first increase ($2,000, $5,000, or $10,000 for § 2B1.1; $2,000, $5,000, $10,000, or $20,000 for § 2F1.1), and what the cutting points of the loss tables should be.

(2) Telemarketing offenses: In addition to the issues raised by the proposed amendment, the Commission invites comment on whether the guidelines should provide a broader enhancement for other frauds involving the victimization or targeting of persons over the age of 55. The Commission also invites comment on whether the guidelines should be amended to add a Chapter Three adjustment that provides a two-level increase if the offense, regardless of type, involves the victimization of 10 or more persons over the age of 55 or the targeting of persons over the age of 55. Alternatively, the Commission invites comment on whether § 3A1.1 (Vulnerable Victim) should be amended to provide that it will always apply when an offense involves the victimization of 10 or more persons over the age of 55 or the targeting of persons over the age of 55, or to provide an enhancement for offenses involving telemarketing conduct.

(3) Cross Reference: The Commission invites comment on whether the following cross reference should be adopted: ''If the offense involved a bribe, gratuity, commercial bribe or kickback, or similar conduct, apply § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); § 2C1.5 (Payment to Obtain Public Office); § 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper); § 2C1.7 (Fraud Involving Deprivation of

the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); or § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), whichever is the most applicable, would provide that the cross reference should apply only if the listed offense conduct results in a higher offense level.''

(4) Consolidation of §§ 2B1.1 and 2F1.1: Currently there is sometimes confusion about whether a given offense should be sentenced using § 2B1.1 or § 2F1.1 and which definition of loss should be used. The Commission invites comment on whether §§ 2B1.1 and 2F1.1 should be consolidated into one guideline and, if so, what provisions of each should be retained in the consolidated guideline, and how the two definitions of loss should be combined into one. Alternatively, the Commission invites comment on whether the definitions of loss in §§ 2B1.1 and 2F1.1 should be combined into one definition and, if so, what provisions of each should be retained in the consolidated definition and how the new definition should be worded.

Additional Issues for Comment—Determination of Loss

These issues for comment solicit input on possible changes to the definition of loss in §§ 2B1.1 and 2F1.1 to clarify the Commission's intent, resolve issues raised by case law, and aid in consistency of application.

(1) Standard of causation: Currently, the definition of loss in § 2F1.1 does not specify a standard of causation governing whether unintended or unexpected losses are to be included in the loss calculation under the guidelines. See United States v. Neadle, 72 F.3d 1104, 1108–11 (3d Cir.) (holding defendant fraudulently posted required $750,000 bond to open insurance company accountable for $23 million in property damage from a hurricane that the defendant's insurance company lacked the assets to cover, loss undoubtedly would have gone unreimbursed regardless of defendant's insurance fraud), amended, 79 F.3d 14 (3d Cir.), cert. denied, 117 S. Ct. 238 (1996).

The Commission invites comment on whether to clarify the standard of causation necessary to link a harm with an offense under § 1B1.3(a)(3). More specifically, the Commission requests comment on whether it should include only harm proximately caused (or directly caused) by the defendant's conduct, or whether it should include all harm that would not have occurred ''but for'' the defendant's conduct. Finally, the Commission invites comment on whether, regardless of which causation standard is adopted, the Commission should invite the possibility of a departure when losses far exceed those intended or reasonably foreseen by the defendant.

(2) Market value: The current definition of loss in theft and fraud uses the concept of market value as an important factor in determining loss. The Commission invites comment on whether this concept should be clarified to specify whether retail, wholesale, or black market value is intended, depending on the nature of the offense. In addition, the Commission invites comment on whether market value includes the enhanced value on the black market when it exceeds fair market value, or alternatively, whether black market value should be a departure consideration.

(3) Consequential damages and administrative costs—inclusion of interest: The definition of loss in fraud provides that reasonably foreseeable consequential damages and administrative costs are included in determinations of loss only in cases involving procurement fraud or product substitution. The Commission invites comment on whether consequential damages should be used in determinations of loss in all theft and/or fraud cases, and if so, how such damages should be determined. Alternatively, should the special rule in fraud on the inclusion of consequential damages and administrative costs in loss determinations in procurement fraud and product substitution cases be deleted? The Commission further invites comment on whether, even if consequential damages, generally, are not included in loss, they might be used as an offset against the value of the benefit received by the victim(s).

Although the definition of loss in the theft and fraud guidelines excludes interest ''that could have been earned had the funds not been stolen,'' some courts have interpreted the definition of loss to permit inclusion in loss of the interest that the defendant agreed to pay in connection with the offense. Cf., United States v. Hoyle, 33 F.3d 415, 419 (4th Cir. 1994) (''[I]nterest shall not be included to determine loss for sentencing purposes.'') with United States v. Gilberg, 75 F.3d 15, 18–19 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan); and United States v. Henderson, 19 F.3d 917, 928–29 (5th Cir.) (''Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction.''), cert. denied, 115 S. Ct. 207 (1994).

The Commission invites comment on whether the definition of loss should be clarified to (A) exclude all interest from loss; (B) to permit inclusion of bargained-for interest, or (C) to allow consideration of bargained-for interest as a departure factor only.

(4) Benefit received by victims: Currently, with the exception of payments made and collateral pledged in fraudulent loan cases, the definition of loss does not specify whether benefit received by the victim(s) reduces the amount of the loss. Courts have generally, although not unanimously, held that loss in fraud cases must be reduced by any benefits received by the victim(s). See, e.g.,United States v. Maurello, 76 F.3d 1304, 1311–12 (3d Cir. 1996) (calculating loss by subtracting value of satisfactory legal services from amount of fees paid to bogus lawyer); United States v. Reddeck, 22 F.3d 1504, 1513 (10th Cir. 1994) (reducing loss by value of education received from bogus university); United States v. Mucciante, 21 F. 3d 1228, 1237–38 (2d Cir.) (refusing to reduce loss by amount that defendant ''repaid * * * as part of a meretricious effort to maintain [the victims'] confidences'' in a non-Ponzi scheme), cert. denied 115 S. Ct. 361 (1994).

A Ponzi scheme is a particular kind of criminal offense that may warrant explicit treatment in the definition of loss. A Ponzi scheme is defined as ''a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments.'' Bryan A. Garner, A Dictionary of Modern Legal Usage 671 (2d ed. 1995). Several cases raise some important issues about Ponzi schemes.

The Seventh Circuit was the first to address the issue of calculating loss from a Ponzi scheme. In United States v. Holiusa, 13 F.3d 1043, 1044–45 (6th Cir. 1994), the defendant perpetuated a Ponzi scheme by appropriating $11,625,739 from ''investors'' and returning approximately $8,000,000 in ''interest.'' The appellate court rejected the district court holding that because the defendant intended ''to defraud all of the victims of their money'' he was accountable for the full $11,625,739. Id. at 1045; see also U.S.S.G. § 2F1.1, comment. (n. 7) (''[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.''). The court held that ''[t]he full amount invested was not the probable or intended loss because [the defendant] did not at any point intend

to keep the entire sum. * * * Because he did not intend to and did not keep the full $11.6 million, that amount does not reflect the actual or intended loss, and is not an appropriate basis for sentencing.'' Holiusa, 13 F.3d at 1046–47. The court remanded the case, instructing the district court not to include in loss ''amounts that [the defendant] both intended to and indeed did return to investors.'' Id. at 1048; see also United States v. Wolfe, 71 F.3d 611, 618 (6th Cir. 1995) (following Holiusa).

While the Seventh Circuit saw the concept of intended loss as the focus of Ponzi scheme loss calculation, the Eleventh Circuit took a different approach in United States v. Orton, 73 F.3d 331 (11th Cir. 1996). The Orton defendant had received $525,865.66 from and returned $242,513.65 to the ''investors.'' Twelve investors received more than they had invested; the total lost by the other investors was $391,540.01. Id. at 333. The Eleventh Circuit adopted what it dubbed the ''loss to losing victims'' method: it held the defendant accountable for ''the net losses of all victims who lost all or part of the money they invested.'' Id. at 334. The money that the defendant received from and returned to those investors who ended up with a net gain did not enter into the loss calculation. The Orton defendant was therefore held accountable for $391,540.01.

The Commission invites comment on whether the value of the benefit received by the victim(s) of an offense should be used to reduce the amount of the loss and, if so, how benefits that are more theoretical than real should be valued. The Commission also invites comment on whether the money returned to victim-investors (including ''profits'') in a Ponzi scheme should be included in the calculation of loss. In addition, the Commission invites comment on whether in cases involving fraudulent representations of a defendant's professional license or training, the loss should be reduced by the value of the ''benefit/service'' given to the victim (or to someone else on the victim's behalf) by the defendant, or whether it should be determined based on the full charge for the ''service.''

(5) Diversion of government benefits: The Commission invites comment on how loss should be determined in fraud cases involving the diversion of government program benefits and kickbacks. These cases tend to present special difficulties in determining or estimating loss and determining gain. At the same time, there is a strong societal interest in the integrity of government programs. More specifically, the Commission invites comment on whether the ''value of benefits diverted'' in such cases should be reduced by the ''benefits'' or services provided by the participants. In addition, the Commission invites comment on whether special rules should be devised for such cases to facilitate the determination/estimation of loss or gain, such as a special rule that determines loss or gain based on a percentage of the total value of the benefits diverted and, if so, what percentage should be chosen (such as 5–40%). The Commission also invites comment on whether the nature and seriousness of such offenses require a specific offense characteristic to target such conduct and/or a floor offense level to guarantee a minimum offense level.

(6) Pledged collateral and payments: Currently, the value of pledged collateral is determined based on the net proceeds of the sale of the collateral, or if the sale has not been accomplished prior to sentencing, then the market value of the collateral reduced by the expected cost of the sale. See, e.g., United States v. Barrett, 51 F.3d 86, 90–91 (7th Cir. 1995) (including in loss the drop in value of property securing fraudulently obtained loans). The Commission invites comment on how and when to determine loss in respect to crediting pledged collateral and payments. More specifically, the Commission invites comment on whether to clarify the current rule that only payments made prior to discovery of the offense are to be credited in determining loss, whether to clarify or change the current rule that provides that the value of the pledged collateral is determined by the amount the lending institution has recovered or can expect to recover, and whether to clarify what constitutes ''discovery of the offense.'' In addition, the Commission invites comment on whether the value of the pledged collateral should be determined at the time it is pledged or at the time of discovery of the offense, or some other time. In addition, the Commission invites comment on whether unforeseen (or unforeseeable) decreases (or increases) in the value of the collateral should affect the credit to be used to determine loss.

(7) Gain: Currently gain can be used in lieu of loss in certain limited circumstances under § 2F1.1. Compare United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991) (holding that gain cannot be used if loss is measurable even if loss is zero), with United States v. Haddock, 12 F.3d 950, 960 (10th Cir. 1993) (allowing gain to be used as alternative at all times). The Commission invites comment on whether to clarify the issue of whether or not gain may be used in lieu of loss. If the rule should be clarified, should upward departures be encouraged if the amount of gain substantially exceeds loss? Alternatively, the Commission invites comment on whether gain should be used whenever it is greater than actual or intended loss and, if so, how gain should be determined. The Commission also invites comment on whether there are situations in which gain should be used for theft-type cases under § 2B1.1.

(8) Intended loss: Intended loss is to be used in fraud cases when it is determined to be greater than actual loss. § 2F1.1, comment. (n. 7). Some courts have held that intended loss should be limited by concepts of ''economic reality'' or impossibility. Compare United States v. Moored, 38 F.3d 1419, 1425 (6th Cir. 1994) (focusing on loss that defendant ''realistically intended'') with United States v. Lorenzo, 995 F.2d 1448, 1460 (9th Cir.) (''[T]he amount of [intended] loss * * * does not have to be realistic.''), cert. denied, 510 U.S. 881 (1993).

The Commission invites comment on whether the current rule should be changed to provide that loss is to be based primarily on actual loss, with intended loss available only as a possible ground for departure. The Commission further invites comment on whether, if the substance of the current rule is to be retained, the magnitude of intended loss should be limited by the amount that the defendant realistically could have succeeded in obtaining. More specifically, the Commission invites comment on whether intended loss should be limited by concepts of ''economic reality'' or impossibility, such as in a government sting operation where there can be no loss, or in a false insurance claims case in which the defendant submits a claim for an amount in excess of the fair market value of the item.

(9) Risk of loss: Currently, in some cases defendants obtain loans by fraudulent means but the loss is determined to be zero because of pledged collateral and payments made prior to discovery. The Commission invites comment on whether the definition of loss should be revised to include the concept of risk of loss, so as to ensure higher punishment levels for defendants who commit serious crimes that, because of the value of pledged collateral or payments made before discovery, result in low or even zero loss, and if so, how the risk of loss might be determined. See § 2F1.1, comment. (n. 7).

(10) Loss amounts that over- or understate the significance of the offense: The Commission invites comment on whether to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense. See § 2F1.1, comment. (n. 10). More specifically, the Commission invites comment on whether to specify that where the loss amount included through § 1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic or special rule to reduce the offense level in such cases.

Chapter Two, Part M

19(A). Issue for comment: Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 pertains to biological weapons. It incorporates attempt and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons. It also expands the scope of biological weapons provisions in chapter 10 of title 18 by expanding the meaning of biological agents.

Section 521 creates a new offense at 18 U.S.C. § 2332c. The new offense smakes it unlawful for a person, without lawful authority, to use (or attempt or conspire to use) a chemical weapon against a United States national outside the United States, any person within the United States, or any federal property. The penalty is any term of years or life or, if death results, death or any term of years or life.

The Commission invites comment as to how the guidelines could be amended to include these statutes. One approach could be to amend § 2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) to include these statutes. If the Commission were to select this approach, what changes, if any, would be appropriate to accommodate these offenses?

(B) Issue for comment: Section 702 creates a new offense at 18 U.S.C. § 2332b. The new offense makes it unlawful for a person, committing conduct occurring outside the United States and conduct occurring inside the United States and under specified circumstances, to (1) kill, kidnap, maim, or commit an assault resulting in serious bodily injury or with a dangerous weapon, or (2) create a substantial risk of serious bodily injury to another person by damaging (or conspiring to damage) any real or personal property within the United States. The specified circumstances are using or obstructing interstate or foreign commerce, having the federal government or one of its employees or agents as a victim or intended victim, involving federal property, and committing the offense in the territorial sea of the United States or within the special maritime or territorial jurisdiction of the United States.

The terms of imprisonment under the new offense are (1) death, or life, or any term of years, if death resulted; (2) any term of years, for kidnaping; (3) not more than 35 years, for maiming; (4) not more than 30 years, for assault; (5) not more than 25 years, for damaging or destroying property; (6) for any term of years not exceeding that which would have applied if the offense had been committed, for a conspiracy; and (7) not more than 10 years, for threatening to commit any such offense.

The provision also expressly precludes the imposition of a term of probation for any of the above-described offenses and precludes the imposition of concurrent sentences for terms of imprisonment imposed under this section with any other terms of imprisonment.

The Commission invites comment on how the guidelines should be amended to include this statute. For example, one option could be to amend the statutory index to reference the statute to the guideline for each of the underlying offenses.

Section 2X3.1 Accessory After the Fact

Section 2X4.1 Misprision of Felony

20. Synopsis of Proposed Amendment: This is a three-part amendment. First, this amendment clarifies the application of § 2X3.1 when this guideline is used as the result of a cross reference.

Second, this amendment clarifies the interaction of § 1B1.3 (Relevant Conduct) with §§ 2X3.1 (Accessory After the Fact) and 2X4.1 (Misprision of Felony). In the case of a guideline with alternative base offense levels, as opposed to one base offense level and one or more specific offense characteristics, the question has arisen as to whether the knowledge requirement set forth in Application Note 1 applies to the selection of the appropriate base offense level. Consistent with § 1B1.3, this amendment clarifies that the knowledge requirement does apply.

Finally, this amendment clarifies that, for purposes of §§ 2X3.1 and 2X4.1, if the offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of being an accessory or to the defendant who committed the misprision.

Proposed Amendment: The Commentary to § 2X3.1 captioned ''Application Notes'' is amended in Note 1 by deleting:

''Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to § 1B1.3 (Relevant Conduct).'',

And inserting in lieu thereof:

''However, if the application of § 2X3.1 results from a cross reference or other instruction in another Chapter Two offense guideline (e.g., §§ 2J1.2(c)(1), 2J1.3(c)(1)), the underlying offense is the offense determined by that cross reference or instruction. Determine the offense level (base offense level, specific offense characteristics, and cross references) based on the conduct that was known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to § 1B1.3 (Relevant Conduct). In addition, if the Chapter Two offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of being an accessory or to whom this section applies due to a cross reference or other instruction in another Chapter Two offense guideline.''.

The Commentary to § 2X4.1 captioned ''Application Notes'' is amended in Note 1 by deleting ''Apply the base offense level plus any applicable specific offense characteristics that were'' and inserting in lieu thereof ''Determine the offense level (base offense level, specific offense characteristics, and cross references) based on the conduct that was''; and by inserting at the end the following as the last sentence:

''In addition, if the Chapter Two offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of committing the misprision or to whom this section applies due to a cross reference or other instruction in another Chapter Two offense guideline.''.

