SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of an entity whose property and interests in property have been unblocked pursuant to Executive Order 13315 of August 28, 2003, ''Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions,'' as amended by Executive Order 13350 of July 30, 2004.

DATES: The removal of this entity from the SDN List is effective as of January 10, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC are available from OFAC's web site (*www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

On August 28, 2003, the President issued Executive Order 13315 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.,* the National Emergencies Act, 50 U.S.C. 1601 *et seq.,* section 5 of the United Nations Participation Act, as amended, 22 U.S.C. 287c, section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution 1483 of May 22, 2003. In the Order, the President expanded the scope of the national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq. The Order blocks the property and interests in property of, *inter alia,* persons listed on the Annex to the Order.

On July 30, 2004, the President issued Executive Order 13350, which, *inter alia,* replaced the Annex to Executive Order 13315 with a new Annex that included the names of individuals and entities, including individuals and entities that had previously been designated under Executive Order 12722 and related authorities.

The Department of the Treasury's Office of Foreign Assets Control has determined that the entity identified below, whose property and interests in property were blocked pursuant to Executive Order 13315, as amended, should be removed from the SDN List.

The following designation is removed from the SDN List:

Matrix Churchill Corporation, 5903 Harper Road, Cleveland, OH 44139 [IRAQ2]

The removal of this entity's name from the SDN List is effective as of January 10, 2012. All property and interests in property of the entity that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Dated: January 9, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–963 Filed 1–18–12; 8:45 am]

BILLING CODE 4810–AL–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment on fraud and related offenses, including (A) An issue for comment in response to the issue of harm to the public and financial markets, as raised by each of two directives to the Commission in section 1079A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203; (B) a proposed change to § 2B1.4 (Insider Trading) to implement the directive in section 1079A(a)(1) of that Act, and related issues for comment on insider trading, securities fraud, and similar offenses; (C) proposed changes to § 2B1.1 (Theft, Property Destruction, and Fraud) regarding mortgage fraud offenses to implement the directive in section 1079A(a)(2) of that Act, and a related issue for comment on mortgage fraud and financial institution fraud; and (D) issues for comment on the impact of the loss table in § 2B1.1(b)(1) and the victims table in § 2B1.1(b)(2) in cases involving relatively large loss amounts; (2) a proposed amendment on offenses involving controlled substances and chemical precursors, including (A) an issue for comment on offenses involving N–Benzylpiperazine (BZP); and (B) a proposed change to § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) that would create a guidelines ''safety valve'' provision for offenses involving chemical precursors that would be analogous to the provision in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); (3) a proposed amendment on human rights offenses, including (A) a proposed guideline applicable to human rights offenses; (B) proposed changes to § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) to address cases in which the offense of conviction is for immigration or naturalization fraud but the defendant had committed a serious human rights offense; and (C) related issues for comment on human rights offenses; (4) a proposed amendment to

§ 2L1.2 (Unlawfully Entering or Remaining in the United States) to respond to a circuit conflict over application of the term ''sentence imposed'' in that guideline when the defendant's original ''sentence imposed'' was lengthened after the defendant was deported; (5) a proposed amendment presenting options for specifying the types of documents that may be considered in determining whether a particular prior conviction fits within a particular category of crimes for purposes of specific guideline provisions, and related issues for comment; (6) a proposed amendment to § 4A1.2 (Definitions and Instructions for Computing Criminal History) to respond to an application issue regarding when a defendant's prior sentence for driving while intoxicated or driving under the influence (and similar offenses by whatever name they are known) is counted toward the defendant's criminal history score; (7) a proposed amendment to § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to respond to differences among the circuits on when, if at all, burglary of a non-dwelling qualifies as a crime of violence for purposes of the guidelines, and related issues for comment; (8) a proposed amendment to § 5G1.2 (Sentencing on Multiple Counts of Conviction) to respond to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range; (9) a proposed amendment to § 5K2.19 (Post-Sentencing Rehabilitative Efforts) to respond to *Pepper* v. *United States,* 131 S.Ct. 1229 (2011), which held, among other things, that a defendant's post-sentencing rehabilitative efforts may be considered when the defendant is resentenced after appeal; and (10) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted, including (A) proposed changes to § 2P1.2 (Providing or Possessing Contraband in Prison) to respond to the Cell Phone Contraband Act of 2010, Public Law 111–225, and (B) proposed changes to Appendix A (Statutory Index) to address certain criminal provisions in the Prevent All Cigarette Trafficking Act of 2009, Public Law 111–154, the Indian Arts and Crafts Amendments Act of 2010, Public Law 111–211, the Animal Crush Video Prohibition Act of 2010, Public Law 111–294, and certain other statutes, and a related issue for comment.

DATES: (1) *Written public comment.*—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 19, 2012.

(2) *Public hearing.*—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its Web site at *www.ussc.gov.*

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

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, Telephone: (202) 502–4502.

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

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(c). To the extent practicable, public comment should address each of these factors.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Patti B. Saris,

Chair.

1. Dodd-Frank/Fraud

Synopsis of Proposed Amendment: This proposed amendment is a multi-part amendment that continues the Commission's multi-year review of fraud offenses to ensure that the guidelines provide appropriate penalties (1) in cases involving securities fraud and similar offenses and (2) in cases involving mortgage fraud and financial institution fraud.

Specifically, the proposed amendment implements the two directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (the ''Act''). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Each directive requires the Commission to ''review and, if appropriate, amend'' the guidelines and policy statements applicable to the offenses covered by the directive and consider whether the guidelines

appropriately account for the potential and actual harm to the public and the financial markets from those offenses. Each directive also requires the Commission to ensure that the guidelines reflect (i) The serious nature of the offenses, (ii) the need for deterrence, punishment, and prevention, and (iii) the effectiveness of incarceration in furthering those objectives.

Part A responds to the issue of harm to financial markets, which is raised by both directives; Part B responds to the directive on securities fraud and similar offenses; and Part C responds to the directive on mortgage fraud and financial institution fraud.

The proposed amendment also includes a Part D, which responds to concerns suggesting that the impact of the loss table or the victims table (or the combined impact of the loss table and the victims table) may overstate the culpability of certain offenders in cases sentenced under § 2B1.1 that involve relatively large loss amounts.

The parts are as follows:

(A) Harm to Financial Markets

Issue for Comment:

1. The Commission requests comment on whether the *Guidelines Manual* provides penalties that appropriately account for the potential and actual harm to the public and the financial markets from the offenses covered by the directives. If not, what changes to the *Guidelines Manual* would be appropriate to respond to this requirement in both directives?

Section 2B1.1 contains provisions that address harm to the public and the financial markets in various ways, by taking into account the amount of the loss, the number of victims, and other factors contained in its specific offense characteristics and departure provisions. For example, subsection (b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if the offense (i) substantially jeopardized the safety and soundness of a financial institution, (ii) substantially endangered the solvency or financial security of an organization that (I) was a publicly traded company or (II) had 1,000 or more employees, or (iii) substantially endangered the solvency or financial security of 100 or more victims. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

Should the Commission amend § 2B1.1 to more directly account for the potential and actual harms to the public and the financial markets? For example, should the Commission provide a new prong in § 2B1.1(b)(14) that provides an enhancement of [2][4][6] levels if the offense involved a significant disruption of a financial market or created a substantial risk of such a disruption? In the alternative, should the Commission provide a new upward departure provision in § 2B1.1 that applies if the offense involved such a disruption or created a substantial risk of such a disruption?

If the Commission were to provide such a provision, what guidance should the Commission provide for determining when the provision would apply?

(B) Securities Fraud and Similar Offenses

Synopsis of Proposed Amendment: Section 1079A(a)(1)(A) of the Act directs the Commission to ''review and, if appropriate, amend'' the guidelines and policy statements applicable to ''persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.''

In addition, section 1079A(a)(1)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) Ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

Securities fraud is prosecuted under 18 U.S.C. 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to § 2B1.1.

Securities fraud is also prosecuted under 18 U.S.C. 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. *See* § 2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to § 2B1.1.

The directive contemplates that the Commission also review offenses ''under any other similar provision of law''. The Commission has received comment indicating that commodities fraud offenses and insider trading offenses should be included within the scope of its review.

The proposed amendment responds to the directive by amending the insider trading guideline, § 2B1.4 (Insider Trading), in several ways.

First, it provides a specific offense characteristic that applies if the offense involved sophisticated insider trading. The specific offense characteristic provides an enhancement of [2] levels and a minimum offense level of [12][14].

Second, it provides a 4-level enhancement that applies if the defendant, at the time of the offense, held one of several listed positions of trust. This enhancement parallels the enhancement in § 2B1.1(b)(18).

Issues for comment are also provided, both on insider trading offenses under § 2B1.4 and on securities fraud and similar offenses under § 2B1.1.

Proposed Amendment:

Section 2B1.4(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by inserting after paragraph (1) the following:

''(2) If the offense involved sophisticated insider trading, increase by 2 levels. If the resulting offense level

is less than level [12][14], increase to level [12][14].

(3) If, at the time of the offense, the defendant was—

(A)(i) An officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B)(i) An officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator, increase by 4 levels.''.

The Commentary to §2B1.4 captioned ''Application Note'' is amended in the phrase ''Application Note'' by striking ''Note'' and inserting ''Notes''; by redesignating Note 1 as Note 3; in that Note, by striking ''Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill)'' and inserting ''If subsection (b)(3) applies, do not apply §3B1.3. In any other case, §3B1.3''; and by striking ''trust. Examples might include a corporate president or'' and inserting ''trust, such as''.

The Commentary to §2B1.4 captioned 'Application Note' is amended by inserting before Note 3 (as so redesignated) the following:

1. *Application of Subsection (b)(2).*— For purposes of subsection (b)(2), 'sophisticated insider trading' means especially complex or intricate offense conduct pertaining to the execution or concealment of the offense.