Part B—Role in the Offense

Introductory Commentary, § 3B1.1 (Aggravating Role)

21. Synopsis of Proposed Amendment: This two-part amendment (A) revises the Introductory Commentary to Chapter Three, Part B to put the application of §§ 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) in perspective and show the relationship among these adjustments, and (B) revises § 3B1.1. Options 1 and 2 of Part B maintain the current structure of § 3B1.1 but revise the guideline to provide clearer definitions and cure a significant anomaly in the current guideline structure. Option 3 presents an alternative structure similar to the proposed amendment to § 3B1.2.

Following the amendment to § 3B1.2 are several issues for comment designed to elicit suggestions for alternative approaches.

(A) Proposed Amendment: Chapter 3, Part B—Role in the Offense is amended in the first sentence of the Introductory Commentary by inserting ''whether, in committing the offense,'' immediately following ''based upon'';

By deleting ''role the'' immediately before ''defendant'';

By inserting ''(A)'' immediately following ''defendant'';

By deleting ''in committing the offense'' and inserting in lieu thereof ''an aggravating or a mitigating role, (B) abused a position of trust or used a special skill, or (C) used a minor''.

Chapter 3, Part B—Role in the Offense is amended in the second sentence of the Introductory Commentary by deleting ''The determination of a defendant's role in the offense'' and inserting in lieu thereof ''Each of these determinations'';

By deleting ''all'' and inserting in lieu thereof ''the'';

By deleting ''within the scope of'' and inserting in lieu thereof ''for which the defendant is accountable under'';

And by deleting the '','' immediately following ''(Relevant Conduct)'' and inserting in lieu thereof a '';''.

Chapter 3, Part B—Role in the Offense is amended in the Introductory Commentary by deleting the second paragraph in its entirety and inserting in lieu thereof the following:

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) are designed to provide appropriate adjustments in the defendant's offense level based on the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). For § 3B1.1 (Aggravating Role) or § 3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant. If an offense has only one participant, neither § 3B1.1 nor § 3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under § 3B1.1, other participants may warrant a downward adjustment under § 3B1.2, and still other participants may warrant no role adjustment.''.

(B) Proposed Amendment:

Option 1:

Section § 3B1.1 is amended by deleting ''follows:'' and inserting in lieu thereof ''follows (Apply the Greatest):''.

Section § 3B1.1(a) is amended by deleting ''a criminal activity that involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''an offense that involved at least four other participants or was otherwise extensive''.

Section § 3B1.1(b) is amended by deleting ''(but not an organizer or leader) and the criminal activity involve five or more participants or was otherwise extensive'' and inserting in lieu thereof ''(1) of at least [three][four] other participants in the offense, or (2) in an offense that was otherwise extensive''.

Section § 3B1.1(c) is amended by deleting ''in any criminal activity other than described in (a) or (b)'' and inserting in lieu thereof ''of at least one other participant in the offense''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning ''For purposes of this guideline-'';

By deleting ''convicted'' and inserting in lieu thereof ''charged [or specifically identified, so long as the court determines that the offense involved another person]''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by deleting Note 2 in its entirety and inserting in lieu thereof the following as paragraphs two and three of Note 1:

''An 'organizer' or 'leader' is the participant who is primarily responsible for the criminal venture; the person in overall charge of the other participant(s). Generally, the organizer or leader will be the person who plans and organizes the offense, recruits the other key participant(s), makes the key decisions, directs and controls the actions of other participants, and receives the largest share of the proceeds. In some offenses (generally larger scale offenses), there may be more than one organizer or leader. The term 'organizer' or leader is not intended to apply to a person who merely suggests the commission of the offense.

A 'manager' or 'supervisor' is a person, other than an 'organizer' or 'leader,' who exercises managerial or supervisory authority over one or more other participants, either directly or indirectly. A manager or supervisor is at a lower level in the hierarchy than the organizer or leader of the offense, and generally will receive a share of the proceeds that is less than that of the organizer or leader but greater than that of the participant(s) that he or she manages or supervises.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by redesignating Note 3 as Note 2; and inserting the following as the new Note 3:

''3. In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from § 3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under § 3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.

The interaction of §§ 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from § 3B1.1 is applied, an adjustment from § 3B1.2 may not be applied.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by deleting Note 4 in its entirety and inserting in lieu thereof the following:

''4. Illustrations of Circumstances That May Warrant an Upward Departure.

There may be circumstances in which a defendant has a more culpable role in the offense but does not qualify for an upward adjustment under this section. In such circumstances, an upward departure may be considered. The following are examples of circumstances that may warrant an upward departure analogous to an aggravating role adjustment:

(A) A defendant who exercised management responsibility over the property, assets, or activities of a criminal organization but who did not organize, lead, manage, or supervise another participant.

(B) In a controlled substance offense, a defendant who functions at a relatively high level in a drug distribution network but who, nevertheless, may not qualify for an aggravating role adjustment because he or she does not exercise supervisory control over other participants.''.

Option 2:

Section 3B1.1(a) is amended by deleting ''a criminal activity that involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''an offense that involved at least four other participants or was otherwise extensive''.

Section 3B1.1 is amended by deleting subsection (b) in its entirety.

Section 3B1.1 is amended by redesignating subsection (c) as subsection (b); by deleting ''in any criminal activity other than described in (a) or (b)'' and inserting in lieu thereof ''of one other participant in the offense''.

Section 3B1.1 is amended by inserting as an additional paragraph at the end ''In cases falling between (a) and (b), increase by 3 levels.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning ''For purposes of this guideline-''; by deleting ''convicted'' and inserting in lieu thereof ''charged [or specifically identified, so long as the court determines that the offense involved another person]''; and by inserting the following additional paragraphs:

''An 'organizer' or 'leader' is the participant who is primarily responsible for the criminal venture; the person in overall charge of the other participant(s). Generally, the organizer or leader will be the person who plans and organizes the offense, recruits the other key participant(s), makes the key decisions, directs and controls the actions of other participants, and receives the largest share of the proceeds. In some offenses (generally larger scale offenses), there may be more than one organizer or leader. The term 'organizer' or 'leader' is not intended to apply to a person who merely suggests the commission of the offense.

A 'manager' or 'supervisor' is a person, other than an 'organizer' or 'leader,' who exercises managerial or supervisory authority over one or more other participants, either directly or indirectly. A manager or supervisor is at a lower level in the hierarchy than the organizer or leader of the offense, and generally will receive a share of the proceeds that is less than that of the organizer or leader but greater than that of the participant(s) that he or she manages or supervises.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by deleting Note 2 in its entirety and inserting in lieu thereof:

''To qualify for a four-level adjustment under subsection (a), the defendant must be an organizer or leader of an offense involving at least four participants in addition to the defendant. The defendant need not, however, personally exercise supervisory control over all such participants. To qualify for a two-level adjustment under subsection (b), the defendant must have been the organizer, leader, manager, or supervisor of one other participant. In cases falling between subsections (a) and (b), i.e., where the defendant organizes, leads, manages, or supervises more than one participant but whose aggravating role does not rise to the level of that described in subsection (a), a three level upward adjustment is warranted.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by deleting Note 4 in its entirety and inserting in lieu thereof the following:

''4. In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from § 3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under § 3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.

The interaction of §§ 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from § 3B1.1 is applied, an adjustment from § 3B1.2 may not be applied.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. Illustrations of Circumstances That May Warrant an Upward Departure.

There may be circumstances in which a defendant has a more culpable role in the offense but does not qualify for an upward adjustment under this section. In such circumstances, an upward departure may be considered. The following are examples of circumstances that may warrant an upward departure analogous to an aggravating role adjustment:

(A) A defendant who exercised management responsibility over the property, assets, or activities of a criminal organization but who did not organize, [lead], manage, or supervise another participant.

(B) In a controlled substance offense, a defendant who functions at a relatively high level in a drug distribution network but who, nevertheless, may not qualify for an aggravating role adjustment because he or she does not exercise supervisory control over other participants.''.

Option 3:

Section 3B1.1 is deleted in its entirety and inserting in lieu thereof the following:

''*Section 3B1.1. Aggravating Role*

Based on the defendant's role in the offense as a substantially more culpable participant, increase the offense level as follows (Apply the greater):

(a) If the defendant had [a major aggravating] role in [the] [a large-scale] offense, increase by 4 levels.

(b) If the defendant had [a lesser aggravating] role in the offense, increase by 2 levels.

Commentary

Application Notes:

1. For purposes of this guideline—

A ''participant'' is a person who is criminally responsible for the commission of the offense, but need not have been charged [or specifically identified, so long as the court determines that the offense involved another such person]. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

[''Large-scale offense'' means an offense that involved at least five participants, including the defendant, or an offense that involved at least two participants, including the defendant, and is otherwise extensive.]

2. For a major aggravating role adjustment to apply under subsection (a), the defendant must be (A) a substantially more culpable participant, and (B) among the most culpable participants in the offense. The following is a non-exhaustive list of characteristics typically possessed by a defendant with a major aggravating role:

(i) Broad knowledge and understanding of the scope and structure of the offense, and of the identity and role of the other participants in the offense;

(ii) Sophisticated tasks performed;

(iii) [Primary] [major] decision-making authority in the offense;

(iv) [Primary] [major] responsibility and control over the property, finances, and other participants involved in the offense;

(v) The anticipated or actual total compensation or benefit was large in comparison to the total return typically associated with offenses of the same type and scope; and

(vi) Recruitment of other participants in the offense.

3. For a lesser role adjustment to apply under subsection (b), the defendant must (A) be a substantially more culpable participant, and (B) typically possess some of the characteristics associated with a major aggravating role, but not qualify for a major aggravating role adjustment.

4. The determinations of (A) whether a defendant is a substantially more culpable participant warranting an aggravating role adjustment under this section, and (B) if so, whether a major aggravating or lesser aggravating role adjustment is more appropriate, involve case-specific, fact-based assessments of the defendant's conduct in comparison to that of other participants in the offense. [In making these determinations, and particularly in determining whether a defendant in fact has an aggravating role, the court may also wish to compare the conduct of the defendant to the conduct of an average participant in an offense of the same type and scope.] The sentencing judge is in a unique position to make these determinations, based on the judge's assessment of all of the relevant circumstances.

19. In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from § 3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under § 3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.

The interaction of §§ 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from § 3B1.1 is applied, an adjustment from § 3B1.2 may not be applied.''.

Section 3B1.2 Mitigating Role

22(A). Synopsis of Proposed Amendment: This amendment clarifies the operation of the mitigating role adjustment in § 3B1.2, as follows:

1. The language in the guideline is standardized by using the term ''offense'' instead of ''criminal activity.''

2. The ''intermediate,'' three-level reduction is bracketed for possible deletion because it does not provide a meaningfully distinct category and is unnecessary in view of the overlapping ranges feature of the Sentencing Table.

3. A common, umbrella definition for mitigating role; i.e., ''substantially less culpable participant'' is provided. This definition should assist the court in distinguishing mitigating role defendants from those who receive an aggravating or no role adjustment.

4. Commentary in current Application Note 2 that has been viewed as overly restrictive in regard to the minimal role adjustment is removed. In its place, a non-exhaustive list of typical characteristics associated with minimal role is provided. The characteristics are derived from the case law and staff review of mitigating role cases.

5. A somewhat more helpful but still flexible definition of minor role is provided.

6. Commentary is added to reflect Commission intent that district court assessments of mitigating role should be reviewed deferentially.

7. A circuit conflict regarding how mitigating role comparisons should be done—whether within the context of relevant conduct or, also by comparing the defendant to a hypothetical average participant—is addressed. The suggested ''compromise'' resolution (see bracketed language in Application Note 4) is to require the relevant conduct comparison but also suggest/allow the broader, ''average participant'' comparison if the court finds it helpful.

8. Commentary is added to address the burden of persuasion in a common-sense fashion consistent with the overall guidelines structure.

9. Commentary is added to address another circuit conflict regarding whether a court can analogize to mitigating role and downwardly depart when a defendant is ''directed'' to some extent by a government agent or other person who is not a criminally responsible participant. Whether the bracketed language that provides a qualified ''yes'' answer should be included is a policy judgment for the Commission.

10. The existing background commentary is removed because it is largely redundant and unnecessary.

Option 1:

Section § 3B1.2 is amended in the first paragraph by inserting ''as a substantially less culpable participant'' immediately following ''offense''.

Section § 3B1.2(a) is amended by deleting ''was a minimal participant in any criminal activity'' and inserting in lieu thereof ''had a minimal role in the offense''.

Section § 3B1.1(b) is amended by deleting ''was a minor participant in any criminal activity'' and inserting in lieu thereof ''had a minor role in the offense''.

Option 2:

Section § 3B1.2 is amended by inserting ''as a substantially less culpable participant'' immediately following ''offense''.

Section § 3B1.2(a) is amended by deleting ''was a minimal participant in any criminal activity'' and inserting in lieu thereof ''had a minimal role in the offense''.

Section § 3B1.1(b) is amended by deleting ''was a minor participant in any criminal activity'' and inserting in lieu thereof ''had a minor role in the offense''.

Section § 3B1.2 is amended by deleting ''In cases falling between (a) and (b), decrease by 3 levels.''.

Options 1 and 2:

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by deleting Note 1 in its entirety and inserting in lieu thereof the following:

''1. For purposes of this guideline—

'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

'Substantially less culpable participant' means a defendant who (A) is recruited by, or voluntarily assists, another more culpable participant in facilitating the commission of a criminal offense, and (B) performs one or more limited, discrete functions that typically are less critical to the success of the offense.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by deleting Note 2 in its entirety and inserting in lieu thereof the following:

''2. For a minimal role adjustment to apply under subsection (a), the defendant must be (A) a substantially less culpable participant, and (B) among the least culpable participants in the offense. The following is a non-exhaustive list of characteristics typically possessed by a defendant with a minimal role:

(i) Lack of knowledge or understanding of the scope and

structure of the offense, and of the identity or role of the other participants in the offense;

(ii) only unsophisticated tasks performed;

(iii) no material decision-making authority in the offense;

(iv) no, or very minimal, supervisory responsibility over the property, finances, or other participants involved in the offense; and

(v) the anticipated or actual total compensation or benefit was small in comparison to the total return typically associated with offenses of the same type and scope.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by deleting Note 3 in its entirety and inserting in lieu thereof the following:

''3. For a minor role adjustment to apply under subsection (b), the defendant must (A) be a substantially less culpable participant, and (B) typically possess some of the characteristics associated with a minimal role, but not qualify for a minimal role adjustment.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended in Note 4 by inserting in the first sentence ''a'' immediately before ''substantially'' and by deleting ''than'' and inserting in lieu thereof ''participant compared to''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by redesignating Note 4 as Note 5 and inserting the following new Note 4:

''4. The determinations of (A) whether a defendant is a substantially less culpable participant warranting a mitigating role adjustment under this section, and (B) if so, whether a minimal or minor role adjustment is more appropriate, involve case-specific, fact-based assessments of the defendant's conduct in comparison to that of other participants in the offense. [In making these determinations, and particularly in determining whether a defendant in fact has a mitigating role, the court may also wish to measure the defendant's conduct and relative culpability against the elements of the offense of conviction and to compare the conduct of the defendant to the conduct of an average participant in an offense of the same type and scope.] The sentencing judge is in a unique position to make these determinations, based on the judge's assessment of all of the relevant circumstances.

The defendant bears the burden of persuasion in establishing whether the defendant qualifies for a minimal or minor role adjustment under this section. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by inserting the following additional note:

''6. If the defendant would be a substantially less culpable participant but for the fact that the defendant was recruited by a person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer), a downward departure may be warranted. Such a downward departure should not result, without more, in a lower sentence than would result if the defendant had received a mitigating role adjustment under this section.''.

(B) Additional Issues for Comment: (1) The Commission invites comment on whether, as an alternative to separate guidelines for aggravating role (§ 3B1.1) and mitigating role (§ 3B1.2), it should adopt a single or unitary role guideline with aggravating, mitigating, and no role adjustments. What would be the advantages and/or disadvantages of such an approach in comparison to the current structure?

(2) Focusing on aggravating role, Option 3, the Commission invites comment on characteristics, in addition to those suggested, that reliably distinguish among aggravating role adjustments, as well as those characteristics that reliably distinguish defendants with an aggravating role from those warranting no role adjustment or a mitigating role adjustment.

(3) Focusing on mitigating role, the Commission invites comment on characteristics, in addition to those suggested in the proposed amendment, that distinguish defendants with a mitigating role from defendants who do not merit such an adjustment. Additionally, the Commission invites suggestions regarding characteristics, factors, and/or definitional language that would better provide a meaningful distinction between minimal role and minor role. Finally, the Commission invites comment on whether it should expressly state whether ''couriers'' or ''mules'' receive a minimal, minor, or no role adjustment.

Section 3C1.1 Obstructing or Impeding the Administration of Justice

23. Synopsis of Proposed Amendment: This amendment addresses a split in the circuits over the meaning of the last sentence of Application Note 1 in the Commentary to the Chapter Three adjustment for obstruction of justice. The issue is whether that sentence requires the use of a heightened standard of proof when the court applies an enhancement for perjury. Compare United States v. Montague, 40 F.3d 1251 (D.C. Cir. 1994) (applying the clear and convincing standard) with United States v. Zajac, 62 F.3d 145 (6th Cir. 1995) (applying the preponderance of the evidence standard). The amendment changes the last sentence of Application Note 1 so that it no longer suggests the use of a heightened standard of proof. Instead, it clarifies that the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice.

Second, subdivision (i) of Application Note 3 in § 3C1.1 is deleted as unnecessary. This subdivision is not helpful in contrasting the types of conduct that are serious enough to warrant an enhancement from those that are not serious enough to warrant the enhancement. The statutes referred to in subsection (i) include a hodgepodge of provisions. Some have very marginal, if any, relevance, e.g., 18 U.S.C. § 1507 (picketing or parading); and some, e.g., 18 U.S.C. § 1514 (civil action to restrain harassment of a victim or witness), and 1515 (definitions for certain provisions; general provision) have no relevance at all.

Third, this amendment adds an additional sentence at the end of Application Note 4 in § 3C1.1 to clarify the meaning of the phrase ''absent a separate count of conviction.'' A panel of the Seventh Circuit, although reaching the correct result, has examined this phrase and found it to be unclear. See United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994).

Fourth, this amendment moves the last two sentences of Application Note 6 into a separate Application Note 7. This clarifies that the guidance provided in these two sentences applies to a broader set of cases than the cases described in the first two sentences of Application Note 6.

Proposed Amendment: The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 1 by deleting in the second sentence ''such testimony or statements should be evaluated in a light most favorable to the defendant'' and inserting the following in lieu thereof:

''The court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in

Note 3(h) by deleting the ''; '' and inserting in lieu thereof '', ''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 3 by deleting subsection (i) in its entirety.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 by deleting ''The following is a non-exhaustive list of examples of the'' and inserting in lieu thereof ''Some'';

By deleting ''that, absent a separate count of conviction for such conduct,'' and inserting in lieu thereof ''ordinarily'';

By deleting ''but ordinarily can appropriately be sanctioned by the determination of the particular'' and inserting in lieu thereof ''but may warrant a greater''; by inserting immediately following ''guideline range'' the following:

''. However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 6 in the second sentence by inserting ''(the offense with respect to which the obstructive conduct occurred),'' immediately before ''the count for the obstruction'' and by redesignating as new Note 7 the second and third sentences.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Note 7 as Note 8.

Section 3E1.1 Acceptance of Responsibility

24. Synopsis of Proposed Amendment: This amendment revises § 3E1.1 (Acceptance of Responsibility) in a number of key respects to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional one-level reduction in subsection (b), based on the defendant's acceptance of responsibility. First, this amendment eliminates many of the considerations currently listed as appropriate to consider in determining whether the defendant qualifies for the two-level reduction under subsection (a), reserving many of those considerations for a determination of whether the defendant qualifies for the additional one-level reduction under subsection (b).

Second, this amendment conditions receipt of the two-level reduction on the timeliness of the defendant's admission of conduct comprising the offense of conviction, the defendant's admission or failure to falsely deny relevant conduct, and the defendant's not having committed, after filing of charges on the instant offense, conduct that, under the totality of the circumstances, negates an inference of acceptance of responsibility. Therefore, obstructive conduct does not automatically preclude receipt of the two-level reduction if the totality of the circumstances indicate that the defendant has accepted responsibility for the offense.

Third, this amendment provides for an additional one-level reduction if the defendant qualifies for the two-level reduction and the defendant has demonstrated extraordinary acceptance of responsibility, based on the sentencing judge's consideration of a variety of considerations, including those listed in Application Note 2, as well as the sentencing judge's consideration of the totality of the circumstances. Finally, the amendment provides a number of options with respect to whether the commission of obstructive conduct or a new offense should disqualify the defendant from receiving the additional one-level reduction.

Proposed Amendment: Section 3E1.1 is amended by deleting it in its entirety and inserting in lieu thereof:

''§ 3E1.1. Acceptance of Responsibility

(a) If the defendant demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant clearly demonstrates extraordinary acceptance of responsibility, decrease the offense level by 1 additional level.

Commentary

Application Notes

1. A defendant qualifies under subsection (a), if the defendant:

(a) Truthfully admits, in a timely manner, the conduct comprising the offense(s) of conviction, and truthfully admits or does not falsely deny any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility; and

(b) Has not, after the filing of charges on the instant offense, committed conduct that, under the totality of the circumstances, negates an inference of acceptance of responsibility. Conduct that may negate an inference of acceptance of responsibility under this paragraph is (1) conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice), i.e., obstructive conduct, or (2) the commission of an offense by the defendant. Such conduct does not necessarily disqualify the defendant from receiving a reduction in offense level under this section. In determining whether such conduct disqualifies the defendant from receiving a reduction in offense level under this section, the court should consider the nature, seriousness, and timing of the conduct, as well as the extent to which commission of the conduct is inconsistent with acceptance of responsibility.

2. In the case in which the defendant qualifies for the 2-level reduction under subsection (a) and the offense level determined prior to the operation of subsection (a) is level 16 or greater, the court may grant an additional 1-level reduction under subsection (b) if the court determines, under the totality of the circumstances, that the defendant has clearly demonstrated extraordinary acceptance of responsibility. The sentencing judge is in a unique position to make this determination. For this reason, this determination is entitled to great deference on review. In determining whether the defendant has clearly demonstrated extraordinary acceptance of responsibility for purposes of subsection (b), appropriate considerations include the following:

(a) Fully cooperating with the probation officer in the preparation of the presentence report.

Note: This includes appearing for interview as required, providing accurate background information, including information regarding the defendant's juvenile and adult criminal record, and providing complete financial information as requested, in a timely fashion. With respect to discussion of the offense of conviction and

relevant conduct, the provisions set forth in Application Note 1(a) above control.

(b) Timely notifying authorities of his intention to enter a plea of guilty, in a sufficiently prompt manner to permit the government to avoid preparing for trial and to permit the court to allocate its resources efficiently.

Note: The notification to authorities of the intention to plead guilty should occur particularly early in the case. For example, a defendant who pleads guilty one day before his scheduled trial date may qualify under subsection (a), but such plea will not ordinarily be timely enough to constitute an indicia of extraordinary acceptance of responsibility under this paragraph.

[(c) Voluntary termination or withdrawal from criminal conduct or associations;]

[(d) Voluntary payment of restitution prior to adjudication of guilt;]

[(e) Voluntary surrender to authorities promptly after commission of the offense;]

[(f) Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;]

[(g) Voluntary resignation from the office or position held during the commission of the offense;]

[(h) Post-offense rehabilitative efforts (e.g., counseling or drug treatment); and]

[(i) Voluntary stipulation to administrative deportation, in the case of a deportable alien].

The defendant may qualify for the additional 1-level decrease under subsection (b) without satisfying all of the factors listed in this Application Note. However, satisfaction by the defendant of one or more of the factors listed in this Application Note will not be sufficient under subsection (b) if the court determines that, under the totality of the circumstances, the defendant has not clearly demonstrated extraordinary acceptance of responsibility.

A defendant who, after the filing of charges on the instant offense, commits obstructive conduct or a new offense [may not receive the additional 1-level decrease under subsection (b)] [ordinarily will not qualify for the additional 1-level decrease under subsection (b)] [will qualify for the additional 1-level decrease under subsection (b) only in an extraordinary case].

3. A reduction in offense level under this section is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

Background: Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and clearly demonstrates extraordinary acceptance of responsibility based on the factors listed in Application Note 2 or equivalent factors. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). The reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) is sufficient at offense level 15 or lower because the 2-level decrease provides a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table.

The reduction of offense level provided by this section recognizes legitimate societal interests. A defendant who timely demonstrates acceptance of responsibility for his offense is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility. A defendant who further demonstrates extraordinary acceptance of responsibility is likewise deserving of additional recognition of his extraordinary acceptance.''.

Section 3E1.1 Acceptance of Responsibility

25. Synopsis of Proposed Amendment: This amendment clarifies that the commission of a new offense while pending trial or sentencing on the instant offense is a negative indicant of acceptance of responsibility. This provision does not require that the new offense be related or similar to the instant offense. Currently, there is a circuit split on this issue. Compare *United States* v. *Morrison*, 983 F.2d 730 (6th Cir. 1993)(consideration of post-indictment theft and positive drug test inappropriate in determining whether defendant accepted responsibility for firearms violations) with, e.g., *United States* v. *Watkins,* 911 F.2d 983 (5th Cir. 1990)(upholding denial of acceptance for defendant convicted of possessing stolen treasury checks who used cocaine pending sentencing).

Proposed Amendment: The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 4 by inserting the following as the last sentence:

''Similarly, the commission of an offense by the defendant while pending trial or sentencing on the instant offense, whether or not that offense is similar to the instant offense, ordinarily indicates that the defendant has not accepted responsibility for the instant offense.''.

Section 3E1.1 Acceptance of Responsibility

26. Synopsis of Proposed Amendment: This amendment revises § 3E1.1 (Acceptance of Responsibility) to remove the restriction that currently prohibits the application of the additional 1-level decrease in subsection (b) for offense levels 15 and lower. This amendment would allow consideration of the additional 1-level decrease for defendants at all offense levels. Consequently, eligibility for alternatives to incarceration would be increased for defendants at offense levels of 15 or less who receive a 3 level reduction for acceptance of responsibility.

Proposed Amendment: Section 3E1.1(b) is amended by deleting ''the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant'' and inserting in lieu thereof ''and''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 6 by deleting ''at offense level 16 or greater prior to the operation of subsection (a)''.

The Commentary to § 3E1.1 captioned ''Background'' is amended in the second paragraph by deleting ''at offense level 16 or greater prior to operation of subsection (a)''; and by deleting ''Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in

subsection (b) within the applicable guideline range.''.

Section 4B1.3 is amended by deleting ''13, unless § 3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11'' and inserting ''level 13 (decreased by any applicable adjustment from § 3E1.1 (Acceptance of Responsibility)).''.

Section 4B1.2 Definitions of Terms Used in Section 4B1.1

27. Synopsis of Proposed Amendment: This amendment resolves a circuit conflict with respect to definitions of terms used in the Chapter Four career offender guideline and addresses several related issues.

(1) Miscellaneous Controlled Substance Offenses—This amendment addresses the question of whether the offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are ''controlled substance offenses'' under the career offender guideline. A panel of the Fifth Circuit concluded that possession of a listed chemical with intent to manufacture a controlled substance is a controlled substance offense under § 4B1.2. *U.S.* v. *Calverley,* 11 F.3d 505 (5th Cir. 1993). (The panel questioned the precedent on which the decision was based and recommended reconsideration en banc; on reconsideration en banc, the Fifth Circuit declined to address the merits of the issue.) In contrast, the Tenth Circuit has concluded that possession of a listed chemical with intent to manufacture a controlled substance is not a controlled substance offense. *United States* v. *Wagner,* 994 F.2d 1467, 1475 (10th Cir. 1993). This amendment makes such offenses a ''controlled substance offense'' under the career offender guideline. There seems such an inherent connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.

(2) Additional Related Issues—The first related issue is whether the Commission should amend § 4B1.2 to clarify that certain offenses are ''crimes of violence'' or ''controlled substance offenses'' if the offense of conviction established that the underlying offense was a ''crime of violence'' or ''controlled substance offense.'' See *United States* v. *Baker,* 16 F.3d 854 (8th Cir. 1994); *United States* v. *Vea-Gonzalez,* 999 F.2d 1326 (9th Cir. 1993), effectively overruled on other grounds by *Custis* v. *United States,* 114 S.Ct. 1732 (1994).

The second issue is whether to make the following nonsubstantive changes to § 4B1.2 to improve the internal consistency of the guidelines: (A) adding the phrase ''punishable by imprisonment for a term exceeding one year'' in subsection (2) to make it consistent with subsection (1); and (B) conforming the second paragraph of Application Note 2 of § 4B1.2 to the language of §§ 2K1.3 and 2K2.1.

Proposed Amendment: Section § 4B1.2(1) is amended by inserting a '','' immediately after ''state law'' and immediately after ''one year'';

By redesignating ''§ 4B1.2(1)'' as ''§ 4B1.2(a)''; by redesignating ''(i)'' as ''(1)'' and redesignating ''(ii)'' as ''(2)''.

Section § 4B1.2(2) is amended by deleting ''a'' immediately after ''under'';

By deleting ''prohibiting'' and inserting in lieu thereof '', punishable by imprisonment for a term exceeding one year, that prohibits'' and by redesignating ''(2)'' as ''(b)''.

Section § 4B1.2(3) is amended by redesignating ''(A)'' as ''(1)'', redesignating ''(B)'' as ''(2)'' and by redesignating ''§ 4B1.2(3)'' as ''§ 4B1.2(c)''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning ''For purposes of this guideline-'';

By deleting ''The terms 'crime' '' and inserting in lieu thereof '' 'Crime' ''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 2 by deleting in the second sentence ''whereas'' immediately following ''included'' and inserting in lieu thereof ''as 'crimes of violence' if'';

By deleting the last sentence from the first paragraph;

By deleting from the first sentence of the second paragraph ''The term 'crime' '' and inserting in lieu thereof '' 'Crime' '';

By deleting in the second sentence of the second paragraph ''has'' immediately following ''if the defendant'' and inserting in lieu thereof ''had'';

And by inserting at the end the following:

''Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a 'controlled substance offense.'

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a 'controlled substance offense.'

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a 'crime of violence' or 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a 'crime of violence' or 'controlled substance offense.' Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under § 4A1.2 (Definitions and Instruction for Computing Criminal History)).''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended by deleting the numbers corresponding to Notes ''2'' and ''3''; and by inserting the following as new Note 2:

''2. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended by redesignating Note 4 as Note 3.

28. Issue for Comment: The Commission requests public comment on whether, and in what manner, it should address by amendment the following circuit court conflicts:

(1) Whether an upward departure may be based on dismissed or uncharged conduct that is related to the offense of conviction but is not relevant conduct. Compare *United States* v. *Figaro,* 935 F.2d 4 (1st Cir. 1991) (permitting consideration of uncharged conduct related to the offense of conviction); *United States* v. *Kim,* 896 F.2d 678 (2d Cir. 1990) with *United States* v. *Thomas,* 961 F.2d 1110 (3d Cir. 1992) (court cannot consider uncharged conduct).

(2) Whether information provided in connection with a § 1B1.8 agreement

may be placed in the presentence report or used to affect conditions of confinement. (Amendment would implicate § 1B1.8 (Use of Certain Information).) Compare *United States* v. *Marsh,* 963 F.2d 72, 74 (5th Cir.1992) (implying court may receive information); *United States* v. *Malvito,* 946 F.2d 1066, 1068 (4th Cir.1991) (same) with *United States* v. *Abanatha,* 999 F.2d 1246, 1249 (8th Cir. 1993), cert. denied 114 S.Ct. 1549 (1994) (information should not be included in PSR because the Fifth Amendment precludes information from being considered at sentencing or allowed to affect conditions of confinement).

(3) Whether drug quantities possessed for personal use should be aggregated with quantities distributed or possessed with intent to distribute. (Amendment would implicate § 1B1.3 and § 2D1.1.) Compare *United States* v. *Antonietti,* 86 F.3d 206, 209 (11th Cir.); *United States* v. *Innamorati,* 996 F.2d 456, 492 (1st Cir. 1993), cert. denied, 510 U.S. 955 (1993) with *United States* v. *Rodriquez-Sanchez,* 23 F.3d 1488 (9th Cir. 1994) (personal use amounts are not same course of conduct as quantities possessed for distribution).

(4) Whether a federal prison camp is a ''similar facility'' under § 2P1.1(b)(3). Compare *United States* v. *Hillstrom,* 988 F.2d 448 (3d Cir. 1993), cert. denied, 115 S. Ct. 1382 (1995) with *United States* v. *Sarno,* 24 F.3d 618 (4th Cir. 1994) (minimum security prison is a secure facility); *United States* v. *Tapia,* 981 F.2d 1194 (11th Cir.), cert. denied, 113 S. Ct. 2979 (1993). (Although the Third Circuit initially disagreed with the Fourth, Fifth, Ninth, Tenth, and Eleventh circuits, the district court on remand held that a federal prison camp is not a ''similar facility'' within the meaning of the escape guideline. *United States* v. *Hillstrom,* 837 F.Supp. 1324 (M.D.Pa. 1993); aff'd, 37 F.3d 1490 (unpublished).).

(5) Whether the two-level enhancement at § 2F1.1(b)(3)(A) requires that the defendant misrepresent his authority to act on behalf of a charitable or governmental organization. Compare *United States* v. *Frazier,* 53 F.3d 1105, 1123–13 (10th Cir. 1995) (enhancement does not apply to chairman of educational organization who misapplied funds because he made no misrepresentation of his authority to act on behalf of the organization) with *United States* v. *Marcum,* 16 F.3d 599, 603 (4th Cir.), cert. denied, 115 S. Ct. 137 (1994) (applying enhancement to president of charitable organization who embezzled fund from the organization).