The following is a non-exhaustive list of factors that the court shall consider in determining whether subsection (b)(2) applies:

(A) The number of transactions;

(B) The dollar value of the transactions;

(C) The number of securities involved;

(D) The duration of the offense;

(E) Whether fictitious entities, corporate shells, or offshore financial accounts were used to hide transactions; and

(F) Whether internal monitoring or auditing systems or compliance and ethics program standards or procedures were subverted in an effort to prevent the detection of the offense.

2. *Application of Subsection (b)(3).*— For purposes of subsection (b)(3): 'Commodity pool operator' has the meaning given that term in section 1a(5) of the Commodity Exchange Act (7 U.S.C. 1a(5)).

'Commodity trading advisor' has the meaning given that term in section 1a(6) of the Commodity Exchange Act (7 U.S.C. 1a(6)).

'Futures commission merchant' has the meaning given that term in section 1a(20) of the Commodity Exchange Act (7 U.S.C. 1a(20)).

'Introducing broker' has the meaning given that term in section 1a(23) of the Commodity Exchange Act (7 U.S.C. 1a(23)).

'Investment adviser' has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

'Person associated with a broker or dealer' has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)).

'Person associated with an investment adviser' has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).

'Registered broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(48)).''.

Issues for Comment:

1. *Insider Trading.* The Commission has received public comment indicating that some insider trading defendants engage in serious offense conduct but nonetheless, because of market forces or other factors, do not necessarily realize high gains. The concern has been raised that in such cases, §2B1.4 may not adequately account for the seriousness of the conduct and the actual and potential harms to individuals and markets, because the guideline uses gain alone as the measure of harm.

Should the Commission provide in §2B1.4 one or more specific offense characteristics that use aggravating factors other than gain to account for the seriousness of the conduct and the actual or potential harm to individuals and markets? If so, what should the factor or factors be? For example, should the Commission provide, as an aggravating factor in §2B1.4, (i) The number of transactions; (ii) the dollar value of the transactions; (iii) the number of securities involved; or some other factor that distinguishes a defendant who engages in multiple instances or higher volumes of insider trading from a defendant who does not?

If the Commission were to provide one or more new specific offense characteristics based on such aggravating factors, what level or levels of enhancement should the Commission provide, and how should any such enhancement interact with the enhancement for gain in §2B1.4?

For example, in bid-rigging cases, the guidelines currently provide a ''volume of commerce'' enhancement in subsection (b)(2) of §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). That enhancement provides a tiered enhancement, ranging from 2 levels if the volume of commerce was more than $1,000,000, to 16 levels if the volume of commerce was more than $1,500,000,000. Should the Commission consider an analogous tiered enhancement (*e.g.,* based on volume of trading) for insider trading cases in §2B1.4? If so, what guidance should the Commission provide on how the volume of trading is to be determined, what volumes of trading should be used for the tiered enhancement, and what levels of enhancement should apply to the various tiers?

Similarly, §2R1.1 provides a special instruction under which the fine for an organizational defendant is calculated based on 20 percent of the volume of commerce, rather than on the pecuniary loss. *See* §2R1.1(d)(1). Should the Commission consider an analogous approach for insider trading cases in §2B1.4? In particular, should the Commission provide a special rule under which the gain enhancement in §2B1.4(b)(1) would use either the gain or an amount equal to [20] percent of the volume of trading, whichever is greater?

2. *Calculation of Loss in §2B1.1.* The Commission has received comment indicating that determinations of loss in cases under §2B1.1 involving securities fraud and similar offenses are complex and a variety of different methods are in use, resulting in application issues and possible sentencing disparities. Should the Commission amend §2B1.1 to clarify the method or methods used in determining loss in such cases to ensure that the guideline appropriately accounts for the potential and actual harm to the public and the financial markets from those offenses?

For example, courts in cases involving securities fraud and similar offenses have used—

(A) A simple rescissory method (under which loss is based upon the price that the victim paid for the security and the price of the security as it existed after the fraud was disclosed), *see, e.g., United States* v. *Grabske,* 260 F.Supp.2d 866, 872–73 (N.D. Cal. 2002);

(B) A modified rescissory method (under which loss is based upon the average price of the security during the period that the fraud occurred and the average price of the security during a set period after the fraud was disclosed to the market), *see, e.g., United States* v. *Brown,* 595 F.3d 498 (3d Cir. 2010); *United States* v. *Bakhit,* 218 F.Supp.2d 1232 (C.D. Cal. 2002);

(C) A market capitalization method (under which loss is based upon the price of the security shortly before the

disclosure and the price of the security shortly after the disclosure), *see, e.g., United States* v. *Moskowitz,* 215 F.3d 265, 272 (2d Cir. 2000), *abrogated on other grounds by Crawford* v. *Washington,* 541 U.S. 36, 64 (2002); *United States* v. *Peppel,* 2011 WL 3608139 (S.D. Ohio 2011); and

(D) A market-adjusted method (under which loss is based upon the change in value of the security, but excluding changes in value that were caused by external market forces), *see, e.g., United States* v. *Rutkoske,* 506 F.3d 170, 179 (2d Cir. 2007); *United States* v. *Olis,* 429 F.3d 540, 546 (5th Cir. 2005).

The Commission seeks comment on these four methods of calculating loss in cases involving securities fraud and similar offenses, and the relative advantages and disadvantages of these methods. The Commission also seeks comment on whether there are any other methods of calculating loss, other than these four methods, that should be used in such cases.

Should the Commission provide a specific method or methods for use by courts in determining loss in cases involving securities fraud and similar offenses? If so, which method or methods should the Commission provide? Should the method used depend on the type of fraudulent scheme, and if so, how?

In particular, two of the more common types of securities fraud are (1) investment fraud, in which victims are fraudulently induced to invest in companies or products related to securities (a category that includes Ponzi schemes); and (2) market or price manipulation fraud, in which the offender seeks to inflate the price of a security through various means (a category that includes so-called ''pump and dump'' schemes as well as accounting frauds). What method or methods of loss calculation should be used for investment fraud, and what method or methods should be used for market or price manipulation fraud? Are there any other types of securities fraud or similar offenses for which the Commission should provide a specific method or methods of loss calculation?

What changes, if any, should the Commission make to the existing rules for calculation of loss in cases involving securities fraud or similar offenses? For example, the calculation of loss in an investment fraud case is covered by Application Note 3(F)(iv) to § 2B1.1, which provides:

Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.,* the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

Should the Commission revise or repeal this application note and provide a different rule for investment fraud?

Should the Commission provide further guidance regarding the causation standard to be applied in calculating loss in cases involving securities fraud or similar offenses? For example, should the Commission provide a loss causation standard similar to the civil loss causation standard articulated by the Supreme Court in *Dura Pharmaceuticals, Inc.* v. *Broudo,* 544 U.S. 336 (2005) (holding that a civil securities fraud plaintiff must prove that the plaintiff's economic loss was proximately caused by the defendant's misrepresentation (or other fraudulent conduct) as opposed to other independent market factors)?

Are there any other changes that the Commission should make regarding the determination of loss in cases involving securities fraud or similar offenses to ensure that the guidelines appropriately account for the potential and actual harm to the public and the financial markets from those offenses?

3. *Specific Provisions in § 2B1.1.* The directive requires the Commission to consider, among other things, the enhancements at § 2B1.1(b)(15) and (b)(18) (formerly (b)(14) and (b)(17), respectively). The Commission seeks comment on whether any changes should be made to either or both of these provisions in response to the directive. Should the Commission expand the scope or the amounts of the increases provided by subsection (b)(15) or (b)(18), or both, to ensure that the guidelines appropriately account for the potential and actual harm to the public and the financial markets? If so, how?

(C) Mortgage Fraud and Financial Institution Fraud

Synopsis of Proposed Amendment: This part of the proposed amendment responds to the directive in section 1079A(a)(2) of the Act, which relates to mortgage fraud and financial institution fraud.

Specifically, section 1079A(a)(2)(A) of the Act directs the Commission to ''review and, if appropriate, amend'' the guidelines and policy statements applicable to ''persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.''

In addition, section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) Ensure that the guidelines and policy statements reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

With regard to mortgage fraud, the proposed amendment makes two changes to Application Note 3 regarding calculation of loss. The first change addresses the credit against loss rule and states that, in the case of a fraud involving a mortgage loan in which the collateral has been disposed of at a foreclosure sale, use the amount recovered from the foreclosure sale.

The second change specifies that, in the case of a fraud involving a mortgage loan, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the lending institution associated with foreclosing on the mortgaged property, provided that the lending institution exercised due diligence in the initiation, processing, and monitoring of the loan and the disposal of the collateral.

With regard to financial institution fraud more generally, the proposed amendment broadens the applicability of § 2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (*e.g.,* jeopardizing a financial institution or organization). Application Note 12 to § 2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(15)(B) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization

suffered one or more listed harms (such as becoming insolvent) as a result of the offense. The proposed amendment amends Note 12 to direct the court to consider whether one of the listed harms was likely to result from the offense but did not result from the offense because of federal government intervention.

Issues for comment are also provided.

Proposed Amendment:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3(A)(v) by adding at the end the following:

''(IV) *Fraud Involving a Mortgage Loan.*—In the case of a fraud involving a mortgage loan, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the lending institution associated with foreclosing on the mortgaged property, provided that the lending institution exercised due diligence in the initiation, processing, and monitoring of the loan and the disposal of the collateral.'';

in Note 3(E)(ii) by adding at the end ''In the case of a fraud involving a mortgage loan in which the collateral has been disposed of at a foreclosure sale, use the amount recovered from the foreclosure sale.'';

in Note 12(A) by adding at the end the following:

''(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention.'';

and in Note 12(B)(ii) by inserting at the end the following:

''(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention.''.

Issue for Comment:

1. The Commission requests comment regarding whether the *Guidelines Manual* provides penalties for mortgage fraud and financial institution fraud that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions and, if not, what changes to the *Guidelines Manual* would be appropriate to respond to section 1079A(a)(2) of the Act.

Bank fraud is prosecuted under 18 U.S.C. 1344 (Bank fraud), which makes it unlawful to knowingly execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any of the property of a financial institution by means of false or fraudulent pretenses, representations, or promises. The statutory maximum term of imprisonment for an offense under section 1344 is 30 years. Offenses under section 1344 are referenced in Appendix A (Statutory Index) to § 2B1.1. Other statutes relating to financial institution fraud or mortgage fraud include 18 U.S.C. 215, 656, 657, 1005, 1006, 1010, 1014, 1029, and 1033. These offenses are likewise generally referenced to § 2B1.1.

A. Proposed Provisions

The proposed amendment would make two changes regarding calculation of loss in mortgage fraud cases. The Commission invites comment on whether there are other issues involving loss in mortgage fraud cases that are not adequately accounted for in the guidelines and, if so, what changes should be made to how loss is calculated in mortgage fraud cases.

For example, the first change would specify that in the case of a fraud involving a mortgage loan in which the collateral was disposed of at a foreclosure sale, use the amount recovered from the foreclosure sale. Should the Commission provide an additional special rule for determining fair market value if the mortgaged property has not been disposed of by the time of sentencing? For example, should the Commission provide that, if the mortgaged property has not been disposed of by that time, the most recent tax assessment value of the mortgaged property shall constitute prima facie evidence of the fair market value, *i.e.,* is evidence sufficient to establish the fair market value, if not rebutted?

The proposed amendment would also expand the scope of § 2B1.1(b)(15) by amending the commentary to provide additional factors for the court to consider in determining whether one or more prongs of subsection (b)(15) apply. The Commission invites comment on whether it should make any further changes to subsection (b)(15), such as by expanding its scope or increasing its penalties, or both, to ''ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions''. If so, what changes to subsection (b)(15) should be made?

B. Mitigating Factors

Are there mitigating factors in cases involving mortgage fraud or financial fraud that are not adequately accounted for in the guidelines? If so, how should the Commission amend the *Guidelines Manual* to account for those mitigating factors?

(D) Impact of Loss and Victims Tables in Certain Cases

Issues for Comment:

1. The Commission has observed that cases sentenced under § 2B1.1 involving relatively large loss amounts have relatively high rates of below-range sentences (both government sponsored and non-government sponsored), particularly in the context of securities fraud and similar offenses. The Commission also has received public comment and reviewed judicial opinions suggesting that the impact of the loss table or the victims table (or the combined impact of the loss table and the victims table) may overstate the culpability of certain offenders in such cases.

In response to these concerns, the Commission is studying whether it should limit the impact of the loss table or the victims table (or both) in cases sentenced under § 2B1.1 involving relatively large loss amounts and, if so, how it should limit the impact.

In particular, the Commission seeks comment on whether one or more of the following approaches should be adopted:

(A) *Limiting Impact of Loss Table if the Defendant Had Relatively Little Gain Relative to the Loss.* Should the Commission insert a new specific offense characteristic in § 2B1.1 to limit the impact of the loss table in cases involving large loss amounts if the defendant had relatively little gain relative to the loss? Examples of such a provision are the following:

(Ex. 1) If the defendant's gain resulting from the offense did not exceed $10,000, the adjustment from application of subsection (b)(1) shall not exceed [14]/[16] levels.

(Ex. 2) If the defendant's gain resulting from the offense did not exceed $25,000, the adjustment from application of subsection (b)(1) shall not exceed [16]/[18] levels.

(Ex. 3) If the defendant's gain resulting from the offense did not exceed $70,000, the adjustment from application of subsection (b)(1) shall not exceed [18]/[20] levels.

The maximum gain amount in the examples corresponds to one percent of the maximum loss amount. For example, in Example 3, the maximum gain amount is $70,000, which corresponds to a maximum loss amount of $7,000,000. (A loss amount of $7,000,000, in turn, corresponds to an enhancement of 18 levels, while a loss amount of more than $7,000,000 corresponds to an enhancement of 20 levels.)

(B) *Limiting Impact of Victims Table if No Victims Were Substantially Harmed by the Offense.* Should the Commission amend the victims table in § 2B1.1(b)(2) to limit the impact of the

victims table if no victims were substantially harmed by the offense? For example, should the Commission provide that the 4-level and 6-level prongs of the victims table apply only if the offense substantially endangered the solvency or financial security of at least one victim?

(C) *Limiting Cumulative Impact of Loss Table and Victims Table.* Should the Commission limit the cumulative impact of the loss table and the victims table? For example, should the Commission provide that, if the enhancement under the loss table is [14]–[24] levels, do not apply the 4-level or 6-level adjustment under the victims table?

The Commission seeks comment on these three approaches. The Commission also seeks comment on whether it should modify one or more of these approaches to take the form of departure provisions rather than specific offense characteristics. Finally, the Commission seeks comment on any other approaches that would address the impacts of the loss table and the victims table in a manner that ensures they are consistent with the purposes of sentencing.

2. If the Commission were to limit the impacts of the loss table or the victims table, or both, should the limitation apply in all cases sentenced under '2B1.1, or only in a subset of such cases (*e.g.,* only in securities fraud cases)?

3. Many guidelines refer to the loss table in § 2B1.1, such as § 2B5.3 (Criminal Infringement of Copyright or Trademark), § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), and § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived From Unlawful Activity). Other guidelines maintain a certain proportionality with the fraud guideline even though they do not refer directly to the loss table in § 2B1.1, such as guidelines that use the tax table in § 2T4.1. If the Commission were to limit the impacts of the loss table or the victims table, or both, in § 2B1.1, what changes, if any, should the Commission make to other guidelines for proportionality?

2. Drugs

Synopsis of Proposed Amendment: This proposed amendment contains two parts, each of which involves drug offenses.

Part A sets forth detailed issues for comment regarding offenses involving N-Benzylpiperazine (BZP) and whether the Commission should amend the guidelines applicable to offenses involving BZP, such as by providing a specific reference for BZP in the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Among other things, the issues for comment ask whether the Commission should base the penalties for BZP on the penalties for MDMA (Ecstasy), on the penalties for amphetamine, or on some other basis.

Part B sets forth a proposed amendment that would create a ''safety valve'' provision in the guideline for chemical precursors, § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), that parallels the ''safety valve'' provision in § 2D1.1. The proposed amendment adds a new specific offense characteristic at § 2D1.11(b)(6) and a corresponding new application note. Under the proposed amendment, certain first-time, nonviolent offenders sentenced under the chemical precursor guideline, § 2D1.11, would be eligible to receive the same 2-level ''safety valve'' reduction (and using the same five ''safety valve'' criteria) as such offenders are eligible to receive under § 2D1.1.

The two parts are as follows:

(A) BZP

Issues for Comment:

1. The Commission seeks comment regarding whether the Commission should amend the guidelines applicable to offenses involving BZP, such as by providing a specific reference for BZP in the Drug Quantity Table in § 2D1.1.

Offenses involving BZP represent a very small but increasing proportion of the federal caseload. Courts have reached different conclusions about what the marijuana equivalency for BZP should be, and those differences may be resulting in unwarranted sentencing disparities. The Commission has received several requests to address BZP offenses, including a request from the Second Circuit in *United States* v. *Figueroa,* 647 F.3d 466 (2d Cir. 2011) (''inasmuch as the parties inform us that use of BZP, alone and in combination with other substances, to mimic the effects of other narcotics is increasingly prominent in certain parts of this Circuit, we direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission for whatever consideration they may deem appropriate'').

The *Guidelines Manual* does not provide a specific reference for BZP in the Drug Quantity Table in § 2D1.1 and does not provide a marijuana equivalency for BZP in the Drug Equivalency Table in Application Note 10(D) to § 2D1.1. Accordingly, guideline penalties for offenses involving BZP are determined under Application Note 5 to § 2D1.1, which directs the court to determine the base offense level using the marijuana equivalency of the ''most closely related controlled substance'' referenced in the guideline. In determining the most closely related substance, the court shall, to the extent practicable, consider the following:

(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

See § 2D1.1, comment. (n.5).

District courts have suggested that the substance most closely related to BZP may be amphetamine, *see United States* v. *Rose,* 722 F.Supp.2d 1286, 1289 (M.D.Ala. 2010) (''BZP on its own may arguably be most similar to amphetamine''), or methylphenidate (Ritalin), *see United States* v. *Beckley,* 715 F.Supp.2d 743, 748 (E.D.Mich. 2010) (stating that, if the issue of BZP alone were before the court, ''it would be obliged to conclude that the most closely related controlled substance * * * is methylphenidate''). However, the Eighth Circuit has upheld a district court's conclusion that BZP is most closely related to MDMA. *See United States* v. *Bennett,* __ F.3d __, 2011 WL 4950051 (8th Cir. 2011).

A. In General

The Commission invites general comment on BZP offenses and BZP offenders and how these offenses and offenders compare with other drug offenses and drug offenders. For example, how is BZP manufactured? How is it distributed and marketed? How is it possessed and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities?

B. Chemical Structure

Is the chemical structure of BZP substantially similar to the chemical structure of a controlled substance referenced in § 2D1.1? If so, to what substance?

C. Effect on Central Nervous System, and Relative Potency

Is the effect on the central nervous system of BZP a stimulant, depressant, or hallucinogenic effect? Is that effect substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in § 2D1.1? If so, to what substance? Is the quantity of BZP needed to produce that effect lesser or greater than the quantity needed of the other such substance? If so, what is the difference in relative potency?