(6) Whether ''victim of the offense'' under § 3A1.1 refers only to victim of the offense of conviction or to victim of any relevant conduct. Compare *United States* v. *Echevarria,* 33 F.3d 175 (2d Cri. 1994) (vulnerable victim need not be victim of the offense of conviction); *United States* v. *Roberson,* 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 961 (1989) with *United States* v. *Dixon,* 66 F.3d 133 (6th Cir. 1995); *United States* v. *Wright,* 12 F.3d 70 (6th Cir. 1993), cert. denied 116 S. Ct. 320 (1995).

(7) Whether a defendant's failure to admit to use of a controlled substance amounts to willful and material obstruction of justice under § 3C1.1 (Obstruction of Justice). Compare *United States* v. *Garcia,* 20 F.3d 670 (6th Cir. 1994), cert. denied, 115 S. Ct. 1120 (1995) with *United States* v. *Belletiere,* 971 F.2d 961 (3d Cir. 1992); *United States* v. *Thompson,* 944 F.2d 1331 (7th Cir. 1991), cert. denied, 502 U.S. 1097 (1992).

(8) Whether time in a community treatment center is a ''sentence of imprisonment'' under § 4A1.2(e)(1). Compare *United States* v. *Rasco,* 963 F.2d 132 (6th Cir.), cert. denied 113 S. Ct. 238 (1992) (detention in community treatment facility following revocation of parole is ''incarceration''); *United States* v. *Vanderlaan,* 921 F.2d 257 (10th Cir. 1990), cert. denied, 499 U.S. 954 (1991) (placement in federal special treatment facility during period of commitment to federal prison is confinement and is considered ''sentence of imprisonment'') with *United States* v. *Latimer,* 991 F.2d 1509 (9th Cir. 1993) (placement in community treatment facility following revocation of parole is not considered ''incarceration''); *United States* v. *Urbizu,* 4 F.3d 636 (8th Cir. 1993) (dicta) (placement in halfway house not categorized as confinement).

(9) Whether convictions that are erased for reasons unrelated to innocence or errors of law (regardless of whether they are termed by statute as ''set aside'' or ''expunged'') should be counted for purposes of criminal history. (Amendment would implicate § 4A1.2, comment. n. 10). Compare *United States* v. *McDonald,* 991 f.2d 866 (D.C. Cir. 1993) (examining effect of set aside D.C. Youth Rehabilitation Act conviction and noting it is automatic and unrelated to innocence) with *United States* v. *Beaulieau,* 959 F.2d 375 (2d Cir. 1992) (do not count conviction where Vermont set aside statute intended to erase conviction from record; such a set aside is equivalent to expungement); *United States* v. *Hidalgo,* 932 F.2d 805 (9th Cir. 1991) (do not count conviction subject to California Youth Act set aside provision releasing youth from all penalties and disabilities; treat as an expungement provision).

(10) Whether a court may impose a fine for costs of imprisonment under § 5E1.2(c). Compare *United States* v. *Sellers,* 42 F.3d 116 (2d Cir. 1994), cert. denied, 116 S. Ct. 93 (1995) (§ 5E1.2 does not require district court to impose a punitive fine in order to impose a fine for costs of imprisonment); *United States* v. *Turner,* 998 F.2d 534 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993) with *United States* v. *Corral,* 964 F.2d 83 (1st Cir. 1992) (court cannot impose fine for cost of imprisonment when defendant is indigent); *United States* v. *Labat,* 915 F.2d 603 (10th Cir. 1990) (cost of imprisonment is additional fine that cannot be imposed unless court first imposes a punitive fine).

(11) Whether a departure above a statutorily required minimum sentence should be measured from a defendant's guideline range or the applicable mandatory minimum. (Amendment would implicate §§ 5G1.1, 5K2.0, 4A1.3.) Compare *United States* v. *Carpenter,* 963 F.2d 736 (5th Cir. 1992) (appropriate for court to depart upwards from the range within which the mandatory minimum falls); *United States* v. *Doucette.* 979 F.2d 1042, 1047 (5th Cir. 1992) with *United States* v. *Rodriguez-Martinez,* 25 F.3d 797 (9th Cir. 1994) (if the court determines that a departure above a mandatory minimum is warranted, it should calculate the departure from the defendant's guideline range).

(12) Whether the district court can depart to the career offender level based on the defendant's criminal history, although the defendant does not otherwise qualify for the career offender enhancement. Compare *United States* v. *Ruffin,* 997 F.2d 343, 347 (7th Cir. 1993)(''Only real convictions support a sentence under § 4B1.1.''); *United States* v. *Faulkner,* 952 F.2d 1066, 1072–73(9th Cir. 1991)(career offender guidelines operate as an ''on/off'' switch and cannot be used for departure purposes if defendant does not qualify as a career offender) with *United States* v. *Cash,* 983 F.2d 558, 562 (4th Cir. 1992)(departure reasonable when defendant would be career offender but for constitutional invalidity of one prior conviction; § 4A1.3's level by level consideration is implicit in the departure); *United States* v. *Hines,* 943 F.2d 348, 354–55 (4th Cir. 1991)(departure reasonable when defendant's two prior murder convictions were consolidated for sentencing).

(13) Whether multiple criminal incidents occurring over a period of time may constitute a single act of

aberrant behavior warranting departure. Compare *United States* v. *Grandmaison,* 77 F.3d 555 (1st Cir. 1996) (includes multiple acts leading up to the defendant's commission of the offense); *United States* v. *Takai,* 941 F.2d 738 (9th Cir. 1991) (multiple incidents over six-week period can be ''single act of aberrant behavior'') with *United States* v. *Marcello,* 13 F.3d 752 (3d Cir. 1994) (requires spontaneous, thoughtless, single act involving lack of planning); *United States* v. *Williams,* 974 F.2d 25 (5th Cir. 1992), cert. denied, 507 U.S. 934 (1993) (same).

(14) Whether collateral consequences of a defendant's conviction can be the basis of a downward departure. Compare *United States* v. *Smith,* 27 F.3d 649 (D.C. Cir. 1994) (objectively more serious prison conditions faced by deportable aliens may warrant downward departure) with *United States* v. *Sharapan,* 13 F.3d 781 (3d Cir. 1994) (demise of defendant's business, employees' loss of jobs, and economic harm do not support downward departure); *United States* v. *Restreppo,* 999 F.2d 640 (2d Cir.), cert. denied, 114 S. Ct. 405 (1993) (disallowing departure based on collateral consequences of being a deportable alien).

(15) Whether the definition of ''violent offense'' under § 5K2.13 (Diminished Capacity) is the same as ''crime of violence'' under § 4B1.2. Compare *United States* v. *Poff,* 926 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 827 (1991); *United States* v. *Maddalena,* 893 F.2d 815 (6th Cir. 1990), cert. denied, 502 U.S. 882 (1991) with *United States* v. *Weddle,* 30 F.3d 532 (4th Cir. 1994); *United States* v. *Chatman,* 986 F.2d 1446 (D.C. Cir. 1993)

Section 5B1.3 Conditions of Probation

29(A). Synopsis of Proposed Amendment: This amendment revises §§ 5B1.3, 5B1.4, and 5D1.3 to reflect required conditions of probation and supervised release that have been added by the Antiterrorism and Effective Death Penalty Act of 1996 and other statutory provisions. Section 5B1.4 is amended to list both statutorily required and discretionary conditions in a way that will facilitate their application in individual cases.

Proposed Amendment: Section 5B1.3(a) is amended by deleting:

''(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).''

And inserting in lieu thereof:

''(a) If a term of probation is imposed, the court is required by statute to impose the following conditions:

(1) That the defendant not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). This condition is reflected in § 5B1.4(a) (condition #1);

(2) That the defendant not unlawfully possess a controlled substance. 18 U.S.C. § 3563(a)(3). This condition is reflected in a broader form in § 5B1.4(a) (condition #8);

(3) In the case of a defendant convicted for the first time of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. 18 U.S.C. § 3563(a)(4). This condition is reflected in a broader form in § 5B1.4(b) (condition #25);

(4) That the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. § 3563(a)(5). This condition is reflected in a broader form in § 5B1.4(a) (condition #8) and § 5B1.4(b) (conditions #22 and #23);

(5) That the defendant make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. 18 U.S.C. § 3563(a)(6)(A). This condition is reflected in a broader form in § 5B1.4(b) (condition #18);

(6) That the defendant pay the special assessment imposed under 18 U.S.C. § 3013. 18 U.S.C. § 3563(a)(6)(B). This condition is reflected in § 5B1.4(a) (condition #15);

(7) That the defendant notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments. 18 U.S.C. § 3563(a)(7). This condition is reflected in § 5B1.4(a) (condition #16);

(8) If the court has imposed a fine, that the defendant pay the fine or adhere to a court-established installment schedule. 18 U.S.C. § 3563(a). This condition is reflected in § 5B1.4(b) (condition #19).''.

Section 5B1.3(b) is renumbered as § 5B1.3(c); and § 5B1.3(c) is renumbered as § 5B1.3(b).

Section 5B1.3(b) (formerly (c)) is amended by deleting ''a fine,''; and by inserting ''(pertaining to discretionary conditions of probation)'' immediately after ''3563(b)''.

Section 5B1.3(c) (formerly (b)) is amended by deleting ''Recommended conditions are set forth in § 5B1.4.''.

Section 5B1.3(d) is amended by inserting at the ''This condition is reflected in § 5B1.4(c) (condition #31).''.

Section 5B1.3 is amended by inserting after subsection (d) the following new subsection:

''(e) Recommended conditions of probation are set forth in § 5B1.4 (Recommended Conditions of Probation and Supervised Release).''.

The Commentary to § 5B1.3 is deleted in its entirety, including the title.

Section 5B1.4(a) is amended by deleting ''(1–13)''; by deleting ''generally''; by deleting '':'' and inserting in lieu thereof ''.'' and by inserting at the end the following ''A condition (or a part of a condition) designated by an asterisk may be statutorily required in all or some cases:''.

Section 5B1.4(a) is amended by renumbering subdivisions (1) through (13) as subdivisions (2) through (14), respectively; and by inserting before subdivision (2) (formerly (a)(1)) the following: ''(1) the defendant shall not commit another federal, state, or local crime;*''

Section 5B1.4(a)(5) (formerly (a)(4)) is amended by deleting ''his'' and inserting in lieu thereof ''the defendant's''; and by inserting immediately following ''responsibilities'' the following: ''(including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living)''.

Section 5B1.4(a)(7) (formerly (a)(6)) is amended by deleting ''within seventy-two hours of'' and inserting in lieu thereof ''at least ten days prior to''; and by deleting ''in'' and inserting in lieu thereof ''of''.

Section 5B1.4(a)(8) (formerly (a)(7)) is amended by deleting ''narcotic or other''; by deleting ''such'' and inserting

in lieu thereof ''any controlled''; by deleting ''substance'' and inserting in lieu thereof ''substances''; and by inserting an asterisk immediately following ''physician;''.

Section 5B1.4(a)(11) (formerly (a)(10)) is amended by deleting ''him'' and inserting in lieu thereof ''the defendant''.

Section 5B1.4(a)(14) (formerly (a)(13)) is amended by deleting ''.'' at the end and inserting in lieu thereof '';''.

Section 5B1.4(a) is amended by inserting at the end the following new subdivisions (15) and (16):

''(15) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;*

(16) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.*''.

Section 5B1.4(b) is amended by deleting in the first sentence ''(14–24)''; by deleting ''either''; by deleting ''or required by law under'' and inserting in lieu thereof ''in''; by deleting '', or may be appropriate in a particular case'' and inserting in lieu thereof ''and, in addition, may otherwise be appropriate in particular cases. A condition (or a part of a condition) designated by an asterisk may be statutorily required in all or some cases''; and by renumbering subdivisions (14) through (18) as (17) through (21) respectively; by renumbering subdivisions (19) through (22) as (26) through (29), respectively; and by renumbering subdivision (23) as subdivision (22); and by renumbering subdivision (25) as subdivision (30).

Section 5B1.4(b)(17) (formerly (b)(14)) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''—''.

Section 5B1.4(b)(18) (formerly (b)(15)) is amended by deleting ''of'' immediately following ''order'' and inserting in lieu thereof ''or condition requiring''; by deleting '' it is recommended that the court impose'' and inserting in lieu thereof ''—''; by deleting ''See § 5E1.1 (Restitution).'' and by inserting in lieu thereof an asterisk; ; and by inserting at the end the following new paragraph:

''If any restitution obligation remains unpaid at the commencement of a term of supervised release, it shall be a condition of supervised release that the defendant pay any such restitution in accordance with the schedule of payments ordered by the court.''.

Section 5B1.4(b)(19) (formerly (b)(16)) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''—''; by inserting an asterisk after ''the fine.''; and by adding at the end the following new paragraph:

''If any fine obligation remains unpaid at the commencement of a term of supervised release, it shall be a condition of supervised release that the defendant pay any such fine in accordance with the schedule of payments ordered by the court.''

Section 5B1.4(b) is amended by inserting after subdivision (22) (formerly subdivison (b)(23)) the following new subdivision (23):

''(23) Drug Testing.

Unless the court determines that there is a low risk of future substance abuse by the defendant—a condition requiring the defendant to submit to one drug test within fifteen days of release on [probation][supervised release] and at least two periodic drug tests thereafter, as determined by the court.*

Note: This condition is not necessary if the substance abuse program participation condition (condition #22) is imposed.''.

Section 5B1.4(b)(20) (formerly (b)(17)) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''——''.

Section 5B1.4(b)(21) (formerly (b)(18)) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''——''.

Section 5B1.4(b)(22) (formerly (b)(23)) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''—''.

Section 5B1.4(b)(24) is amended by deleting '', it is recommended that the court impose'' and inserting in lieu thereof ''——''.

Section 5B1.4(b) is amended by inserting the following as new subdivision (25):

''(25) Domestic Violence Program Participation.

In the case of a defendant convicted of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), a condition requiring the defendant to attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant.*''

Section 5B1.4 is amended by inserting the following immediately after new subdivision (25);

''(c) Additional Conditions.

The following ''special conditions'' may be appropriate on a case-by-case basis:''

Section 5B1.4 (c)(30) (formerly (b)(25)) is amended by deleting ''If'' and inserting in lieu thereof ''A condition imposing a curfew may be imposed if''; and by deleting '', a condition of curfew is recommended''.

Section 5B1.4 is amended by inserting after subdivision (30) (formerly subdivision (b)(25)) the following new subdivision:

''(31) Intermittent Confinement

Intermittant confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation.

Note: This condition may not be order as a condition of supervised release.''.

The commentary to 5B1.4 captioned ''Application Note'' is amended in Note 1 by deleting ''his'' wherever it appears and inserting in lieu thereof ''the defendant's''; and by inserting in the last sentence a comma immediately following ''home detention''.

Section 5D1.3 is amended by deleting subsection (a) in its entirety and inserting in lieu thereof:

''(a) If a term of supervised release is imposed, the court is required by statute to impose the following conditions:

(1) that the defendant not commit another federal, state, or local crime during the term of supervised release. 18 U.S.C. § 3583 (d). This condition is reflected in § 5B1.4(a) (condition #1);

(2) that the defendant not unlawfully possess a controlled substance. 18 U.S.C. § 3583 (d). This condition is reflected in § 5B1.4(a) (condition #8);

(3) in the case of a defendant convicted for the first time of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. 18 U.S.C. § 3583(d). This condition is reflected in § 5B1.4(b) (condition #25);

(4) that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test with 15 day of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but this condition may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. § 3583(d). This

condition is reflected in a broader form in § 5B1.4(a) (condition #8), and § 5B1.4(b) (conditions #22 and #23).''.

Section 5D1.3(b) is amended by deleting ''§ 3353(a)(2) and''.

Section 5D1.3(c) is amended by inserting ''(Recommended Conditions of Probation and Supervised Release)'' immediately following ''§ 5B1.4''.

The Commentary to 5D1.3 captioned ''Background'' is amended by deleting the fourth sentence.

Section 8D1.3(a) is amended by deleting ''shall'' following ''the organization''.

Section 8D1.3 is amended by redesignating subsection (c) as subsection (g); and by inserting after subsection (b) the following new subsections:

(c) Pursuant to 18 U.S.C. § 3563(a)(6)(A), any sentence of probation shall include the condition that the defendant make restitution in accordance with 18 U.S.C. § 2248, 2259, 2327, 3663, 3663A, and 3664.

(d) Pursuant to 18 U.S.C. § 3563(a)(6)(B), any sentence of probation shall include the condition that the defendant pay the special assessment imposed under 18 U.S.C. § 3013.

(e) Pursuant to 18 U.S.C. § 3563(a)(7), any sentence of probation shall include the condition that the defendant notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

(f) Pursuant to 18 U.S.C. § 3563(a), if the court has imposed a fine, any sentence of probation shall include the condition that the defendant pay the fine or adhere to a court-established installment schedule.

B. *Issue for Comment:* The Commission invites comment as to whether §§ 5B1.3 (Conditions of Probation), 5B1.4 (Recommended Conditions of Probation and Supervised Release (Policy Statements)), and 5D1.3 (Conditions of Supervised Release) should be reorganized so as to better distinguish between the statutorily required, standard, and special conditions of probation and supervised release. For example, one option could be to delete § 5B1.4 and amend §§ 5B1.3 and 5D1.3 so that subsection (a) of each guideline lists all the statutorily required conditions of probation or supervised release, subsection (b) lists all the standard conditions, and subsection (c) lists all the optional conditions.