The Drug Enforcement Administration has described BZP as a stimulant that is 10 to 20 times less potent than amphetamine. See 75 FR 47451 (August 6, 2010) (''BZP is about 20 times less potent than amphetamine in producing [effects similar to amphetamine]. However, in subjects with a history of amphetamine dependence, BZP was found to be about 10 times less potent than amphetamine.''). The Commission invites comment on this description. If this description is accurate, should the Commission provide a marijuana equivalency for BZP on this basis, *e.g.,* by specifying a marijuana equivalency for BZP equal to one-tenth or one-twentieth of the marijuana equivalency for amphetamine? In particular, under the Drug Equivalency Table, 1 gram of amphetamine is equivalent to 2 kilograms of marijuana. Should the Commission specify a marijuana equivalency for BZP such that 1 gram of BZP is equivalent to one-tenth or one-twentieth of this, *i.e.,* 200 or 100 grams of marijuana? If not, what should the Commission specify as the marijuana equivalency for BZP?

2. There have been cases in which the offense involved BZP in combination with another controlled substance (such as MDMA), with non-controlled substances (such as TFMPP or caffeine), or both, in various proportions.

Courts have recognized that distinctions between BZP alone and BZP in combination with other substances may be appropriate. For example, the Second Circuit in *United States* v. *Chowdhury,* 639 F.3d 583 (2d Cir. 2011), upheld a determination that BZP in combination with TFMPP is most closely related to MDMA, but in *United States* v. *Figueroa,* 647 F.3d 466 (2d Cir. 2011), remanded a determination that BZP alone is most closely related to MDMA, finding *Chowdhury* not applicable and the record otherwise insufficient. *See id.* at 470 (''Although we certainly do not foreclose the determination that MDMA is the appropriate substitute for BZP alone, in the absence of an evidentiary hearing to determine the nature of the mixture, its chemical structure, and its intended neurological effects, the record on appeal does not permit us to determine whether the proper substitute is amphetamine * * *, MDMA, or another substance on the Drug Equivalency Table * * *'').

Should the guidelines make distinctions between offenses involving BZP alone and BZP in combination with other substances? If so, what distinctions should be made? Are there particular combinations involving BZP that should be specifically accounted for in the guidelines and, if so, what are the combinations and how should the guidelines account for them?

What controlled substance or substances are most closely related to BZP in combination with these various other substances? What marijuana equivalency or equivalencies should be provided for offenses involving BZP under these various circumstances?

The tendency of the courts appears to be to follow an approach under which the BZP combination is most closely related to MDMA (but possibly at reduced potency). The Commission invites comment on this approach. If this approach is appropriate, should the Commission provide a marijuana equivalency for BZP combinations on this basis, *e.g.,* by specifying a marijuana equivalency for BZP in combination with other substances that is equal to the marijuana equivalency for MDMA (but possibly at reduced potency)? In particular, under the Drug Equivalency Table, 1 gram of MDMA is equivalent to 500 grams of marijuana. Should the Commission specify a marijuana equivalency for BZP in combination with other substances such that 1 gram of BZP is equivalent to 500 grams of marijuana? Or should the Commission specify an equivalency lower than 500 grams to account for the possible reduced potency?

3. What, if any, other considerations should the Commission take into account in determining how, if at all, the guidelines should be amended as they apply to offenses involving BZP?

(B) ''Safety Valve'' Provision in § 2D1.11

Proposed Amendment:

Section 2D1.11(b) is amended by adding at the end the following:

''(6) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of '5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by adding at the end the following:

''9. *Applicability of Subsection (b)(6).*—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, § 5C1.2(b) does not apply. *See* § 5C1.2(b)(2) (requiring a minimum offense level of level 17 if the 'statutorily required minimum sentence is at least five years').''.

3. Human Rights

Synopsis of Proposed Amendment: This proposed two-part amendment is a continuation of the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations.

A. Human Rights Offenses

Part A of the proposed amendment addresses cases in which the defendant is convicted of an offense that Congress has indicated is a ''serious human rights offense,'' *i.e.*, an offense under 18 U.S.C. 1091 (Genocide), 2340A (Torture), 2441 (War crimes), and 2442 (Recruitment or use of child soldiers). *See* 28 U.S.C. 509B(e). Such offenses are currently accounted for in the guidelines as follows:

(1) *Genocide.* Section 1091 offenses apply to a range of conduct committed ''with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group''. *See* 18 U.S.C. 1091(a). The range of conduct includes (i) Killing members of the group; (ii) causing serious bodily injury to members of the group; (iii) causing permanent impairment of the mental faculties of members of the group (*e.g.*, by drugs or torture); (iv) subjecting the group to conditions of life that are intended to cause the physical destruction of the group; (v) imposing measures intended to prevent births within the group; and (vi) transferring by force children of the group to another group. *Id.* The statutory maximum term of imprisonment is 20 years, or life imprisonment if the conduct involved killing and death resulted. *See* 18 U.S.C. 1091(b). In addition, section 1091(c) makes it a crime to ''directly and publicly incite[] another'' to violate section 1091(a); the statutory maximum term of imprisonment for this offense is 5 years. *See* 18 U.S.C. 1091(c). Section 1091 offenses are referenced in Appendix A (Statutory Index) to § 2H1.1 (Civil Rights).

(2) *Torture.* Section 2340A offenses apply to whoever commits or attempts to commit

torture (as defined in 18 U.S.C. 2340). The statutory maximum term of imprisonment is 20 years, or any term of years or life if death resulted. *See* 18 U.S.C. 2340A(a). Section 2340A offenses are referenced in Appendix A to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

(3) *War Crimes.* Section 2441 offenses apply to a range of conduct that constitute a war crime (as defined in 18 U.S.C. 2441(c)). The range of conduct includes (i) Torture; (ii) cruel or inhuman treatment; (iii) performing biological experiments; (iv) murder; (v) mutilation or maiming; (vi) intentionally causing serious bodily injury; (vii) rape; (viii) sexual assault or abuse; and (ix) taking hostages. The statutory maximum term of imprisonment is any term of years or life. *See* 18 U.S.C. 2441(a). Section 2441 offenses are not referenced in Appendix A.

(4) *Child Soldiers.* Section 2442 offenses apply to whoever knowingly (1) recruits, enlists, or conscripts a child (*i.e.,* a person under 15 years of age) to serve in an armed force or group or (2) uses a child to participate actively in hostilities. *See* 18 U.S.C. 2442(a). The statutory maximum term of imprisonment is 20 years, or any term of years or life if death resulted. *See* 18 U.S.C. 2442(b). Section 2442 offenses are referenced in Appendix A to § 2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers).

The proposed amendment provides two options for cases in which the defendant is convicted of such an offense.

Option 1 establishes a new Chapter Two offense guideline, at § 2H5.1 (Human Rights). The new offense guideline reflects a consolidation into a single guideline of the various base offense levels and specific offender characteristics that are involved in the guidelines that currently account for these offenses. The new offense guideline contains alternative base offense levels of [18] if the defendant is convicted of the offense of incitement to genocide (which generally has a statutory maximum term of imprisonment of 5 years) and [24] otherwise. The guideline also contains enhancements that apply if any victim sustained serious bodily injury (2 to 4 levels); if any victim was sexually exploited (6 to 10 levels); if any victim was abducted, involuntarily detained, or held in a condition of servitude (6 to 10 levels); if the number of victims was [10][50] or more (2 levels); if death resulted; or if the defendant was a public official [or military official] or the offense was committed under color of law [or color of military authority].

Option 1 also amends Appendix A (Statutory Index) to reference each of these offenses of conviction to the new guideline and makes conforming changes to other offense guidelines.

Option 2 establishes a new Chapter Three adjustment, at § 3A1.5 (Human Rights), that applies if the defendant [was convicted of]/[committed] a serious human rights offense. The proposed guideline provides an enhancement of [4]–[12] levels and a minimum offense level of [24]–[32]. The proposed guideline also requires that the defendant be placed in Criminal History Category [V][VI].

B. Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

Part B of the proposed amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud but the defendant had committed a serious human rights offense. Immigration and naturalization frauds are referenced in Appendix A to § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport), depending on the offense of conviction.

The proposed amendment adds a new specific offense characteristic to both guidelines. The new specific offense characteristic provides an enhancement of [10]–[18] levels if the offense reflected an effort to avoid detection or responsibility for a serious human rights offense.

Part C of the proposed amendment sets forth issues for comment on human rights offenses.

(A) Human Rights Offenses

Proposed Amendment:

Option 1:

Chapter 2, Part H is amended in the heading by adding at the end ''AND HUMAN RIGHTS''.

Chapter 2, Part H is amended by adding at the end the following:

''5. HUMAN RIGHTS

§ 2H5.1. *Human Rights*

(a) Base Offense Level:

(1) [24], except as provided below;

(2) [18], if the defendant is convicted of an offense under 18 U.S.C. § 1091(c).

(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if any victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) (A) If any victim was sexually exploited, increase by 6 levels; (B) if any such victim had not attained the age of sixteen years, increase by 8 levels; or (C) if any such victim had not attained the age of twelve years, increase by 10 levels.

(3) (A) If any victim was abducted, involuntarily detained, or held in a condition of servitude, increase by 6 levels; (B) if any such victim continued to be so detained or held for at least 30 days, increase by 8 levels; or (C) if any such victim continued to be so detained or held for at least 180 days, increase by 10 levels.

(4) If the number of victims described in subdivisions (1) through (3) was [10][50] or more, increase by [2][4] levels.

(5) If death resulted, increase to the greater of:

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

(B) 2 plus the offense level from the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

(6) If (A) the defendant was a public official [or military official] at the time of the offense; or (B) the offense was committed under color of law [or color of military authority], increase by 6 levels.

Commentary

Statutory Provisions: 18 U.S.C. 1091, 2340A, 2441, and 2442.

Application Notes:

1. *Definitions.*—For purposes of this guideline—

Definitions of 'serious bodily injury' and 'permanent or life-threatening bodily injury' are found in the Commentary to § 1B1.1 (Application Instructions). However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(2).

'Sexually exploited' includes offenses set forth in 18 U.S.C. 2241–2244, 2251, and 2421–2423.

2. *Interaction With § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).*—

(A) *Hate Crime Motivation (§ 3A1.1(a)).*—If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere,* the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object

of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, an additional 3-level enhancement from § 3A1.1(a) will apply. An adjustment from § 3A1.1(a) will not apply, however, if a 6-level adjustment from § 2H5.1(b)(6) applies.

(B) *Vulnerable Victim (§ 3A1.1(b)).*—The base offense level does not incorporate the possibility that a victim of the offense was a vulnerable victim for purposes of § 3A1.1(b). Therefore, an adjustment under '3A1.1(b) would apply, for example, in a case in which the defendant recruited or used child soldiers (*see* 18 U.S.C. 2442) or transferred by force children of a national, ethnic, racial, or religious group (*see* 18 U.S.C. 1091(a)(5)).

3. *Interaction with § 3A1.3 (Restraint of Victim).*—If subsection (b)(3) applies, do not apply § 3A1.3 (Restraint of Victim).

4. *Interaction With § 3B1.3 (Abuse of Position of Trust or Use of Special Skill.*—If subsection (b)(6) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. *See generally* 28 U.S.C. 509B(e).''.

The Commentary to § 2A1.1 captioned ''Statutory Provisions'' is amended by striking '', 2340A''.

The Commentary to § 2A1.2 captioned ''Statutory Provisions'' is amended by striking '', 2340A''.

The Commentary to § 2A2.2 captioned ''Statutory Provisions'' is amended by striking '', 2340A''.

The Commentary to § 2A4.1 captioned ''Statutory Provisions'' is amended by striking '', 2340A''.

The Commentary to § 2H1.1 captioned ''Statutory Provisions'' is amended by striking '', 1091''.

Chapter 2, Part H, Subpart 4 is amended in the heading by striking ''SLAVE TRADE, AND CHILD SOLDIERS'' and inserting ''AND SLAVE TRADE''.

Section 2H4.1 is amended in the heading by striking ''*Slave Trade, and Child Soldiers*'' and inserting ''*and Slave Trade*''.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by striking '', 2442''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended in the sentence beginning '''Peonage or involuntary servitude''' by striking '', slavery, and recruitment or use of child soldiers'' and inserting ''and slavery''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1091 by striking ''2H1.1'' and inserting ''2H5.1''; in the line referenced to 18 U.S.C. 2340A by striking ''2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1'' and inserting ''2H5.1''; after the line referenced to 18 U.S.C. 2425 by inserting the following:

''18 U.S.C. 2441 2H5.1'';

and in the line referenced to 18 U.S.C. 2442 by striking ''2H4.1'' and inserting ''2H5.1''.

Option 2:

Chapter 3, Part A, Subpart 1 is amended by adding at the end the following:

''§ 3A1.5. *Serious Human Rights Offense*

(a) If the defendant [was convicted of]/[committed] a serious human rights offense, increase by [4]–[12] levels; but if the resulting offense level is less than level [24]–[32], increase to level [24]–[32].

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be [not lower than Category V][Category VI].

Commentary

Application Notes:

1. *'Serious Human Rights Offense'.*—For purposes of this guideline, 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).

2. *Computation of Criminal History Category.*—Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category [V][VI], it shall be increased to Category [V][VI].''.

(B) Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

Proposed Amendment:

Section 2L2.1(b) is amended by adding at the end the following:

''(6) If the offense reflected an effort to avoid detection or responsibility for a serious human rights offense, increase by [10]–[18] levels.''.

The Commentary to § 2L2.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following:

'' 'Serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).''.

Section 2L2.2(b) is amended by adding at the end the following:

''(4) If the offense reflected an effort to avoid detection or responsibility for a serious human rights offense, increase by [10]–[18] levels.''.

The Commentary to § 2L2.2 captioned ''Application Notes'' is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively, and by inserting after Note 3 the following:

''4. *Application of Subsection (b)(4).*—For purposes of subsection (b)(4), 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).'';

(C) Issues for Comment

Issues for Comment:

1. The Commission invites general comment on human rights offenses and human rights offenders and how these offenses and offenders compare with other offenses and offenders. For example, what activities are involved in human rights offenses? What are the characteristics of the offenders involved in these activities? What harms are posed by these activities?

2. Do the guidelines provide appropriate guidelines penalties for cases involving human rights offenses? If not, what amendments are appropriate to ensure that the guidelines provide appropriate guidelines penalties for such cases? What penalty structure or structures should the guidelines provide for human rights offenses, and what penalty levels should the Commission provide? In considering whether the penalty levels and penalty structures for human rights offenses are appropriately proportional to other offenses, what are the other offenses to which the human rights offenses should be compared?

In addition, the Commission seeks comment on whether Option 1 or Option 2 of Part A of the proposed amendment would provide appropriate guidelines penalties for cases involving human rights offenses. Should the Commission adopt Option 1 or Option 2, or neither?

Are there particular changes to the penalty levels in Option 1 that should be made? Are the alternative base offense levels appropriate, or should they be raised or lowered? Are the levels provided by the specific offense

characteristics appropriate, or should they be raised or lowered? Should the Commission revise Option 1 to provide cross-references to any other Chapter Two offense guidelines?

Option 1 specifies the manner in which the new guideline would interact with certain Chapter Three adjustments. Are there particular changes that should be made to Option 1 to change how the new guideline would interact with the various Chapter Three adjustments?

3. The Commission seeks comment on what guidance should be given to courts in determining whether a particular offense is, or is not, a human rights offense for purposes of Parts A and B of the proposed amendment. Parts A and B would apply only to the offenses defined as ''serious human rights offenses'' in 28 U.S.C. 509B(e), which includes genocide, war crimes, torture, and the recruitment or use of child soldiers. Should the Commission add other offenses or categories of offenses and, if so, what offenses or categories of offenses?

4. The Commission seeks comment on aggravating and mitigating circumstances in cases involving human rights offenses. In particular:

A. Direct Prosecution of Human Rights Offenses

In cases in which the defendant is directly prosecuted for a human rights offense, are there aggravating and mitigating circumstances that should be taken into account in establishing what level of enhancement should apply, what minimum offense level should apply, and what Criminal History Category should apply? If so, what are the circumstances, and how should they be taken into account in the guidelines?

B. Immigration and Naturalization Fraud Involving Human Rights Offenses

In cases in which the defendant is convicted of an immigration or naturalization fraud involving a human rights offense, are there aggravating and mitigating circumstances that should be taken into account in establishing what level of enhancement should apply and what minimum offense level should apply? If so, what are the circumstances, and how should they be taken into account in the guidelines?

For example, there appear to be cases in which the defendant is convicted of an immigration or naturalization fraud and the evidence is sufficient to establish (1) That the defendant concealed the defendant's membership in a foreign military or paramilitary organization and (2) that the organization was involved in a human rights violation, but the evidence is not sufficient to establish (3) that the defendant was involved in the human rights violation. In such a case, should the establishment of (1) and (2) (or, in the alternative, of (1) alone) be an aggravating factor in the guidelines, warranting an enhancement or an upward departure provision?

The enhancements in Part B of the proposed amendment bracket a range of penalty levels, from [10] to [18]. Should the Commission provide a tiered enhancement, with different levels of enhancement based on different aggravating or mitigating circumstances? For example, should an enhancement of 10 levels apply in certain cases, and an enhancement of 18 levels apply in certain other cases? If so, what aggravating or mitigating circumstances should the Commission provide, and what levels should apply?

C. Amnesty

How, if at all, should the guidelines account for circumstances in which the defendant committed a human rights offense but received amnesty (or some similar mitigating measure) in the country where the conduct occurred? Should such a circumstance warrant a reduction or a downward departure?

4. ''Sentence Imposed'' in § 2L1.2

Synopsis of Proposed Amendment: This proposed amendment responds to a circuit conflict over application of the term ''sentenced imposed'' in § 2L1.2 (Unlawfully Entering or Remaining in the United States) when the defendant's original ''sentence imposed'' was lengthened after the defendant was deported.

Section 2L1.2(b)(1) provides an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a felony drug trafficking offense. The level of the enhancement depends on the ''sentence imposed'' for the felony drug trafficking offense. Specifically:

(1) if the ''sentence imposed'' exceeded 13 months, the enhancement is 16 or 12 levels, depending on whether the conviction receives criminal history points. *See* § 2L1.2(b)(1)(A); and

(2) if the ''sentence imposed'' was 13 months or less, the enhancement is 12 or 8 levels, depending on whether the conviction receives criminal history points. *See* § 2L1.2(b)(1)(B).

The term ''sentence imposed'' is defined in Application Note 1(B)(vii) as follows:

''Sentence imposed'' has the meaning given the term ''sentence of imprisonment'' in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

The conflict arises when the defendant was sentenced on two or more different occasions for the same drug trafficking conviction (*e.g.,* because of a revocation of supervision), such that there was a sentence imposed before the defendant's deportation and another, longer sentence imposed after the deportation.

The Fifth, Seventh, and Eleventh Circuits have held that the later, higher sentence does not apply for purposes of the enhancement in § 2L1.2(b)(1). *See United States* v. *Lopez,* 634 F.3d 948 (7th Cir. 2011); *United States* v. *Guzman-Bera,* 216 F.3d 1019 (11th Cir. 2000); *United States* v. *Bustillos-Pena,* 612 F.3d 863 (5th Cir. 2010). These cases generally reason that there is a ''temporal restriction'' inherent in the enhancement and conclude that the ''sentence imposed'' is determined as of when the defendant was deported or unlawfully remained in the United States. *See, e.g., Lopez,* 634 F.3d at 950.