Section 5D1.2 Term of Supervised Release

30. Synopsis of Proposed Amendment: This amendment amends § 5D1.2 (Term of Supervised Release) to make clear that a defendant who qualifies under the ''safety valve'' (§ 5C1.2, 18 U.S.C. § 3553(f)) is not subject to any statutory minimum term of supervised release. This issue has arisen in a number of hotline calls. This amendment also clarifies that the requirement in subsection (a), with respect to the length of a term of supervised release, is subject to the requirement in subsection (b) that the term be not less than any statutorily required term of supervised release.

Proposed Amendment: Section 5D1.2(a) is amended by deleting ''If'' and inserting in lieu thereof ''Subject to subsection (b), if''.

Section 5D1.2(b) is amended by deleting ''The'' and inserting in lieu thereof ''Provided, that the''.

The Commentary to § 5D1.2 is amended by inserting the following immediately before ''Background'':

''Application Note:

1. In the case of a defendant who qualifies under § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases), the term of supervised release is to be determined under subsection (a) without regard to any otherwise applicable statutory minimum term of supervised release; i.e., the requirement in subsection (b) is inapplicable in such a case because a statutory minimum term of supervised release no longer applies to that defendant.''.

Section 5E1.1 Restitution

31(A). Synopsis of Proposed Amendment: This amendment conforms the provisions of § 5E1.1 to the mandatory restitution provisions of the Antiterrorism and Effective Death Penalty Act of 1996. Because the new restitution provisions have ex post facto provisions that cannot be addressed in the usual fashion (by determining whether the final Chapter Five guideline range is greater), a separate provision is set forth as a special instruction to address this issue and allow the maintenance of the Commission's ''one book'' rule.

Proposed Amendment: Section 5E1.1(a)(1) is amended by inserting ''in the case of an identifiable victim of the offense for the full amount of the victim's loss,'' immediately following ''restitution order''; by deleting ''§ '' immediately after ''18 U.S.C.''; by inserting ''2248, § 2259, § 2264, § 2327, § '' immediately before ''3663''; and by deleting ''-3664'' and inserting in lieu thereof '', or § 3663A''.

Section 5E1.1(a)(2) is amended by inserting ''impose a term of probation or supervised release with a condition requiring restitution in the case of an identifiable victim of the offense for the full amount of the victim's loss,'' immediately before ''if a restitution''; by deleting ''§ '' immediately following ''18 U.S.C.''; by deleting ''-3664'' immediately following ''3663''; by deleting ''set forth in'' and inserting in lieu thereof ''under''; by inserting ''21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863,'' immediately following ''States Code,''; and by deleting '', impose a term of probation or supervised release with a condition requiring restitution''.

Section 5E1.1(b) is amended by deleting it in its entirety and inserting in lieu thereof:

''(b) Provided, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (1) the number of identifiable victims is so large as to make restitution impracticable, or (2) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.''

Section 5E1.1(c) is amended by inserting ''to an identifiable victim'' immediately following ''to make restitution''.

Section 5E1.1(d) is deleted in its entirety and the following new subsections are inserted in lieu thereof:

''(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property, or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not

allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction.

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 5E1.1 (set forth in Appendix C, amendment 537) in lieu of this guideline in any other case.''.

The Commentary to § 5E1.1 captioned ''Application Note'' is amended by deleting Note 1 in its entirety; and by deleting ''Application Note:''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first sentence of the first paragraph by inserting '', United States Code,'' immediately following ''Title 18''; by deleting the second sentence and inserting the following in lieu thereof: ''Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A.''; in the third sentence by deleting ''other'' immediately following ''For''; and by inserting ''for which an order of restitution is not authorized'' immediately following ''offenses''; and by deleting the fourth sentence and inserting in lieu thereof ''To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.''.

The Commentary to § 5E1.1 captioned ''Background'' is amended by deleting the second through fifth paragraphs in their entirety.

Section 8B1.1 is deleted in its entirety and the following is inserted in lieu thereof:

''§ 8B1.1. Restitution—Organizations.

(a) The court shall——

(1) Enter a restitution order in the case of an identifiable victim of the offense for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) Impose a term of probation with a condition requiring restitution in the case of an identifiable victim of the offense for the full amount of the victim's loss, if a restitution order would be authorized under 18 U.S.C. § 3663, except for the fact that the offense of conviction is not an offense under Title 18, United States Code, 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, or 49 U.S.C. § 46312, § 46502, or § 46504.

(b) Provided, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (1) the number of identifiable victims is so large as to make restitution impracticable, or (2) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property, or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction.

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 8B1.1 (set forth in Appendix C, amendment 537) in lieu of this guideline in any other case.

Commentary

Background: Section 3553(a)(7) of Title 18 requires the court, ''in determining the particular sentence to be imposed,'' to consider ''the need to provide restitution to any victims of the offense.'' Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.''.

(B) *Issue for Comment:* Community Restitution—Section 205 of the Antiterrorism and Effective Death Penalty Act of 1996 (''the Act'') authorizes district courts to order ''community restitution'' when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863) in which there is no identifiable individual victim. The Act further directs the Commission to promulgate guidelines, based on the amount of public harm caused by the offense and not to exceed the amount of the fine ordered for the offense, to assist courts in determining the appropriate amount of community restitution to be ordered in individual cases.

The Commission requests comment regarding implementation of this directive so as to fully effectuate congressional intent. The Commission specifically requests comment on (1) how the Commission should determine the appropriate amount of community restitution to be ordered, (2) whether it would be appropriate to determine the amount of community restitution by reference to the fine table found at section 5E1.2 of the Guidelines Manual, (3) whether it would be appropriate to apportion a specific percentage of any fine ordered under the current guidelines to community restitution, and (4) if it is appropriate to apportion a specific percentage of any fine ordered under the current guidelines to community restitution, whether the Commission should adjust the fine table.

Section 5E1.3 Special Assessments

32. Synopsis of Proposed Amendment: This amendment implements section 210 of the Antiterrorism and Effective Death Penalty Act of 1996. That section amends 18 U.S.C. § 3013(a)(2) to provide for a special assessment, in the case of a felony, of not less than $100 for an individual and not less than $400 for an organization.

Proposed Amendment: Section 5E1.3 is deleted in its entirety and the following replacement guideline is inserted in lieu thereof:

''*§ 5E1.3. Special Assessments.*

(a) In the case of a defendant convicted of a felony offense committed on or after April 24, 1996, the special assessment shall be $100.

(b) In the case of a defendant convicted of—

(1) A misdemeanor offense or an infraction; or

(2) A felony offense committed prior to April 24, 1996,

the special assessment shall be the amount fixed by statute (18 U.S.C. § 3013).

Commentary

Application Notes:

1. This guideline applies only if the defendant is an individual. See § 8E1.1 for special assessments applicable to organizations.

In the case of a felony conviction for an offense committed by an individual on or after April 24, 1996, this guideline specifies a special assessment in the amount of $100. Any greater special assessment is a departure from this guideline.

In any other case, the special assessment is in the amount set forth by statute.

2. The following special assessments are provided by statute (18 U.S.C. § 3013):

For Offenses Committed By Individuals On Or After April 24, 1996:

(A) Not less than $100, if convicted of a felony;

(B) $25, if convicted of a Class A misdemeanor;

(C) $10, if convicted of a Class B misdemeanor or an infraction;

(D) $5, if convicted of an infraction or a Class C misdemeanor.

For Offenses Committed By Individuals On Or After November 18, 1988, But Prior To April 24, 1996:

(E) $50, if convicted of a felony;

(F) $25, if convicted of a Class A misdemeanor;

(G) $10, if convicted of a Class B misdemeanor or an infraction;

(H) $5, if convicted of an infraction or a Class C misdemeanor.

For Offenses Committed By Individuals Prior To November 18, 1988:

(I) $50, if convicted of a felony;

(J) $25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, added by The Victims of Crimes Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837, 2174 (1984), requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

In the case of felony conviction for an offense committed on or after April 24, 1996, the special assessment authorized by statute on each count is not less than $100 if the defendant is an individual. No maximum limit is specified. In all other cases, the amount of the special assessment is fixed by statute.

The Commission has set the guideline for a special assessment for a felony offense committed by an individual on or after April 24, 1996 at $100. The Commission believes a special assessment in this amount, combined with the restitution provisions in § 5E1.1 (Restitution) and the fine provisions in § 5E1.2 (Fines) (which increase with the seriousness of the offense committed), will provide an appropriate, coordinated financial penalty.''.

Section 8E1.1 amended by deleting the guideline in its entirety and the following replacement guideline is inserted in lieu thereof:

Section 8E1.1. Special Assessments—Organizations

(a) In the case of a defendant convicted of a felony offense committed on or after April 24, 1996, the special assessment shall be $400.

(b) In the case of a defendant convicted of—

(1) A misdemeanor offense or an infraction; or

(2) A felony offense committed prior to April 24, 1996,

the special assessment shall be the amount fixed by statute (18 U.S.C. § 3013).

Commentary

Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See § 5E1.3 for special assessments applicable to individuals.

In the case of a felony conviction for an offense committed by an organization on or after April 24, 1996, this guideline specifies a special assessment in the amount of $400. Any greater special assessment is a departure from this guideline.

In any other case, the special assessment is in the amount set forth by statute.

2. The following special assessments are provided by statute (18 U.S.C. § 3013):

For Offenses Committed By Organizations On Or After April 24, 1996:

(A) Not less than $400, if convicted of a felony;

(B) $125, if convicted of a Class A misdemeanor;

(C) $50, if convicted of a Class B misdemeanor; or

(D) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $200, if convicted of a felony;

(F) $125, if convicted of a Class A misdemeanor;

(G) $50, if convicted of a Class B misdemeanor; or

(H) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations Prior To November 18, 1988:

(I) $200, if convicted of a felony;

(J) $100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, added by The Victims of Crimes Act of 1984, Pub. L. No. 98–473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

In the case of felony conviction for an offense committed on or after April 24, 1996, the special assessment authorized by statute on each count is not less than $400 if the defendant is an organization. No maximum limit is specified. In all other cases, the amount of the special assessment is fixed by statute.

The Commission has set the guideline for a special assessment for a felony offense committed by an organization on or after April 24, 1996 at $400. The Commission believes a special assessment in this amount, combined with the restitution provisions in Part B of this Chapter and the fine provisions in Part C of this Chapter (which increase with the seriousness of the offense committed), will provide an appropriate, coordinated financial penalty.''.

Section 5H1.13 Susceptibility to Abuse in Prison and Designation of Prison Facility

33. Synopsis of Proposed Amendment: This amendment creates an additional policy statement in Chapter 5, part H as § 5H1.13 (Susceptibility to Abuse in Prison and Designation of Prison (Policy Statement)). The amendment provides that neither susceptibility to abuse in prison nor the type of imprisonment facility designated for service of imprisonment is ordinarily relevant in determining a departure.

Proposed Amendment: Chapter 5, Part H is amended by inserting an additional policy statement as:

''§ 5H1.13. Susceptibility to Abuse in Prison and Designation of Prison Facility (Policy Statement).

Neither susceptibility to abuse in prison nor the type of facility designated for service of a term of imprisonment is ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.''.

Section 5K2.0 Grounds for Departure

34. Synopsis of Proposed Amendment: This amendment proposes to make changes to policy statement § 5K2.0 (Grounds for Departure). The proposed amendment moves language discussing departure policies from the Introduction of the Guidelines Manual to § 5K2.0; deletes a sentence that, under the proposed emergency amendment to the immigration guidelines, will no longer be apt; adds a citation to Koon v. United States, 116 S.Ct. 2035 (1996), to reflect the greater deference to be accorded district court departure decisions by the appellate courts; adds a sentence stating that departures must be consistent with the purposes of sentencing and Sentencing Reform Act goals; and makes minor changes to improve the precision of the language.

Proposed Amendment: Section 5K2.0 is amended by deleting ''Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' '' and inserting in lieu thereof ''The Sentencing Reform Act permits a court to depart from a guideline range when it finds 'an aggravating or mitigating circumstance, of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. 18 U.S.C. § 3553(b). The Commission intends for sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. With the few exceptions noted below, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

Factors that the court may not take into account as grounds for departure are:

(1) race, sex, national origin, creed, religion, and socio-economic status (See § 5H1.10);

(2) Lack of guidance as a youth and similar circumstances (See § 5H1.12);

(3) Drug or alcohol abuse (See § 5H1.4);

(4) Personal financial difficulties and economic pressures upon a trade or business (See § 5K2.12).''.

Section 5K2.0 is amended in the first paragraph by beginning a new paragraph at the sentence that starts ''Circumstances that may warrant departure''; by deleting ''guidelines'' immediately following ''from the'' and inserting in lieu thereof ''guideline range''; by deleting ''controlling'' immediately following ''The''; by deleting ''can only be'' immediately following ''warranted'' and inserting in lieu thereof ''most appropriately is''; by deleting ''courts'' immediately following ''the'' and inserting in lieu thereof ''sentencing court on a case-specific basis''; by inserting ''determining'' immediately following ''consideration in''; by deleting ''guidelines'' immediately following ''consideration in the'' and inserting in lieu thereof ''guideline range''; by deleting ''guideline level'' immediately following ''circumstances, the'' and inserting in lieu thereof ''weight''; and by inserting ''under the guidelines'' immediately following ''factor''.

Section 5K2.0 is amended in the third paragraph by deleting ''For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.''

Section 5K2.0 is amended in the fourth paragraph by deleting ''An'' and inserting in lieu thereof ''Finally, an''; by inserting '', in the commission's view,'' immediately following ''circumstance that''; and by inserting parentheses around ''not ordinarily relevant'' immediately before ''in determining''.

The Commentary to § 5K2.0 is amended by inserting ''Moreover, any cited basis for departure must be consistent with the statutory purposes of sentencing and the fundamental objectives of the Sentencing Reform Act. See 18 U.S.C. §§ 3553(a),(b), 28 U.S.C. § 991 (b)(1).'' immediately before ''For, example''; and by inserting as a new paragraph ''The Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard. Koon v. United States, 116 S.Ct. 2035 (1996).''

Section 5K2.19 Successive Federal Prosecution

35. Synopsis of Proposed Amendment: This amendment proposes to create an additional amendment in Chapter 5, Part K as § 5K2.19 (Successive Federal Prosecutions (Policy Statement)). The amendment provides that a federal prosecution following another jurisdiction's prosecution for the same or similar conduct is not ordinarily relevant in determining a departure, except as authorized by § 5G1.3 (Imposition of a Sentence on a Defendant subject to an Undischarged Term of Imprisonment).

Proposed Amendment: Chapter 5, Part K is amended by inserting an additional policy statement as follows:

''§ 5K2.19. Successive Federal Prosecution (Policy Statement).

Prosecution and conviction in federal court following prosecution in another jurisdiction for the same or similar offense conduct is not ordinarily relevant in determining whether a sentence below the guideline range is warranted, except as authorized by § 5G1.3 (Imposition of a Sentence on a Defendant subject to an Undischarged Term of Imprisonment). In circumstances not covered by § 5G1.3, concerns about the impact of successive prosecutions must be carefully weighed against concerns relating to the legitimate exercise of prosecutorial authority by separate sovereigns.''.

Section 6A1.1 Presentence Report

36. Synopsis of Proposed Amendment: This amendment makes a number of technical changes to Chapter Six (Sentencing Procedures and Plea Agreements) to reflect changes recently made in the structure of Rule 32, Fed. R. Crim. P.

Proposed Amendment: Section 6A1.1 is amended by deleting ''(c)(1)'' and inserting in lieu thereof ''(b)(1)''.

The Commentary to § 6A1.1 is amended by deleting ''(c)(1)'' and inserting in lieu thereof ''(b)(1)''.

Section 6A1.2 is amended by deleting ''See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)'' and insert in lieu thereof ''Rule 32 (b)(6), Fed. R. Crim. P.''.

The Commentary to § 6A1.2 captioned ''Application Note'' is amended in Note 1 by deleting ''111 S. Ct. 2182'' and inserting in lieu thereof ''501 U.S. 129, 135–39''.

The Commentary to § 6A1.2 captioned ''Background'' is amended by inserting

''in writing'' immediately following ''respond''; and by deleting the second, third, and fourth sentences and inserting in lieu thereof ''Rule 32 (b)(6), Fed. R. Crim. P.''.

Section 6A1.3(a) is amended in the second sentence by deleting ''reasonable'' immediately before ''dispute''.

Section § 6A1.3(b) is amended by inserting ''at a sentencing hearing'' immediately following ''factors''; by deleting ''(a)(1)'' and inserting in lieu thereof ''(c)(1)''; and by deleting ''(effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral written objections before imposition of sentence''.

The Commentary to § 6A1.3 is amended in the seventh sentence of the first paragraph by deleting ''reasonable'' immediately before ''dispute''.

The Commentary to § 6A1.3 is amended by deleting the last paragraph in its entirety.