The Second Circuit has held otherwise, concluding that the later, higher sentence does apply. *See United States* v. *Compres-Paulino,* 393 F.3d 116 (2d Cir. 2004). According to the Second Circuit, the enhancement requires only that the conviction have occurred, not that the sentence also be imposed, as of when the defendant was deported or unlawfully remained in the United States. For the Second Circuit, any ''amended sentence, whenever imposed, relates back to this conviction'' and is covered by the enhancement. *See id.* at 118.

The proposed amendment resolves the conflict by amending the definition of ''sentence imposed'' in Application Note 1(B)(vii). Two bracketed options are presented. The first option follows the approach of the Fifth, Seventh, and Eleventh Circuits and specifies that a post-revocation sentence increase is included, ''but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States''. The second option follows the approach of the Second Circuit and specifies that a post-revocation sentence increase is included, ''without regard to whether the revocation occurred before or after the defendant previously was deported or unlawfully remained in the United States''.

Proposed Amendment:

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in

Note 1(B)(vii) by inserting before the period at the end the following:

''[, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States][, without regard to whether the revocation occurred before or after the defendant was deported or unlawfully remained in the United States]''.

5. Categorical Approach

Synopsis of Proposed Amendment: This proposed amendment presents options for specifying the types of documents that may be considered in determining whether a particular prior conviction fits within a particular category of crimes for purposes of specific guidelines provisions (*e.g.,* determining whether a defendant's prior conviction for nonresidential burglary under a particular state statute qualifies as an ''aggravated felony'' for purposes of § 2L1.2(b)(1)(C)).

A number of guidelines and statutes contain provisions that use a prior conviction as an aggravating factor if the prior conviction fits within a particular category of crimes. Two Supreme Court decisions, *Taylor* v. *United States,* 495 U.S. 575 (1990), and *Shepard* v. *United States,* 544 U.S. 13 (2005), set forth a ''categorical approach'' for determining whether a particular prior conviction fits within a particular category of crimes.

Taylor holds that, in making such a determination, a sentencing court may ''look only to the fact of conviction and the statutory definition of the prior offense.'' *Taylor,* 495 U.S. at 602. Because the court is not concerned with the ''facts underlying the prior convictions,'' *id.* at 600–02, the court may not focus on the underlying criminal conduct itself. This categorical approach ''may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements'' of the offense. *Id.* at 602. Thus, a prior conviction fits within the particular category of crimes ''if either its statutory definition substantially corresponds to [the definition of the crime], or the charging paper and jury instructions actually required the jury to find all the elements of [the specified crime] in order to convict the defendant.'' *Id.*

Shepard applied *Taylor* to a case in which the prior conviction was the result of a guilty plea. In such a case, the Court held, the sentencing court may look to a limited list of documents to determine the class of offense: ''The terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.'' *Shepard,* 544 U.S. at 26.

In cases where the defendant's prior conviction involved a provision that covers both conduct that fits within the category and conduct that does not, the Court has authorized courts to look at the judicial record to determine whether the prior conviction was in fact based on conduct that fit within the category of crimes. This analysis is called the ''modified categorical approach.'' Under this modified approach, the court may consider only those sources approved by *Taylor* and *Shepard*—the charging document, the jury instructions, any plea agreement or plea statement, or ''some comparable judicial record of this information.'' The Fifth Circuit has extended this list to include New York Certificates of Disposition, *see United States* v. *Bonilla,* 524 F.3d 647 (5th Cir. 2008), and the Ninth Circuit has included California Minute Entries, *see United States* v. *Snellenberger,* 548 F.3d 699 (9th Cir. 2008). On the other hand, courts have disallowed the use of a federal presentencing report, *see, e.g., United States* v. *Garza-Lopez,* 410 F.3d 268 (5th Cir. 2005), a California abstract of judgment, *see, e.g., United States* v. *Gutierrez-Ramirez,* 405 F.3d 352 (5th Cir. 2005), or a police report, *see, e.g., Shepard,* 544 U.S. at 16; *United States* v. *Almazan-Becerra,* 482 F.3d 1085, 1090 (9th Cir. 2007) (noting that ''[t]he Supreme Court appears to have foreclosed the use of police reports in a *Taylor* analysis'' but that such reports may be used when stipulated to by the defendant).

Notably, the Supreme Court cases have involved statutes rather than guidelines. However, lower courts have by analogy applied the ''categorical approach'' to guideline provisions.

The proposed amendment presents options for specifying the types of documents that may be considered for purposes of the guidelines in determining whether a particular prior conviction fits within a particular category of crimes. Option 1 would apply only to determinations under the illegal reentry guideline, § 2L1.2 (Unlawfully Entering or Remaining in the United States). Option 2 would apply throughout the *Guidelines Manual* in any case in which the nature of the prior conviction is a disputed factor.

Both options contain four options, each of which would specifically authorize the sentencing court to look to certain sources of information beyond the fact of conviction and the statutory definition of the prior offense.

It appears that *Taylor* and *Shepard* specifically authorize the sentencing court to look to four sources of information beyond the fact of conviction and the statutory definition of the prior offense:

(i) The terms of the charging document;

(ii) The terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant;

(iii) Any explicit factual finding by the trial judge to which the defendant assented; and

(iv) Some comparable judicial record of this information.

Option A would specify these four sources of information. Option B would incorporate Option A and add as a fifth source of information ''any uncontradicted, internally consistent parts of the record from the prior conviction''. *See Shepard,* 544 U.S. at 31 (''I would expand that list to include *any* uncontradicted, internally consistent parts of the record from the earlier conviction. That would include the two sources the First Circuit relied upon in this case,'' which consisted of ''the applications by which the police had secured the criminal complaints and the police reports attached to those applications.'' [Emphasis in original.]) (O'Connor, J., dissenting). Option C would incorporate Option A and add as a fifth source of information ''any other parts of the record from the prior conviction, provided that the information in such other parts of the record has sufficient indicia of reliability to support its probable accuracy''. *See* § 6A1.3 (Resolution of Disputed Factors)(Policy Statement). Option D would combine all three options, incorporating Option A as well as the additional sources of information in both Options B and C.

Issues for comment are also included.

Proposed Amendment:

Option 1:

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following:

''[Option A:

(D) *Documents Considered in Determining Whether Prior Conviction Falls Within Category of Offense.*—In determining for purposes of subsection (b)(1) whether a prior conviction falls within a category of offense (*e.g.,* whether a prior conviction qualifies as a 'crime of violence' or 'aggravated felony'), beyond the fact of conviction

and the statutory definition of the prior offense, the court may look only to—

(i) The terms of the charging document,

(ii) The terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant,

(iii) Any explicit factual finding by the trial judge to which the defendant assented, or

(iv) Some comparable judicial record of this information.]

[Option B incorporates Option A, but also adds:

(v) Any uncontradicted, internally consistent parts of the record from the prior conviction.]

[Option C incorporates Option A, but also adds:

(v) Any other parts of the record from the prior conviction, provided that the information in such other parts of the record has sufficient indicia of reliability to support its probable accuracy. *See* subsection (a) to § 6A1.3 (Resolution of Disputed Factors).]

[Option D combines all three options, *i.e.,* it incorporates Option A and also adds the additional sources of information in both Options B and C, as follows:

(v) Any uncontradicted, internally consistent parts of the record from the prior conviction; or

(vi) Any other parts of the record from the prior conviction, provided that the information in such other parts of the record has sufficient indicia of reliability to support its probable accuracy. *See* subsection (a) to § 6A1.3 (Resolution of Disputed Factors).]''.

Option 2:

The Commentary to § 6A1.3 is amended by adding at the end the following:

''[Option A:

In resolving a dispute as to whether a prior conviction falls within a category of offense for purposes of a guidelines provision (*e.g.,* whether a prior conviction qualifies as a 'crime of violence' or an 'aggravated felony'), beyond the fact of the conviction and the statutory definition of the prior offense, the information that has sufficient indicia of reliability to support its probable accuracy is limited to—

(A) The terms of the charging document;

(B) The terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant;

(C) Any explicit factual finding by the trial judge to which the defendant assented; or

(D) Some comparable judicial record of this information.]

[Option B incorporates Option A, but also adds:

(E) Any uncontradicted, internally consistent parts of the record from the prior conviction.]

[Option C incorporates Option A, but also adds:

(E) Any other parts of the record from the prior conviction for which there is sufficient indicia of reliability to support its probable accuracy.]

[Option D combines all three options, *i.e.,* it incorporates Option A and also adds the additional sources of information in both Options B and C, as follows:

(E) Any uncontradicted, internally consistent parts of the record from the prior conviction; or

(F) Any other parts of the record from the prior conviction for which there is sufficient indicia of reliability to support its probable accuracy.]''.

Issues for Comment:

1. The proposed amendment provides four options for specifying the types of documents that may be considered in determining whether a particular prior conviction fits within a particular category of crimes. Are there any other types of documents that the Commission should include among the types of documents specified as documents that may be considered for this purpose? If so, what types of documents?

2. Option 1 of the proposed amendment amends only § 2L1.2. However, the Supreme Court's ''categorical approach'' has been applied by lower courts to a variety of other guidelines that contain provisions that use a prior conviction as an aggravating factor if the prior conviction fits within a particular category of crimes. Among the most commonly applied are § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 4B1.1 (Career Offender), each of which contain provisions that use a prior conviction as an aggravating factor if the prior conviction is a ''crime of violence'' or a ''controlled substance offense''. *See, e.g.,* § 2K2.1(a)(1)–(4), § 4B1.1(a). Accordingly, Option 2 of the proposed amendment would apply throughout the *Guidelines Manual*.

As an alternative to Options 1 and 2, should the Commission apply the proposed amendment more broadly than Option 1 (§ 2L1.2-only) but more narrowly than Option 2 (guidelines-wide)? In particular, should the Commission apply the proposed amendment to § 2L1.2 as well as one or more other specific guidelines? If so, which guidelines should the Commission amend?

6. Driving While Intoxicated

Synopsis of Proposed Amendment: This proposed amendment responds to an application issue regarding when a defendant's prior sentence for driving while intoxicated or driving under the influence (and similar offenses by whatever name they are known) is counted toward the defendant's criminal history score. There appear to be differences among the circuits on this issue.

The issue does not occur when the prior sentence is a felony, because ''[s]entences for all felony offenses are counted.'' *See* subsection (c) of § 4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is a misdemeanor or petty offense, circuits have taken different approaches.

When the prior sentence is a misdemeanor or petty offense, § 4A1.2(c) specifies that the offense is counted, but with two exceptions, which are limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from ''careless or reckless driving'' to ''trespassing,'' and the exception applies if the prior offense is on (or similar to an offense that is on) the list. In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense. *See* § 4A1.2(c)(1). On the second list are offenses from ''fish and game violations'' to ''vagrancy,'' and the exception applies to any offense that is on (or similar to an offense that is on) the list. In such a case, the sentence is never counted. *See* § 4A1.2(c)(2).

Several circuits have held that a sentence for driving while intoxicated—whether a felony, misdemeanor, or petty offense—is always counted toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits rely on Application Note 5 to § 4A1.2, which provides:

> *Sentences for Driving While Intoxicated or Under the Influence.*—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of § 4A1.2(c).

The Seventh Circuit has read Application Note 5 as ''reflect[ing] the Sentencing Commission's conclusion 'that driving while intoxicated offenses

are of sufficient gravity to merit inclusion in the defendant's criminal history, however they might be classified under state law.' '' *United States* v. *LeBlanc,* 45 F.3d 192, 195 (7th Cir. 1995) (quoting *United States* v. *Jakobetz,* 955 F.2d 786, 806 (2d Cir. 1992)). Thus, the Seventh Circuit has held, a sentence for driving while intoxicated is always counted, without exception. For example, such a sentence is counted even though it may otherwise qualify for a second-list exception, *see LeBlanc, supra,* 45 F.3d at 194–95 (sentence counts even though it was a local ordinance violation that was not also a violation under state criminal law).

The Eighth Circuit has also relied on Application Note 5 to hold that a sentence for driving while intoxicated is always counted, without exception. *See United States* v. *Pando,* 545 F.3d 682 (8th Cir. 2008) (Colorado misdemeanor for driving a vehicle when a person has consumed alcohol or one or more other drugs which ''affects the person to the slightest degree so that the person is less able than the person ordinarily would have been'' to operate a vehicle was ''similar'' to driving while intoxicated or under the influence, and therefore automatically counted, without regard to the exceptions in § 4A1.2(c)(1) and (2)).

The Second Circuit took a different approach in *United States* v. *Potes-Castillo,* 638 F.3d 106 (2d Cir. 2011). In that case, the Second Circuit held Application Note 5 to be ambiguous and could be read either (1) to ''mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception'' or (2) ''as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2).'' *Id.* at 110–11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired ''should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2).'' *Id.* at 113. Accordingly, such a sentence can qualify for an exception under the first list (*e.g.,* if it was similar to ''careless or reckless driving'' and the other criteria for a first-list exception were met).

The proposed amendment responds to the application issue by amending Application Note 5 consistent with the approaches of the Seventh and Eighth Circuits. Specifically, it amends Application Note 5 to clarify that such a sentence is always counted, without regard to how the offense is classified and without regard to whether any exception in § 4A1.2(c)(1) or (2) otherwise applies.

Proposed Amendment:

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 5 by striking ''are counted. Such offenses are not minor traffic infractions within the meaning of § 4A1.2(c).'' and inserting ''are always counted, without regard to how the offense is classified and without regard to whether any exception in § 4A1.2(c)(1) or (2) otherwise applies.''.

7. Burglary of a Non-Dwelling

Synopsis of Proposed Amendment: This proposed amendment responds to differences among the circuits on when, if at all, burglary of a non-dwelling qualifies as a crime of violence for purposes of the guidelines. Under a variety of guidelines, a defendant's sentence is subject to enhancement if the defendant previously committed a crime of violence.

The term ''crime of violence'' is defined in several different ways in the guidelines and in statute. The definition that has given rise to the differences among the circuits is contained in subsection (a) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1). This definition is used not only for determining whether a defendant's sentence is subject to enhancement in § 4B1.1, but also for determining whether a defendant's sentence is subject to enhancement in a variety of other guidelines. *See, e.g.,* § 2K1.3(a)(1)–(2) & comment. (n.2); § 2K2.1(a)(1), (2), (3)(B), (4)(A) & comment. (n.1), § 2K2.1(b)(5) & comment. (n.13(B)); § 2S1.1(b)(1)(B)(ii) & comment. (n.1); § 4A1.1(e) & comment. (n.5).

The definition in § 4B1.2(a) provides, among other things, that a felony is a crime of violence if it ''is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.'' Thus, § 4B1.2(a) specifies that burglary of a dwelling is always a crime of violence but is silent about burglary of a non-dwelling.

Courts have observed that this clause in § 4B1.2(a) substantially parallels a clause in 18 U.S.C. 924(e), except that the statutory provision specifies that any burglary is a crime of violence while the guideline provision is more limited, specifying that burglary of a dwelling is a crime of violence. There are different approaches among the circuits about whether burglary of a non-dwelling is a crime of violence under § 4B1.2(a). The Fourth, Tenth, and Eleventh Circuits have held that burglary of a non-dwelling is never a crime of violence under § 4B1.2(a). *See, e.g., United States* v. *Smith,* 10 F.3d 724, 733 (10th Cir. 1993) (per curiam) (holding that, in promulgating § 4B1.2 with language limiting a crime of violence to ''burglary of a dwelling,'' the Commission ''obviously declined'' to adopt the view that all burglaries present the serious potential risk of physical injury to another necessary to bring the crime within the residual clause); *see also United States* v. *Harrison,* 58 F.3d 115, 119 (4th Cir. 1995); *United States* v. *Spell,* 44 F.3d 936, 938–39 (11th Cir. 1995) (per curiam). The Second and Eighth Circuits have held that burglary of a non-dwelling is always a crime of violence under § 4B1.2(a). *See, e.g., United States* v. *Brown,* 514 F.3d 256, 264–67 (2d Cir. 2008) (concluding that burglary of a non-dwelling falls within the residual clause at § 4B1.2(a) in light of the identically worded residual clause in § 924(e), the circuit court's previous holding that the residual clause in § 924(e) includes burglary of a non-dwelling, and the absence of a relevant statement by the Commission on the issue); *see also United States* v. *Ross,* 613 F.3d 805, 809 (8th Cir. 2010). The First, Fifth, Sixth, Seventh, and Ninth Circuits have declined to adopt *per se* rules, holding instead that the question depends on the individual circumstances of each case. *See, e.g., United States* v. *Giggey,* 551 F.3d 27 (1st Cir. 2008) (en banc); *United States* v. *Matthews,* 374 F.3d 872, 880 (9th Cir. 2004); *United States* v. *Hoults,* 240 F.3d 647, 651–52 (7th Cir. 2001); *United States* v. *Wilson,* 168 F.3d 916, 928 (6th Cir. 1999); *United States* v. *Turner,* 349 F.3d 833 (5th Cir. 2003).

The proposed amendment presents two options for resolving this issue. The first option specifies that all burglaries are crimes of violence. The second option specifies that burglary of a non-dwelling is not a crime of violence [, unless the offense meets the requirement of subsection (a)(1), *i.e.,* it has as an element the use, attempted use, or threatened use of physical force against the person of another].

Two issues for comment are also provided. The first issue for comment asks whether the Commission should consider a third option, *i.e.,* to specify that whether burglary of a non-dwelling is a crime of violence depends on the individual circumstances of each case. The second issue for comment asks whether the Commission should also address the definition of ''crime of violence'' in '2L1.2, which presents a similar issue.

Proposed Amendment:

Option 1:

Section 4B1.2(a)(2) is amended by striking ''burglary of a dwelling'' and inserting ''burglary''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Crime of violence' includes'', by striking ''burglary of a dwelling'' and inserting ''burglary''.

Option 2:

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Crime of violence' includes'' the following:

'' 'Crime of violence' does not include burglary of a structure other than a dwelling [, unless the offense meets the requirement of subsection (a)(1), *i.e.,* it has as an element the use, attempted use, or threatened use of physical force against the person of another].''.

Issues for Comment:

1. The two options presented in the proposed amendment would amend § 4B1.2 in either of two ways—to specify that the offense of burglary is always a crime of violence, or to specify that the offense of burglary of a non-dwelling is never a crime of violence. Should the Commission instead consider a third option—to specify that, in determining whether burglary of a non-dwelling is a crime of violence under § 4B1.2(a), the court should determine whether the particular offense satisfies the requirements of the definition's residual clause (*i.e.,* whether the offense ''involves conduct that presents a serious potential risk of physical injury to another'')?

2. The issue of whether burglary of a non-dwelling is a crime of violence is also presented in § 2L1.2 (Unlawfully Entering or Remaining in the United States), which contains its own definition of ''crime of violence''. That definition, as with the definition in § 4B1.2(a), specifies that burglary of a dwelling is a crime of violence, but is silent about burglary of a non-dwelling. If the Commission amends the definition in § 4B1.2 to clarify when, if at all, burglary of a non-dwelling is a crime of violence, should it also make a parallel change to the definition in § 2L1.2?

8. Multiple Counts (§ 5G1.2)

Synopsis of Proposed Amendment: This proposed amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. There are differences among the circuits on this issue.

The issue arises under § 5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case. The cases indicate that there may also be an ancillary application issue over how the ''total punishment'' is to be determined and imposed under § 5G1.1(b).