Consolidation of Closely Related Guidelines

37. Synopsis of Proposed Amendment: This amendment consolidates a number of Chapter Two offense guidelines. There are several advantages to consolidation of offense guidelines: (1) shortening the Guidelines Manual and simplifying its application and appearance; (2) reducing the potential for inconsistency in phraseology and definitions between closely related offense guidelines (and litigation as to the meaning of such differences); (3) reducing the potential for inadvertent, unwarranted inconsistency in offense levels among closely related offense guidelines; (4) reducing the potential for uncertainty (and resulting litigation) as to which offense guideline applies when one statute references two or more closely related offense guidelines; (5) making application of the rules relating to the grouping of multiple counts of conviction simpler by reducing the frequency of cases in which the offense levels have to be determined under more than one guideline using aggregate quantity and then compared (§ 3D1.3(b)); (6) reducing the number of cross references in the Guidelines Manual and the added calculations entailed; (7) aiding the development of case law because cases involving similar or identical concepts will be referenced under one guideline section rather than different guideline sections; and (8) reducing the number of conforming amendments required when the guidelines are amended.

On the other hand, the proposed consolidation of offense guidelines may raise one or more of the following concerns: (1) some of the proposals result, or may result, in a change in offense levels for some offenses (due mainly to the application of specific offense characteristics and cross references as a result of consolidation); (2) some of the proposals may move closer to a ''real offense'' system with respect to offense behavior covered by those proposals; and (3) some of the proposals implicate other policy issues (e.g.; through the elimination of specific offense characteristics).

(A) *Consolidation of §§ 2A1.5 and 2E1.4.*

Synopsis of Proposed Amendment: Section 2E1.4 (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire) is consolidated with § 2A1.5 (Conspiracy or Solicitation to Commit Murder) with no change in offense levels. The base offense level of 32 under § 2E1.4 is represented in the consolidation by a base offense level of 28 plus four levels for pecuniary gain under subsection (b)(2). The four-level enhancement for pecuniary gain always should apply to murder-for-hire offenses under § 2E1.4. This amendment also eliminates the cross reference in § 2A1.5(c)(2) and replaces it with a bodily injury enhancement in subsection (b)(1).

The 1993 Annual Report (FY 93) shows 31 cases sentenced under § 2A1.5 (in 13 of those it was the primary guideline) and 26 cases sentenced under § 2E1.4 (in 24 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 28 cases sentenced under § 2A1.5 (in 18 of those it was the primary guideline) and 31 cases sentenced under § 2E1.4 (in 23 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 25 cases sentenced under § 2A1.5 (in 16 of those it was the primary guideline) and 20 cases sentenced under § 2E1.4 (in 15 of those it was the primary guideline).

Proposed Amendment: Section 2A1.5 is amended in the title by inserting at the end ''; Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire''. Section 2A1.5(b) is amended by redesignating subdivision (1) as subdivision (2) and by inserting the following new subdivision:

''(1) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; or (B) if the victim sustained serious bodily injury, increase by 2 levels''.

Section 2A1.5(c) is amended in the caption by deleting ''References'' and inserting in lieu thereof ''Reference''.

Section 2A1.5(c) is amended by deleting:

''(2) If the offense resulted in an attempted murder or assault with intent to commit murder, apply § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).''.

The Commentary to § 2A1.5 captioned ''Statutory Provisions'' is amended by inserting after ''1751(d)'' '',1958 (formerly 18 U.S.C. § 1952A).''.

The Commentary to § 2A1.5 is amended by inserting the following at the end:

''Application Notes:

1. Definitions of 'serious bodily injury' and 'permanent or life-threatening bodily injury' are found in the Commentary to § 1B1.1 (Application Instructions).

2. If the offense involved a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.''.

Section 2E1.4 is deleted in its entirety.

(B) *Consolidation of §§ 2A2.3 and 2A2.4.*

Synopsis of Proposed Amendment: Section 2A2.4 (Obstructing or Impeding Officers) is consolidated with § 2A2.3 (Minor Assault). The resulting offense levels are the same as those under the current guidelines, except for the following differences. First, the cross reference to aggravated assault (shown as an option under the consolidated guideline) would now apply to offenses under § 2A2.3. Currently, the cross reference to aggravated assault applies only to § 2A2.4. Second, the enhancement for official victim in the consolidated guideline would now apply to minor assault cases under § 2A2.3. Similarly, the upward departure provision for significant disruption of governmental function (Application Note 3 of the consolidated guideline) would apply to minor assault cases.

In addition, there is a split among the circuits as to whether subsection (c) refers to the conviction offense or is based on consideration of the underlying conduct (compare *United States* v. *Jennings*, 991 F.2d 725 (11th Cir. 1993) with *United States* v. *Padilla*, 961 F.2d 322 (2d Cir.), cert. denied, 506 U.S. 846 (1992). There seems no reason for the cross reference to apply to one guideline but not the other. Two options are provided. If the bracketed language (subsection (c)) is included, the cross reference to § 2A2.2 will apply on the basis of the underlying conduct (i.e., whether the assault was an aggravated or simple assault will be a sentencing

rather than a charge offense factor). If the bracketed language is not included, § 2A2.2 will apply only if established by the offense of conviction (see § 1B1.2 (Applicable Guidelines)).

The 1993 Annual Report (FY 93) shows 26 cases sentenced under § 2A2.3 (in 25 of those it was the primary guideline) and 97 cases sentenced under § 2A2.4 (in 83 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 27 cases sentenced under § 2A2.3 (in 22 of those it was the primary guideline) and 85 cases under § 2A2.4 (in 73 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 24 cases sentenced under § 2A2.3 (in 19 of those it was the primary guideline) and 120 cases sentenced under § 2A2.4 (in 98 of those it was the primary guideline).

Proposed Amendment: Section 2A2.3 is amended in the title by inserting at the end ''; Obstruction or Impeding Officers''.

Section 2A2.3(b) is amended by deleting ''Characteristic'' and inserting in lieu thereof ''Characteristics''.

Section 2A2.3(b) is amended by redesignating subdivision (1) as subdivision (2) and inserting the following new subsection:

''(1) If the offense involved obstructing or impeding a governmental officer in the performance of his duty, increase by 3 levels.''.

Section 2A2.3(b) is amended in the redesignated (2) (formerly (1)) by deleting ''resulted in'' and inserting in lieu thereof ''involved''.

Section 2A2.3 is amended by adding the following additional subsection:

''[(c) Cross Reference.

(1) If the offense involved aggravated assault, apply § 2A2.2 (Aggravated Assault).]''.

The Commentary to § 2A2.3 captioned ''Statutory Provisions'' is amended by inserting ''111,'' immediately before ''112''; by inserting ''1501, 1502,'' immediately following ''351(e),''; and by inserting '', 3056(d)'' immediately following ''1751(e)''.

The Commentary to § 2A2.3 captioned ''Application Notes'' is amended by deleting Notes 1 through 3 and inserting the following as new Notes 1 through 3:

''1. For purposes of this guideline—

'Minor assault' means a misdemeanor assault, or a felonious assault not covered by § 2A2.2 (Aggravated Assault).

'Firearm' and 'dangerous weapon' have the meaning given such terms in the Commentary to § 1B1.1 (Application Instructions).

'Substantial bodily injury' means 'bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.' See 18 U.S.C. § 113(b)(1).

2. Subsection (b)(1) reflects the fact that the victim was a governmental officer performing official duties. If subsection (b)(1) applies, do not apply § 3A1.2 (Official Victim) unless the offense level is determined by use of the cross reference in subsection (c).

3. The offense level under this guideline does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See § 5K2.7 (Disruption of Governmental Function).''.

The Commentary to § 2A2.3 captioned ''Background'' is deleted in its entirety.

Section 2A2.4 is amended by deleting it in its entirety.

(C) *Consolidation of §§ 2B1.1, 2B1.3, 2B6.1, and 2H3.3.*

Synopsis of Proposed Amendment: This is a three-part amendment. First, § 2B1.3 (Property Damage or Destruction) is consolidated with § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) with no change in offense levels.

Second, § 2B6.1 (Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers) is consolidated with § 2B1.1. Section 2B6.1 is, in effect, a stolen property guideline limited to stolen automobiles and automobile parts with altered or obliterated identification numbers. The offense levels resulting from application of the current guidelines in most cases are identical. The only differences are that § 2B6.1 has a built-in adjustment for more than minimal planning and a loss of at least $2,000. In the small percentage of cases in which the loss is $1,000 or less, or more than minimal planning is not found, the offense level from § 2B6.1 is higher than from § 2B1.1. To ensure no reduction in offense level (with respect to the more than minimal planning adjustment) under the consolidated guideline, an application note is added providing that more than minimal planning is deemed present when the offense involved altering or removing an automobile or automobile part identification number or trafficking in an automobile or automobile part with an altered or obliterated identification number. Therefore, under the consolidated guideline, if the value of the vehicle(s) or part(s) is more than $1,000, the offense level will be the same as under the current guidelines. The only difference in offense level between the current and proposed guideline is that if the value of the vehicle(s) or part(s) is $100 or less, the offense level under the consolidated guideline will be 6 rather than 8; and if the value of the vehicle(s) or part(s) is $101–$1,000, the offense level under the consolidated guideline will be 7 rather than 8. In FY 95, 4.3% of cases (i.e.; 3 of 70 cases) sentenced under § 2B6.1 did not receive an enhancement under § 2B6.1(b)(1) because the value of the vehicle was less than $2,000.

Third, the consolidation of §§ 2B1.1 and 2B1.3 allows the consolidation of § 2H3.3 (Obstructing Correspondence) with § 2B1.1. No substantive change in offense levels would result.

The 1993 Annual Report (FY 93) shows 3,902 cases sentenced under §§ 2B1.1 and 2B1.2 (which is now consolidated with § 2B1.1; in 3,769 of those they were the primary guidelines), 79 cases sentenced under § 2B1.3 (in 74 of those it was the primary guideline), 93 cases sentenced under § 2B6.1 (in 85 of those it was the primary guideline), and 17 cases sentenced under § 2H3.3 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 3,712 cases sentenced under §§ 2B1.1/2B1.2 (in 3,598 of those they were the primary guidelines), 62 cases sentenced under § 2B1.3 (in 56 of those it was the primary guideline), 55 cases sentenced under § 2B6.1 (in 51 of those it was the primary guideline), and nine cases sentenced under § 2H3.3 (in all of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 3,265 cases sentenced under §§ 2B1.1/2B1.2 (in 3,152 of those it was the primary guideline), 81 cases sentenced under § 2B1.3 (in 77 of those it was the primary guideline), 75 cases sentenced under § 2B6.1 (in 70 of those it was the primary guideline), and seven cases sentenced under § 2H3.3 (in all of those it was the primary guideline).

Proposed Amendment: Section 2B1.1 is amended in the title by inserting at the end ''; Property Damage or Destruction; Obstructing Correspondence''.

Section § 2B1.1(b)(3) is amended by redesignating ''(B)'' as ''(C)'';

By deleting ''or'' immediately after ''was taken'' and inserting in lieu thereof ''destroyed, or obstructed, (B)'';

And by deleting ''of such item'' and inserting in lieu thereof '',destruction, or obstruction of undelivered United States mail''.

Section 2B1.1(b)(5) is amended by inserting ''or to receive stolen vehicles or vehicle parts,'' immediately following ''vehicle parts,''.

Section 2B1.1(c) is amended by deleting ''Reference'' and inserting in lieu thereof ''References''; and by inserting the following new subdivision at the end:

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

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''511,'' immediately following ''225,''; by inserting ''(2),'' immediately following ''553(a)(1),''; by inserting ''1361,'' immediately following ''664,''; by inserting ''1703,'' immediately following ''1702,''; and by inserting '',2321'' immediately following ''2317''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by inserting the following additional notes:

''15. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a $500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure may be warranted.

16. More than minimal planning shall be deemed present in any offense involving altering or removing an automobile (or automobile part) identification number or trafficking in an automobile (or automobile part) with an altered or obliterated identification number.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting the following as a new first paragraph:

''This guideline covers offenses involving theft, stolen property, and property damage or destruction. It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, and obstructing correspondence.'';

In the third paragraph by deleting ''Consistent with statutory distinctions, an'' and inserting in lieu thereof ''An''; by inserting in the first sentence of the third paragraph '', destruction, or obstruction'' immediately following ''theft''; and by deleting in the third paragraph ''. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain'' immediately following ''undelivered mail'', and inserting in lieu thereof ''because theft, destruction, or obstruction of undelivered mail inherently interferes with a governmental function''; in the fourth paragraph by inserting ''or to receive stolen vehicles or vehicle parts'' immediately following ''vehicle parts'';

Section 2B1.3 is deleted in its entirety.

Section 2B6.1 is deleted in its entirety.

Section 2H3.3 is deleted in its entirety.

Section 2K1.4(a)(4) is amended by deleting ''§ 2B1.3 (Property Damage or Destruction)'' and inserting in lieu thereof ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Obstructing Correspondence)''.

(D) *Consolidation of §§ 2C1.2 and 2C1.6.*

Synopsis of Proposed Amendment: This amendment consolidates §§ 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) and 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper). Both guidelines cover offenses involving gratuities and have identical base offense levels. There are, however, several inconsistencies between §§ 2C1.2 and 2C1.6. Section 2C1.2 (like § 2C1.1) contains enhancements for multiple instances and involvement of high-level officials, but § 2C1.6 does not contain these enhancements. Section 2C1.2 has a special instruction pertaining to fines for organizations; § 2C1.6 does not contain this instruction. This amendment removes these inconsistencies. In addition, this amendment adds an application note to clarify that the unlawful payment involved need not be a monetary payment.

The 1993 Annual Report (FY 93) shows 15 cases sentenced under § 2C1.2 (in 13 of those it was the primary guideline) and one case sentenced under § 2C1.6 (in that case it was also the primary guideline).

The 1994 Annual Report (FY 94) shows 39 cases sentenced under § 2C1.2 (in 37 of those it was the primary guideline) and no cases sentenced under § 2C1.6.

The 1995 Annual Report (FY 95) shows 37 cases sentenced under § 2C1.1 (in 35 of those it was the primary guideline) and no cases sentenced under § 2C1.6.

Proposed Amendment: Section § 2C1.2(b)(2)(A) is amended by deleting ''gratuity'' and inserting in lieu thereof ''unlawful payment''.

Section § 2C1.2(b)(2)(B) is amended by deleting ''gratuity'' and inserting in lieu thereof ''unlawful payment''.

The Commentary to § 2C1.2 captioned ''Statutory Provisions'' is amended by inserting ''§ '' immediately following ''§ ''; and by inserting '', 212, 214, 217, 666'' immediately following ''(c)(1)''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. An unlawful payment may be anything of value; it need not be a monetary payment.''.

The Commentary to § 2C1.2 captioned ''Background'' is amended by deleting the second, third, and fourth sentences and inserting the following in lieu thereof:

''It also applies to the offer to, or acceptance by, a bank examiner of any unlawful payment; the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve Bank; and the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.''.

(E) *Consolidation of §§ 2C1.3, 2C1.4, and 2C1.5.*

Synopsis of Proposed Amendment: This amendment consolidates §§ 2C1.3 (Conflict of Interest), 2C1.4 (Payment or Receipt of Unauthorized Compensation), and § 2C1.5 (Payments to Obtain Public Office) .

Although the elements of the offenses of conflict of interest (currently covered by § 2C1.3) and unauthorized compensation (currently covered by § 2C1.4) payment differ in some ways, the gravamen of the offenses is similar—unauthorized receipt of a payment in respect to an official act. The base offense levels for both guidelines are identical. The few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity; i.e., the conflict of interest statute was used as a plea bargaining statute.

Note that there may be a change in offense levels for some cases if the cross reference to the guidelines for offenses involving a bribe or gratuity is provided. If the bracketed language (subsection (c)) is included, a cross reference to § 2C1.1 or § 2C1.2 will apply on the basis of the underlying conduct; i.e., as a sentencing factor rather than a charge of conviction factor.

Offenses involving payment to obtain public office (currently covered by § 2C1.5) generally, but not always, involve the promised use of influence to obtain public appointive office. Also, such offenses need not involve a public official (see, for example, the second paragraph of 18 U.S.C. § 211). The current offense level for all such offenses is level 8. The two statutes to which § 2C1.5 applies (18 U.S.C. §§ 210

and 211) are both Class A misdemeanors.

Under the proposed consolidation, the base offense level would be level 6, but the higher base offense level of § 2C1.5 would be taken into account by a 2-level enhancement in subsection (b)(2) covering conduct under 18 U.S.C. § 210 and the first paragraph of 18 U.S.C. § 211. There is one circumstance in which a lower offense level may result and one circumstance in which a higher offense level may result. The offense level for conduct under the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that does not pertain to the promise or use of influence) is reduced to level 6. On the other hand, conduct that involves a bribe of a government official will result in an increased offense level (level 10 or greater) under the proposed cross reference.

The 1993 Annual Report (FY 93) shows four cases sentenced under § 2C1.3 (in all of those it was the primary guideline), seven cases sentenced under § 2C1.4 (in all of those it was the primary guideline), and no cases sentenced under § 2C1.5.

The 1994 Annual Report (FY 94) shows 16 cases sentenced under § 2C1.3 (in 13 of those it was the primary guideline), 16 cases sentenced under § 2C1.4 (in 15 of those it was the primary guideline), and one case sentenced under § 2C1.5 (in that case it was also the primary guideline).

The 1995 Annual Report (FY 95) shows 10 cases sentenced under § 2C1.3 (in all of those it was the primary guideline), six cases sentenced under § 2C1.4 (in all of those it was the primary guideline), and no cases sentenced under § 2C1.5.

Proposed Amendment: Section 2C1.3 is amended in the title by inserting at the end ''; Payment or Receipt of Unauthorized Compensation; Payments to Obtain Public Office''.

Section 2C1.3(b) is amended by inserting the following additional subsection:

(2) If the offense involved (A) the payment, offer, or promise of any money or thing of value in consideration of the use of, or promise to use, any influence to procure an appointive federal position for any person; or (B) the solicitation or receipt of any money or thing or value in consideration of the promise of support, or use of influence, in obtaining an appointive federal position for any person, increase by 2 levels.

Section 2C1.3 is amended by inserting at the end the following:

[(c) Cross Reference.

(1) If the offense involved a bribe or gratuity, apply § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than determined above.]

The Commentary to § 2C1.3 captioned ''Statutory Provisions'' is amended by inserting '', 209, 210, 211, 1909'' immediately following ''208''.

The Commentary to § 2C1.3 captioned ''Application Notes'' is amended by deleting ''Note'' and inserting in lieu thereof ''Notes''.

The Commentary to § 2C1.3 captioned ''Background'' is deleted in its entirety.

Section 2C1.4 is deleted in its entirety.

Section 2C1.5 is deleted in its entirety.

(F) *Consolidation of §§ 2D1.9 and 2D1.10.*

Synopsis of Proposed Amendment: Section 2D1.10 is consolidated with § 2D1.9. The offenses covered by both guidelines essentially involve endangering human life while manufacturing a controlled substance. The treatment under the current guidelines, however, is very different. Under § 2D1.9 (effective 11/1/87), the offense level is 23, with no additional characteristics. Under § 2D1.10 (effective 11/1/89), the offense level is the greater of 20 or 3 plus the offense level from the underlying drug offense. In the consolidated guideline, the structure from § 2D1.10 (the more recently adopted guideline) is used. Two bracketed options (level 20 or level 23) are provided for the alternative base offense level in subsection (a)(2). If level 20 is provided as the alternative base offense level under subsection (a)(2), a change in offense levels for some cases under § 2D1.9 may result. The base offense level currently is 23 for offenses under § 2D1.9. The base offense level applicable for such offenses under the consolidation with § 2D1.10 would be either 3 plus the offense level from the Drug Quantity Table in § 2D1.1; or 20.

The 1993 Annual Report (FY 93) shows no cases sentenced under § 2D1.9 or § 2D1.10.

The 1994 Annual report (FY 94) shows no cases sentenced under § 2D1.9 and four cases sentenced under § 2D1.10 (in all of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows no cases sentenced under § 2D1.9 and four cases sentenced under § 2D1.10 (in all of those it was the primary guideline).

Proposed Amendment: Section 2D1.10 is amended in the title by inserting at the end ''; Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy''.

Section 2D1.10(a)(2) is amended by deleting ''20'' and inserting in lieu thereof ''[20][23]''.

The Commentary to § 2D1.10 is amended by deleting ''Provision'' and inserting in lieu thereof ''Provisions'' and by inserting ''§ 841 (e),'' immediately following ''§ ''.

Section 2D1.9 is deleted in its entirety.

Section 2D1.10 is redesignated as § 2D1.9.

(G) *Consolidation of §§ 2D2.1 and 2D2.2.*

Synopsis of Proposed Amendment: Sections 2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy) and 2D2.1 (Unlawful Possession; Attempt or Conspiracy) are consolidated. The only substantive change is that any adjustment for acquiring a controlled substance by forgery, fraud, deception, or subterfuge will be determined as a sentencing factor rather than on the basis of the offense of conviction.

The 1993 Annual Report shows 961 cases sentenced under § 2D2.1 (in 904 of those it was the primary guideline) and 38 cases sentenced under § 2D2.2 (in 34 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 845 cases sentenced under § 2D2.1 (in 809 of those it was the primary guideline) and 46 cases sentenced under § 2D2.2 (in 41 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 630 cases sentenced under § 2D2.1 (in 587 of those it was the primary guideline), 24 cases sentenced under § 2D2.2 (in 17 of those it was the primary guideline).

Proposed Amendment: Section 2D2.1 is amended in the title by inserting ''of a Controlled Substance; Acquiring a Controlled Substance by Misrepresentation, Forgery, Fraud, Deception or Subterfuge'' immediately following ''Possession''.

Section 2D2.1(b) is redesignated as ''(c)''.

Section 2D2.1(c)(2) (formerly (b)(2)) is amended by inserting ''if the resulting offense level is greater than that determined above'' immediately before ''.''.

Section 2D2.1 is amended by adding the following new subsection after subsection (a):

''(b) Specific Offense Characteristic

(1) If the offense involved acquiring a controlled substance from a legally

authorized source by misrepresentation, forgery, fraud, deception, or subterfuge, increase by 2 levels. If the resulting offense level is less than level 8, increase to level 8.''.

The Commentary to § 2D2.1 is amended by deleting ''Provision'' and inserting in lieu thereof ''Provisions'' and by inserting ''§ 843(a)(3),'' immediately after ''§ ''.

The Commentary to § 2D2.1 is amended by inserting the following:

''Application Note:

1. Subsection (b)(1) would apply, for example, where the defendant obtained a controlled substance from a pharmacist by using a forged prescription or a prescription obtained from a physician by fraud or deception.''.

The Commentary to § 2D2.1 captioned ''Background'' is amended in the second paragraph by deleting ''2D2.1(b)'' and inserting in lieu thereof ''2D2.1(c)''.

Section 2D2.2 is deleted in its entirety.

(H) *Consolidation of §§ 2D3.1 and 2D3.2*.

Synopsis of Proposed Amendment: Sections 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) and 2D3.2 (Regulatory Offenses Involving Controlled Substances; Attempt or Conspiracy) are consolidated. Section 2D3.1 currently has a base offense level of 6; § 2D3.2 has a base offense level of 4. The consolidated guideline would have a base offense level of 6, the base offense level most typical for regulatory offenses.

The 1993 Annual Report shows seven cases sentenced under § 2D3.1 (in all of those it was the primary guideline) and three cases sentenced under § 2D3.2 (then §§ 2D3.2–2D3.5; in all of those they were the primary guidelines).

The 1994 Annual Report (FY 94) shows nine cases sentenced under § 2D3.1 (in eight of those it was the primary guideline) and two cases sentenced under §§ 2D3.2–2D3.5 (in both of those they were the primary guidelines).

The 1995 Annual Report (FY 95) shows two cases sentenced under § 2D3.1 (in both of those it was the primary guideline) and four cases sentenced under §§ 2D3.2–2D3.5 (in three of those they were the primary guidelines).

Proposed Amendment: Section 2D3.1 is amended in the title by deleting ''Registration Numbers'' and inserting in lieu thereof ''Controlled Substances or Listed Chemicals''.

The commentary to § 2D3.1 captioned ''Statutory Provisions'' is amended by deleting ''842(a)(1), 843(a)(1), (2)'' and inserting in lieu thereof ''842(a)(1), (2), (9), (10), (b), 843(a)(1), (2), 954, 961''.

Section 2D3.2 is deleted in its entirety.

(I) *Consolidation of §§ 2E2.1 and 2B3.2*.

Synopsis of Proposed Amendment: Sections 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means) are consolidated. These guidelines use the same basic structure and cover conduct that is in many respects similar. The current guidelines have four differences. First, the base offense level of § 2B3.2 is 18 with a 2-level adjustment for an express or implied threat of death, bodily injury, or kidnapping. The base offense level of § 2E2.1 is 20. Second, the offense levels for weapon use (originally identical) are now different. (In 1991, the Commission increased the adjustments for firearms possession or use in §§ 2B3.1 and 2B3.2 but not § 2E2.1).

Third, § 2B3.2 provides an enhancement for the amount demanded or loss to the victim. Section 2E2.1 does not contain this enhancement (because there would be substantial difficulty in separating the unlawfully demanded interest from the principal and legitimate interest that could have been charged). Fourth, § 2B3.2 contains a cross reference to the attempted murder guideline; § 2E2.1 does not.

The consolidated guideline uses the base offense level and adjustments from § 2B3.2. A specific offense characteristic is added to include a 2-level adjustment for extortionate extension of credit and collecting an extension of credit by extortionate means (resulting in the same offense level as the current guideline for such conduct). In addition, Application Note 1 is amended to provide (as in current § 2E2.1) that, in cases involving extortionate extension of credit or collecting an extension of credit by extortionate means, subsection (b)(2) does not apply to the demand for repayment of principal or interest in the case of a loan.

Under the consolidation, offenses under § 2E2.1 will be subject to a weapon enhancement that may be two levels greater, in some cases, than is currently provided by the weapon enhancement in § 2E2.1. In addition, under the consolidated guideline, the attempted murder cross reference in § 2B3.2 and the enhancement in § 2B3.2(b)(3)(B) (providing a three-level increase if the offense involved preparation or other demonstrated ability to carry out a threat of specified unlawful behavior), would now apply to offenses under § 2E2.1.

The 1993 Annual Report (FY 93) shows 52 cases sentenced under § 2B3.2 (in 36 of those it was the primary guideline) and 48 cases sentenced under § 2E2.1 (in 31 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 129 cases sentenced under § 2B3.2 (in 74 of those it was the primary guideline), and 48 cases sentenced under § 2E2.1 (in 29 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 93 cases sentenced under § 2B3.2 (in 52 of those it was the primary guideline), and 62 cases sentenced under § 2E2.1 (in 39 of those it was the primary guideline).

Proposed Amendment: Section 2B3.2 is amended in the title by inserting at the end ''; Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means''.

Section 2B3.2(b)(2) is amended by inserting at the end the following: ''Do not apply this subsection in the case of extortionate extension of credit or collecting an extension of credit by extortionate means.''.

Section 2B3.2(b) is amended by inserting the following additional subdivision at the end:

''(6) If the offense involved extortionate extension of credit or collecting an extension of credit by extortionate means, increase by 2 levels.''.

Section 2B3.2(c) is amended by inserting the following additional subdivision:

''(3) If the offense did not involve a threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, apply § 2B3.3 (Blackmail and Similar Forms of Extortion).''.

The Commentary to § 2B3.2 captioned ''Statutory Provisions'' is amended by inserting ''892–894'' following ''877,''.

The Commentary to § 2B3.2 captioned ''Statutory Provisions'' is amended by inserting ''892–894,'' immediately following ''877''.

The Commentary to 2B3.2 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning ''For purposes of this guideline-'';

By deleting ''are defined in the commentary to § 1B1.1 (Application Instructions)'' and inserting in lieu thereof ''have the meaning given such terms in [the commentary to] § 1B1.1'';

And by inserting the following additional paragraph at the end:

'' 'Loss to the victim,' as used in subsection (b)(2), means any demand

paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense). Subsection (b)(2) does not apply in the case of extortionate extension of credit or collecting an extension of credit by extortionate means. However, in such a case, if the loss to the victim involved consequential loss from the offense, such as damage to an automobile, an upward departure may be warranted.''.

The Commentary to § 2B3.2 captioned ''Application Notes'' is amended in Note 3 by deleting the last sentence.

The Commentary to § 2B3.2 captioned ''Application Notes'' is amended by deleting Note 5 in its entirety and renumbering the remaining notes accordingly.

The Commentary to § 2B3.2 captioned ''Background'' is deleted in its entirety.

Section 2E2.1 is deleted in its entirety.

(J) *Consolidation of §§ 2E5.3 and 2F1.1*

Synopsis of Proposed Amendment: Section 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act) and 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) are consolidated. Section 2E5.3 is an infrequently used guideline for what is essentially a false statement offense or a failure to maintain records offense that in some cases may be used to conceal another offense, generally embezzlement or bribery. Consolidation with § 2F1.1 retains the same base offense level, and will produce the same final offense level in cases of embezzlement.

Currently, Application Note 13 of § 2F1.1 describes situations in which application of offense guidelines other than § 2F1.1 may be more apt. This amendment adds a cross reference to § 2F1.1 to apply another offense guideline if the offense conduct is addressed more specifically by that guideline and modifies Application Note 13 accordingly. Application Note 13 is also modified to address the small number of cases in which this offense may be committed to conceal a bribery offense.

The 1993 Annual Report (FY 93) shows two cases sentenced under § 2E5.3 (in both of those it was the primary guideline) and 5,963 cases sentenced under § 2F1.1 (in 5,696 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 10 cases sentenced under § 2E5.3 (in seven of those it was the primary guideline), and 6,235 cases sentenced under § 2F1.1 (in 5,952 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 90 cases sentenced under § 2E5.3 (in eight of those it was the primary guideline) and 6,339 cases sentenced under § 2F1.1 (in 6,019 of those it was the primary guideline).

Proposed Amendment: Section 2E5.3 is deleted in its entirety.

Section 2F1.1 is amended by inserting the following new subsection:

''(c) Cross Reference.

(1) If the offense conduct is addressed more specifically by another offense guideline, apply that offense guideline.''.

The Commentary to § 2F1.1 captioned ''Statutory Provisions'' is amended by deleting '', 1026, 1028,'' and inserting ''-''; and by inserting ''; 29 U.S.C. §§ 439, 461, 1131'' immediately after ''2315''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 13 by deleting ''Sometimes,'' and inserting in lieu thereof ''Subsection (c)(1) provides a cross reference to another offense guideline if that guideline more specifically addresses the offense conduct than this section does. For example, sometimes''; by inserting ''false statements to secure immigration documents, for which § 2L2.1 or § 2L2.2 would be more apt,'' immediately before ''and false statements''; by inserting ''§ 2S1.3 or'' immediately before ''§ 2T3.1''; and by deleting ''Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered.'' and inserting in lieu thereof: ''In certain other cases, an offense involving fraudulent statements or documents, or failure to maintain required records, may be committed in furtherance of the commission or concealment of another offense, such as embezzlement or bribery. In such cases, § 2B1.1 or § 2E5.1 would be more apt.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting the following new paragraph after the first paragraph:

''This guideline also covers the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act and failure to maintain or falsification of documents required by the Labor Management Reporting and Disclosure Act.''.

(K) Consolidation of §§ 2E1.2 and 2E1.3.

Synopsis of Proposed Amendment: Sections 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise) and 2E1.3 (Violent Crimes in Aid of Racketeering Activity) are consolidated. Both have the base offense level for the underlying offense as the primary base offense level. Section 2E1.2 has an alternative base offense level of 6 and § 2E1.3 has an alternative base offense level of 12. Elimination of these alternative base offense levels will considerably simplify the operation of these guidelines, removing the need in each case for the comparison set forth in Application Note 1. In FY 95, 5 of the 24 cases sentenced under § 2E1.2 (or 20.8%) had a base offense level of 6, and one of the 19 cases sentenced under § 2E1.3 (or 5.3%) had a base offense level of 12.

The 1993 Annual Report (FY 93) shows 90 cases sentenced under § 2E1.2 (in 72 of those it was the primary guideline) and 55 cases sentenced under § 2E1.3 (in 26 of those it was the primary guideline).

The 1994 Annual Report (FY94) shows 97 cases sentenced under § 2E1.2 (in 77 of those it was the primary guideline), and 48 cases sentenced under § 2E1.3 (in 17 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 33 cases sentenced under § 2E1.2 (in 24 of those it was the primary guideline), and six cases sentenced under § 2E1.3 (in three of those it was the primary guideline).

Proposed Amendment: Section § 2E1.2 is amended in the title by inserting at the end ''; Violent Crimes in Aid of Racketeering Activity''.

Section § 2E1.2(a) is amended by deleting ''(Apply the greater):''; by deleting subsection (1) in its entirety; by deleting ''(2)''; by deleting ''the'' and inserting in its place ''The''; and by deleting ''crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken'' and inserting in lieu thereof ''offense (crime of violence or racketeering activity)''.

The Commentary to § 2E1.2 captioned ''Statutory Provision'' is amended by deleting ''Provision'' and inserting in lieu thereof ''Provisions''; by inserting an additional ''§ '' immediately following the ''§ ''; and by inserting at the end ''; 1959 (formerly 18 U.S.C. 1952B)''.

The Commentary to § 2E1.2 captioned ''Application Notes'' is amended in Note 1 by deleting ''for the purposes of

subsection (a)(2)'' and by deleting the second and third sentences.

The Commentary to § 2E1.2 captioned ''Application Notes'' is amended by deleting Note 3 in its entirety.

Section 2E1.3 is deleted in its entirety.

(L) *Consolidation of §§ 2J1.2 and 2J1.3.*

Synopsis of Proposed Amendment: Sections 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) and 2J1.2 (Obstruction of Justice) are consolidated. No substantive change in offense levels results from this consolidation. The only difference between the current guidelines is that § 2J1.3 contains a special instruction pertaining to the grouping of certain separate instances of perjury. This special instruction would continue to apply only to cases currently covered. This amendment also clarifies the interaction of §§ 2J1.2(c)(1) and 2J1.3(c)(1) with § 2X3.1 and adds an Application Note to § 2J1.2 to clarify that the criminal offense the investigation or prosecution of which was obstructed need not have been specifically charged or resulted in a conviction in order for the cross reference to § 2X3.1 to apply.