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. *See United States* v. *Salter,* 241 F.3d 392, 395–96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in *United States* v. *Evans-Martinez,* 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, ''a mandatory minimum count becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range,'' but ''[a]ll other counts * * * are sentenced based on the Guidelines sentencing range, regardless of the mandatory minimum sentences that apply to other counts.'' *See id.* at 637. The Ninth Circuit stated that it would be more ''logical'' to follow the Fifth Circuit's approach but ''such logic is overcome by the precise language of the Sentencing Guidelines''. *See id.*

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. *See United States* v. *Kennedy,* 133 F.3d 53, 60–61 (DC Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The proposed amendment adopts the approach followed by the Fifth Circuit and makes three changes to § 5G1.2.

First, it amends § 5G1.2(b) to clarify that the court is to determine the total punishment (*i.e.,* the combined length of the sentences to be imposed) and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under § 5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant's guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which a defendant's guideline range was affected or restricted by a mandatory minimum penalty, the court is resentencing the defendant, and the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

Proposed Amendment:

Section 5G1.2 is amended by striking subsection (b) and inserting the following:

''(b) For all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.,* the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law.''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins ''*In General.*—'', by striking the period at the end and inserting ''and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).''; and by inserting after such paragraph the following:

''Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* § 5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Note 3, below.''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended by redesignating Note 3 as Note 4; and by inserting after Note 2 the following:

''3. *Application of Subsection (b).*—

(A) *In General.*—Subsection (b) provides that, for all counts not covered

by subsection (a), the court shall determine the total punishment (*i.e.,* the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) *Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.*—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* § 5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* § 5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* § 5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* § 5G1.1(a).

(C) *Examples.*—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate 'total punishment' to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. *See* subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate 'total punishment' to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) *Special Rule on Resentencing.*—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.''.

9. Rehabilitation

Synopsis of Proposed Amendment: This proposed amendment responds to *Pepper* v. *United States,* 131 S.Ct. 1229 (2011), which held, among other things, that a defendant's post-sentencing rehabilitative efforts may be considered when the defendant is resentenced after appeal. *See id.* at 1236 (holding that ''when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines.'').

The policy statement in the guidelines on post-sentencing rehabilitation is § 5K2.19 (Post-Sentencing Rehabilitative Efforts). Two options are presented:

Option 1 repeals § 5K2.19.

Option 2 amends § 5K2.19 to provide that rehabilitative efforts, whether pre- or post-sentencing, may be relevant in determining whether a departure is warranted, if the efforts, individually or in combination with other circumstances, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.

Option 2 also adds commentary to § 5K2.19 that sets forth a two-part test for determining whether a departure may be warranted and factors for the court to consider in determining whether a departure may be warranted. *See generally Pepper* v. *United States, supra; Gall* v. *United States,* 552 U.S. 38, 57–58 (2007) (in which the district court ''quite reasonably attached great weight to the fact that [defendant] voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life'').

Proposed Amendment:

Option 1:

Chapter Five, Part K, Subpart 2 is amended by striking § 5K2.19 and its accompanying commentary.

Option 2:

Chapter Five, Part K, Subpart 2 is amended by striking § 5K2.19 and its accompanying commentary and inserting the following:

''§ 5K2.19. *Rehabilitative Efforts* (Policy Statement)

Rehabilitative efforts may be relevant in determining whether a departure is warranted if the rehabilitative efforts, individually or in combination with other circumstances, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.

In addition, pre-sentencing rehabilitative efforts may be relevant in determining acceptance of responsibility under § 3E1.1 (Acceptance of Responsibility), and post-sentencing rehabilitative efforts may provide a basis for early termination of supervised release under 18 U.S.C. 3583(e)(1).

Commentary

Application Note:

1. In determining whether to provide a downward departure based on rehabilitative efforts, the court should consider whether the defendant engaged in a pattern of activity that demonstrates that (A) the defendant has been making a genuine and purposeful effort to lead a law-abiding life and (B) the effort is likely to be successful.

The pattern of activity should involve specific rehabilitative acts. Examples of such acts are voluntarily withdrawing from a conspiracy, obtaining counseling,

entering drug treatment, maintaining regular employment, making efforts to remedy the harm caused by the offense, and making educational progress.

The court may also consider the extent to which the specific rehabilitative acts were taken at the defendant's own initiative.

Background: A defendant's post-offense rehabilitative efforts may be considered at sentencing. *See, e.g., Gall* v. *United States,* 552 U.S. 38 (2007). Such efforts may also be relevant in determining whether an adjustment applies under § 3E1.1 (Acceptance of Responsibility) and whether a departure is warranted under § 5K2.16 (Voluntary Disclosure of Offense). Similarly, a defendant's post-sentencing rehabilitative efforts may be considered when the defendant is resentenced after appeal. *See Pepper* v. *United States,* 131 S.Ct. 1229, 1236 (2011) (holding that 'when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation' and that such evidence 'may, in appropriate cases,' support a sentence below the applicable guideline range).''.

10. Miscellaneous

Synopsis of Proposed Amendment: This proposed multi-part amendment responds to miscellaneous issues arising from recently enacted legislation.

Part A responds to the Cell Phone Contraband Act of 2010, Public Law 111–225 (August 10, 2010), which amended 18 U.S.C. 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device—specifically, ''a phone or other device used by a user of commercial mobile service (as defined in section 332(d) of Title 47) in connection with such service''. *See* 18 U.S.C. 1791(d)(1)(F). Offenses under section 1791 are referenced in Appendix A (Statutory Index) to § 2P1.2 (Providing or Possessing Contraband in Prison). The other class A misdemeanors in section 1791 involve currency, alcohol, and certain controlled substances; those other types of contraband receive a base offense level of 6 in § 2P1.2. The proposed amendment amends § 2P1.2 to assign mobile phones and similar devices to a particular alternative base offense level in the guidelines. Two options are presented. Option 1 assigns a base offense level of 13. Option 2 assigns a base offense level of 6.

Part B responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Public Law 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. 575 *et seq.,* which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco. First, the PACT Act raised the criminal penalty at 15 U.S.C. 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The proposed amendment amends Appendix A (Statutory Index) to reference section 377 offenses to § 2T2.1 (Non-Payment of Taxes). The possibility of an additional reference, to § 2T2.2 (Regulatory Offenses), is bracketed.

Second, the PACT Act created a new Class A misdemeanor at 18 U.S.C. 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The proposed amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to either or both of two bracketed options, § 2T2.1 and § 2T2.2.

Part C responds to the Indian Arts and Crafts Amendments Act of 2010, Public Law 111–211 (July 29, 2010), which amended the criminal offense at 18 U.S.C. 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than $1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than $1,000. The proposed amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to § 2B1.1 (Theft, Property Destruction, and Fraud).

Part C also addresses an existing offense, 18 U.S.C. 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trade mark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. Offenses under section 1158 are not referenced in Appendix A (Statutory Index). The proposed amendment references section 1158 offenses to both § 2B1.1 and § 2B5.3 (Criminal Infringement of Copyright or Trademark).

Part D responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code—title 41, ''Public Contracts''. As part of this codification, two criminal offenses, 41 U.S.C. 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. 54 and 423(e), were given new title 41 U.S.C. section numbers: Sections 8702 and 8707 for sections 53 and 54, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e). The substantive offenses and their related penalties did not change. The proposed amendment makes clerical changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A.

Part E responds to the Animal Crush Video Prohibition Act of 2010, Public Law 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an ''animal crush video,'' as defined in section 48 (which requires, among other things, that the depiction be ''obscene''). The maximum term of imprisonment for a section 48 offense is 7 years. Section 48 is not referenced in Appendix A (Statutory Index). The proposed amendment amends Appendix A (Statutory Index) to reference section 48 offenses to § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). An issue for comment is also included.

Proposed Amendment

(A) Cell Phone Contraband Act

Section 2P1.2(a) is amended as follows:

Option 1: In paragraph (2) by inserting after ''ammunition,'' the following: ''[a mobile phone or similar device,]''.

Option 2: In paragraph (3) by inserting after ''currency,'' the following: ''[a mobile phone or similar device,]''.

The Commentary to § 2P1.2 captioned ''Application Notes'' is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; and by inserting at the beginning the following:

''1. In this guideline, the term 'mobile phone or similar device' means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).''.

(B) Prevent All Cigarette Trafficking Act

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. 158 the following:

''15 U.S.C. § 377 2T2.1 [, 2T2.2]'';

and by inserting after the line referenced to 18 U.S.C. 1716D the following:

''18 U.S.C. § 1716E [2T2.1], [2T2.2]''.

(C) Indian Arts and Crafts Amendments Act

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1153 the following:

''18 U.S.C. § 1158 2B1.1, 2B5.3
18 U.S.C. § 1159 2B1.1''.

(D) Public Law 111–350

Appendix A (Statutory Index) is amended by striking the following:

''41 U.S.C. § 53 2B4.1
41 U.S.C. § 542B4.1
41 U.S.C. § 423(e) 2B1.1, 2C1.1'';

and inserting the following:

''41 U.S.C. § 2102 2B1.1, 2C1.1
41 U.S.C. § 2105 2B1.1, 2C1.1
41 U.S.C. § 8702 2B4.1
41 U.S.C. § 8707 2B4.1''.

(E) Animal Crush Video Prohibition Act of 2010

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 43 the following:

''18 U.S.C. § 48 2G3.1''.

Issue for Comment:

1. The proposed amendment would reference offenses under 18 U.S.C. 48 (Animal crush videos) to § 2G3.1. That guideline provides a base offense level of 10 and enhancements for distribution (ranging from 2 levels to 5 or more levels), certain conduct with intent to deceive a minor into viewing material that is harmful to minors (2 levels), use of a computer (2 levels), and material portrays sadistic or masochistic conduct or other depictions of violence (2 levels).

The Commission invites comment on offenses under section 48, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. Do the provisions in § 2G1.3 adequately account for offenses under section 48? If not, how should the Commission amend the guideline to account for offenses under section 48? For example, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions to § 2G3.1 to better account for offenses under section 48? If so, what should the Commission provide?

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