In addition, this amendment adds an application note to reemphasize that the defendant's conduct need not constitute the offense of accessory after the fact in order for the cross reference to § 2X3.1 to apply. Even though the background and commentary to § 2J1.2 was amended in 1991 to clarify that the cross reference to § 2X3.1 could apply even if the defendant was a principal to the underlying offense, hotline calls indicate there is still some confusion in respect to this issue for both §§ 2J1.2 and 2J1.3 cases.

The 1993 Annual Report (FY 93) shows 111 cases sentenced under § 2J1.2 (in 89 of those it was the primary guideline) and 125 cases sentenced under § 2J1.3 (in 109 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 137 cases sentenced under § 2J1.2 (in 99 of those it was the primary guideline) and 119 cases sentenced under § 2J1.3 (in 96 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 104 cases sentenced under § 2J1.2 (in 82 of those it was the primary guideline) and 78 cases sentenced under § 2J1.3 (in 63 of those it was the primary guideline).

Proposed Amendment: Section 2J1.2 is amended in the title by inserting ''Perjury or Subornation of Perjury; Witness Bribery;'' immediately before ''Obstruction''.

Section 2J1.2(b)(1) is amended by inserting ''suborn perjury or otherwise'' immediately before ''obstruct''.

Section 2J1.2 is amended by adding the following new subsection:

''(d) Special Instruction.

(1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under § 3D1.2 (Groups of Closely Related Counts).''.

The Commentary to § 2J1.2 captioned ''Statutory Provisions'' is amended by inserting ''201(b) (3), (4),'' immediately before ''1503,''; and by inserting '', 1621–1623'' immediately following ''1516''.

The Commentary to § 2J1.2 captioned ''Application Notes is amended in Note 2 by deleting ''or'' immediately after ''investigation'' and inserting a comma in lieu thereof; by deleting ''of the'' immediately after ''trial'' and inserting in lieu thereof '', or sentencing of the perjury, subornation of perjury, witness bribery, or''; in Note 5 by inserting ''suborn perjury or'' immediately following ''(e.g., to''; and by inserting the following additional notes:

''6. For purposes of subsection (c)(1), the criminal offense the investigation or prosecution of which was obstructed need not have been charged or resulted in a conviction.

Application of subsection (c)(1) does not require that the defendant's conduct constitute the offense of accessory after the fact. Rather, it provides for the use, in the circumstances specified, of the guideline that applies to accessory after the fact offenses. Thus, the fact that a defendant cannot be an accessory after the fact, under federal law, to an offense in which the defendant is a principal does not bar application of this cross reference.

7. 'Separate proceedings,' as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.''.

The Commentary to § 2J1.2 captioned ''Background'' is amended in the first sentence by deleting ''the'' immediately following ''involving'' and inserting in lieu thereof ''perjury, subornation of perjury, witness bribery, and''.

Section 2J1.3 is deleted in its entirety.

Issue for Comment: The special instruction currently contained in § 2J1.3(d)(1) applies to perjury or subornation of perjury and not to obstruction, separate instances of which are more difficult to determine. This special instruction was not included in the original guideline but was later added to cover the very infrequent perjury case to which it applied (approximately six in 40,000 cases). The Commission requests comment on whether this historical policy judgment, which was limited to perjuries, should be expanded to cover obstructions.

(M) *Consolidation of §§ 2K1.1 and 2K1.6.*

Synopsis of Proposed Amendment: Sections 2K1.1 and 2K1.6 are consolidated. These are regulatory and recordkeeping offenses having the same base offense level. The only substantive change resulting from the consolidation is that the cross reference in § 2K1.6, which directs to apply § 2K1.3 if the offense reflected an effort to conceal a substantive offense, would also apply to offenses under § 2K1.1. This could result in a change in offense levels for cases under § 2K1.1 (offenses under which currently have a statutory maximum of one year.) There seems no reason that the cross reference in § 2K1.6 (covering conduct reflecting an effort to conceal a substantive offense) should not also cover conduct under § 2K1.1.

The 1993 Annual Report (FY 93) shows no cases sentenced under § 2K1.1 or § 2K1.6.

The 1994 Annual Report (FY 94) shows nine cases sentenced under § 2K1.1 (in all of those it was the primary guideline) and no cases sentenced under § 2K1.6.

The 1995 Annual Report (FY 95) shows 11 cases sentenced under § 2K1.1 (in all those it was the primary guideline) and no cases sentenced under § 2K1.6.

Proposed Amendment: Section 2K1.1 is amended in the title by inserting at the end ''; Licensee Recordkeeping Violations''.

Section 2K1.1 is amended by adding the following new subsection after subsection (a):

''(b) Cross Reference:

(1) If the offense involved an effort to conceal a substantive explosive materials offense, apply § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials).''.

The Commentary to § 2K1.1 captioned ''Statutory Provisions'' is amended by inserting ''(f), (g),'' immediately following ''§ 842''.

The Commentary to § 2K1.1 captioned ''Background'' is deleted in its entirety.

Section 2K1.6 is deleted in its entirety.

(N) *Consolidation of §§ 2L2.2 and 2L2.5.*

Synopsis of Proposed Amendment: Sections 2L2.2 and 2L2.5 are consolidated. No change in offense level

will result. Section 2L2.5 covers a rarely prosecuted statute that has the same base offense level as § 2L2.2. Section 2L2.2 contains additional adjustments, but they do not apply to conduct covered by § 2L2.5.

The 1993 Annual Report (FY 93) shows 186 cases sentenced under § 2L2.2 (in 156 of those it was the primary guideline) and no cases sentenced under § 2L2.5.

The 1994 Annual Report (FY 94) shows 266 cases sentenced under § 2L2.2 (in 242 of those it was the primary guideline) and no cases sentenced under § 2L2.5.

The 1995 Annual Report (FY 95) shows 402 cases sentenced under § 2L2.2 (in 354 of those it was the primary guideline) and no cases sentenced under § 2L2.5.

Proposed Amendment: Section 2L2.2 is amended in the title by inserting at the end ''; Failure to Surrender Canceled Naturalization Certificate''.

The Commentary to § 2L2.2 captioned ''Statutory Provisions'' is amended by deleting ''1426'' and inserting in lieu thereof ''1427''.

Section 2L2.5 is deleted in its entirety.

(O) *Consolidation of §§ 2M2.1 and 2M2.3.*

Synopsis of Proposed Amendment: This amendment consolidates §§ 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities). [Note: The Commission decided in October that it did not wish to propose deletion of these two guidelines and their incorporation into § 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, and Property Destruction), but the Commission indicated a willingness to consider merging the two guidelines into one.] Consolidation is appropriate for two reasons. First, prosecutions under these statutes are infrequent. In FY 1990 through 1995, there were no cases sentenced under these guidelines. Second, although the statutes referenced to §§ 2M2.1 and 2M2.3 cover an extremely wide range of conduct (e.g., from major sabotage designed to injure the United States on one hand to minor property damage by a disgruntled serviceman or a war protest group on the other), the offenses covered by these two guidelines essentially are property damage offenses. An option for addressing the issue of the appropriate offense level is to add an application note explaining the circumstances under which a departure may be warranted.

Proposed Amendment: Section 2M2.1 is amended by deleting subsection (a) in its entirety and inserting the following in lieu thereof:

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

(1) 32, if the defendant is convicted (A) under 18 U.S.C. § 2153 or § 2154; or (B) under 42 U.S.C. § 2284 of acting with intent to injure the United States or aid a foreign nation; or

(2) 26, otherwise.

The Commentary to § 2M2.1 captioned ''Statutory Provisions'' is amended by inserting an additional ''§ '' immediately following the ''§ ''; and by deleting ''2154'' and inserting in lieu thereof ''–2156''.

The Commentary to § 2M1.1 captioned ''Application Note'' is amended by deleting Note 1 in its entirety and inserting the following in lieu thereof:

[1. Because this section covers a particularly wide range of conduct, it is not possible to include all of the potentially relevant circumstances in the offense level. Therefore, depending on the circumstances of the case, an upward or a downward departure may be warranted. For example, if the defendant was convicted under 18 U.S.C. § 2155 of throwing paint on defense equipment or supplies as an act of protest during peacetime, the offense level in subsection (a)(2) may overrepresent the seriousness of the offense. In that case, a downward departure may be warranted. However, if the defendant was convicted under 18 U.S.C. § 2153 of major sabotage of arms and munitions while the United States was at war, the offense level in subsection (a)(1) may underrepresent the seriousness of the offense. In that case, an upward departure may be warranted. Factors to be considered in determining the extent of the departure include whether the offense was committed while the United States was at war, whether the purpose of the offense was to injure the United States or aid a foreign nation or power, whether a substantial risk of death or physical injury was created, and the extent to which national security was threatened. See Chapter Five, Part K (Departures).]

Section 2M2.3 is deleted in its entirety.

(P) *Deletion of § 2M3.4.*

Synopsis of Proposed Amendment: This amendment deletes § 2M3.4 (Losing National Defense Information) as unnecessary and potentially counterproductive. This guideline covers an extremely rarely prosecuted offense. There have been no sentences recorded under this section since the guidelines took effect. Given that this offense could occur in a variety of circumstances (as well as could be used as a plea bargain offense for a more serious offense), it seems questionable whether the current § 2M3.4 is adequate to provide an appropriate result. Given the rarity of this offense, deletion of this offense guideline is recommended. Any offenses currently handled under this section will be addressed by § 2X5.1 (Other Offenses).

The 1993 Annual Report (FY 93) shows no cases sentenced under § 2M3.4.

The 1994 Annual Report (FY 94) shows no cases sentenced under § 2M3.4.

The 1995 Annual Report (FY 95) shows no cases sentenced under § 2M3.4.

Proposed Amendment: Section 2M3.4 is deleted in its entirety.

(Q) *Consolidation of §§ 2M3.5 and 2M6.2.*

Synopsis of Proposed Amendment: Sections 2M3.5 (Tampering with Restricted Data Concerning Atomic Energy) and 2M6.2 (Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations) are rarely used guidelines that cover conduct relating to atomic energy. Currently, there seems to be some inconsistency in the offense levels between these guidelines. It is not clear why tampering with restricted data concerning atomic energy has an offense level of 24 (even if done with intent to injure the United States or aid a foreign nation) while violations of other federal atomic energy statutes, rules, or regulations have an offense level of 30 if committed with intent to injure the United States or aid a foreign nation. This amendment would remove this inconsistency by consolidating these guidelines. However, offenses that involve tampering with restricted data (which currently receive an offense level of 24) would receive an offense level of 30 if the offense were committed with intent to injure the United States or aid a foreign nation.

The 1993 Annual Report (FY 93) shows no cases sentenced under § 2M3.5, and five cases sentenced under § 2M6.2 (in four of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows no cases sentenced under § 2M3.5, and two sentences under § 2M6.2 (in one of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows no cases sentenced under § 2M3.5 and three cases sentenced under § 2M6.2 (in all of those it was the primary guideline).

Proposed Amendment: Section 2M6.2 is amended in the title by inserting ''Tampering With Restricted Data Concerning Atomic Energy;'' immediately before ''Violation''.

Section 2M6.2(a) is amended by deleting ''Greater'' and inserting in lieu thereof ''Greatest''; by renumbering subdivision (2) as subdivision (3) and inserting the following as subdivision (2):

''(2) 24, if the offense involved tampering with restricted data concerning atomic energy; or''.

The Commentary to § 2M6.2 captioned ''Statutory Provision'' is amended by deleting ''Provision'' and inserting in lieu thereof ''Provisions''; by inserting ''§ '' immediately before ''2273''; and by inserting '', 2276'' immediately following ''2273''.

The Commentary to § 2M6.2 is amended by inserting the following immediately before ''Background'':

''Application Note:

1. For purposes of this guideline, 'tampering with restricted data concerning atomic energy'' means conduct proscribed by 18 U.S.C. § 2276.''.

Section 2M3.5 is deleted in its entirety.

(R) *Consolidation of §§ 2N3.1 and 2F1.1.*

Synopsis of Proposed Amendment: Section 2N3.1 (Odometer Laws and Regulations) is consolidated with § 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other Than Counterfeit Bearer Obligations of the United States). Currently, § 2N3.1 has the same base offense level as § 2F1.1 and is cross-referenced to § 2F1.1 if more than one vehicle was involved (one vehicle cases are infrequent). Under this consolidation, fraud by odometer tampering involving one vehicle will be treated the same as other fraud (i.e., the specific offense characteristics for loss and more than minimal planning will apply, if warranted). There seems no reason to treat this type of fraud differently than other types of fraud.

The 1993 Annual Report (FY 93) shows 5,963 cases sentenced under § 2F1.1 (in 5,696 of those it was the primary guideline) and 17 cases sentenced under § 2N3.1 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 6,235 cases sentenced under § 2F1.1 (in 5,952 of those it was the primary guideline) and eight cases sentenced under § 2N3.1 (in seven of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 6,339 cases sentenced under § 2F1.1 (in 6,019 of those it was the primary guideline) and two cases sentenced under § 2N3.1 (in both of those it was the primary guideline).

Proposed Amendment: The Commentary to § 2F1.1 captioned ''Statutory Provisions'' is amended by inserting '', 1983–1988, 1990c'' immediately following ''1644''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting as a new paragraph after the first paragraph:

''This guideline also covers offenses relating to odometer laws and regulations.''.

Section 2N3.1 is deleted in its entirety.

(S) *Consolidation of §§ 2T1.1 and 2T1.6.*

Synopsis of Proposed Amendment: Sections 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) and 2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax) are consolidated. Section 2T1.6 is an infrequently prosecuted tax offense involving an employer failing to collect or truthfully account for any pay over tax.

Both guidelines have the same base offense level. In most cases, there will be no change in offense level, which is based on the tax loss, because sections 2T1.1(b) (1) and (2) will not apply to conduct under § 2T1.6. However, currently § 2T1.6 contains a cross reference to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it. Application of that cross reference could result in offense levels one or two levels greater for offenses under § 2T1.6. That cross reference no longer exists under the consolidation, and the consolidation does not provide an enhancement for offenses involving embezzlement.

The 1993 Annual Report (FY 93) shows 302 cases sentenced under § 2T1.1 (in 225 of those it was the primary guideline) and five cases sentenced under § 2T1.6 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 528 cases sentenced under § 2T1.1 (in 413 of those it was the primary guideline) and no cases sentenced under § 2T1.6.

The 1995 Annual Report (FY 95) shows 517 cases sentenced under § 2T1.1 (in 405 of those it was the primary guideline) and five cases sentenced under § 2T1.6 (in all of those it was the primary guideline).

Proposed Amendment: Section 2T1.1 is amended in the title by inserting ''; Failing to Collect or Truthfully Account for and Pay Over Tax'' immediately following ''Documents''.

Section 2T1.1(c) is amended by renumbering subdivision (5) as subdivision (6) and by inserting the following as a new subdivision (5):

''(5) If the offense involved failing to collect or truthfully account for any pay over tax, the tax loss is the amount of tax not collected or accounted for and paid over.''.

Section 2T1.6 is deleted in its entirety.

(T) *Consolidation of §§ 2E4.1, 2T2.1, and 2T2.2.*

Synopsis of Proposed Amendment: Sections 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes), 2T2.1 (Non-Payment of [Alcohol and Tobacco] Taxes), and 2T2.2 (Regulatory Offenses) and are consolidated. This amendment consolidates three infrequently applied guidelines.

Under this consolidation, the base offense level for § 2T2.2 is raised from four to six, which is the base offense most typical for regulatory offenses. Otherwise, there is no substantive change.

The 1993 Annual Report shows no cases sentenced under § 2E4.1, seven cases sentenced under § 2T2.1 (in five of those it was the primary guideline), and no cases sentenced under § 2T2.2.

The 1994 Annual Report (FY94) shows 10 cases sentenced under § 2E4.1 (in six of those it was the primary guideline), four cases sentenced under § 2T2.1 (in one of those it was the primary guideline), and no cases sentenced under § 2T2.2.

Proposed Amendment: Chapter Two, Part T, Subpart 2 captioned ''Introductory Commentary'' is deleted in its entirety.

Section 2T2.1 is amended by deleting it in its entirety and inserting in lieu thereof:

§ 2T2.1. Non-Payment of Taxes; Regulatory Offenses.

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

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss;

(2) 9, if the offense involved contraband cigarettes; or

(3) 6, if there is no tax loss.

(b) Special Instruction.

(1) For purposes of this guideline, the ''tax loss'' is the total amount of taxes on the alcohol or tobacco that the taxpayer failed to pay, evaded, or attempted to evade.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a); 26 U.S.C. §§ 5601, 5603–5605, 5661, 5671, 5762. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. In the case of contraband cigarettes (as defined in 18 U.S.C. § 2341 (2)), the tax loss is the total amount of unpaid state excise taxes on the cigarettes.

2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: This section covers a variety of offenses involving alcohol and tobacco, including evasion of alcohol and tobacco taxes, evasion of state excise taxes on cigarettes, operating an illegal still, and regulatory offenses.''

Sections 2E4.1 and 2T2.2 are deleted in their entirety.

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