UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments; request for public comment; notice of public hearings.

SUMMARY: (A) Proposed Temporary, Emergency Amendment Pertaining to Steroid Offenses.—Pursuant to section 994(a), (o), and (p) of title 28, United States Code, section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358, and the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–75, the Commission is considering promulgating a temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary to increase the penalties for steroid offenses. This notice sets forth the proposed amendment and a synopsis of the issues addressed by the amendment. Issues for comment follow the proposed amendment.

(B) Proposed Non-Emergency Amendments.—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 provides multiple issues for comment, some of which are contained within proposed amendments.

The specific proposed amendments and issues for comment in this notice are as follows: (A) proposed amendment and issues for comment regarding immigration offenses, particularly offenses covered by §§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L1.2 (Unlawfully Entering or Remaining in the United States), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; etc.) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use); (B) proposed amendments to §§ 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 1B1.1 (Application Instructions), and 5K2.11 (Lesser Harms), and issues for comment pertaining to firearms offenses; (C) proposed repromulgation of the proposed temporary, emergency amendment to §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), and 3B1.3 (Hate Crime Motivation and Vulnerable Victim) set forth in Part A of this notice; (D) proposed amendment to repromulgate as a permanent amendment the temporary, emergency amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark), which became effective October 24, 2004 (see Supplement to Appendix C, (Amendment 675)); (E) proposed amendment to repromulgate as a permanent amendment the temporary, emergency amendment to § 2J1.2 (Obstruction of Justice), which became effective October 24, 2005 (see Supplement to Appendix C, (Amendment 676)); (F) proposed amendments §§ 2A1.4 (Involuntary Manslaughter), 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry), 2B1.1 (Theft, Fraud, and Property Destruction), 2K1.4 (Arson; Property Damage by Use of Explosives), and Chapter Two, Part X (Other Offenses) to implement the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. 109–59; (G) proposed amendments to §§ 2A6.1 (Threatening Communications), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), and 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) to implement the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458; (H) proposed amendments to (i) Chapter Three (Adjustments) to implement the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, Pub. L. 108–482; and (ii) § 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials) to implement section 5(d)(1) of the CAN-SPAM Act, Pub. L. 108–187; (I) proposed amendments to (i) §§ 2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to implement the Veterans' Memorial Preservation and Recognition Act of 2003, Pub. L. 108–29; (ii) § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to implement the Plant Protection Act of 2002, Pub. L. 107–171; (iii) § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) to implement the Clean Diamond Trade Act of 2003, Pub. L. 108–19; (iv) §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2X5.1 to implement the Unborn Victims of Violence Act of 2004, Pub. L. 108–212; and (v) Chapter Two, Part X (Other Offenses) to implement several other laws that created new Class A Misdemeanor offenses; (J) proposed amendments to § 2D1.1 and Chapter Three (Adjustments) to address various guideline application issues; (K) proposed amendment to § 3C1.1 (Obstruction of Justice) that addresses three issues of circuit conflict; (L) issue for comment pertaining to attorney-client waiver in Chapter Eight (Sentencing of Organizations); (M) proposed amendment to Chapter Six (Sentencing Procedures and Plea Agreements) pertaining to crime victims' rights; and (N) proposed amendment to Chapter One, Part B (General Application Principles) pertaining to reductions in the term of imprisonment based on a Bureau of Prisons motion.

DATES: (A) Proposed Temporary, Emergency Amendment.—Written public comment on the proposed emergency amendment should be received by the Commission not later February 27, 2006, in anticipation of a vote to promulgate the emergency amendments at the Commission's March 2006 public meeting. Thereafter, written public comment on whether to repromulgate the emergency amendment as a permanent, non-emergency amendment should be received by the Commission not later than March 28, 2006.

(B) Proposed Non-Emergency Amendments.—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 28, 2006.

(C) Public Hearings.—The Commission has scheduled a public hearing on its proposed amendments for March 15, 2006, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002–8002. A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502–4597, not later than February 17, 2006. Written testimony for the public hearing must be received by the Commission not later than March 1, 2006. Timely submission of written testimony is a requirement for testifying at the public hearing. The Commission requests that, to the extent practicable, commentators submit an electronic version of the comment and of the testimony for the public hearing. The Commission also reserves the right to select persons to testify at any of the hearings and to structure the hearings as the Commission considers appropriate and the schedule permits. Further information regarding the public hearing, including the time of the hearing, will be provided by the Commission on its Web site at *http://www.ussc.gov.*

In addition to the March public hearing, the Commission has scheduled two regional public hearings on the proposed immigration amendment. The first hearing will be held in San Antonio, TX, on February 21, 2006. The second hearing will be held in San Diego, CA, on March 6, 2006. Further information regarding these hearings, including the time and location, will be provided by the Commission on its Web site.

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: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4597.

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 of each year pursuant to 28 U.S.C. 994(p).

The Commission seeks comment on the proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary. In addition to the issues for comment presented in the proposed amendments, the Commission requests comment regarding simplification of the guidelines. Specifically, with respect to the guidelines that are the subject of the following proposed amendments, should the Commission make additional amendments to simplify those guidelines, and if so, how? For example, should Specific Offense Characteristics that are infrequently applied be deleted and instead included as bases for upward departures? Should Specific Offense Characteristics that provide graduated increases for degrees of conduct be collapsed to provide a single offense level increase? For example, should a firearm enhancement that provides alternative offense level increases based on how a firearm was involved in the offense (*e.g.*, discharged, brandished, possessed, or otherwise used) provide a single offense level increase for the involvement of a firearm?

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

The proposed amendments 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 on 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.

Additional information pertaining to the proposed amendments described in this notice, including the Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines, may be accessed through the Commission's Web site at *http://www.ussc.gov.*

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

Ricardo H. Hinojosa,

Chair.

A. Proposed Emergency Amendment

1. Steroids

Synopsis of Proposed Amendment: This proposed amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the ''ASC Act''). The ASC Act directs the Commission to ''review the Federal sentencing guidelines with respect to offenses involving anabolic steroids'' and ''consider amending the * * * guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use * * *.'' The Commission must promulgate an amendment not later than 180 days after the date of enactment of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, which creates a promulgation deadline of March 27, 2006.

The proposed amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Currently, one unit of an anabolic steroid ''means a 10 cc vial of an injectable steroid or fifty tablets.'' The proposed amendment presents two options for increasing penalties. Option One bases the offense level in an anabolic steroid offense on the ''actual'' quantity of steroid involved in the offense and provides that one unit of an anabolic steroid means

[25][50][100] mg of an anabolic steroid, regardless of the form involved in the offense (*e.g.*, patch, cream, tablet, liquid). At 25 mg, sentencing penalties would be increased approximately 6–8 levels above current offense levels, and would closely approximate a 1:1 ratio with other Schedule III substances. At 50 mg, sentencing penalties would be increased approximately 4–6 levels above current offense levels, and at 100 mg, sentencing penalties would be increased approximately 2–4 levels above current offense levels. This option also includes a rebuttable presumption that the label, shipping manifest, or other similar documentation accurately reflects the purity of the steroid. Option Two eliminates the sentencing distinction between anabolic steroids and other Schedule III substances. Accordingly, if an anabolic steroid is in a pill, tablet, capsule, or liquid form, the court would sentence as it would in any other case involving a Schedule III substance. For anabolic steroids in other forms, the proposed amendment instructs the court that [1 unit means 25 mg and that] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

The proposed amendment also provide new enhancements designed to capture aggravating harms involved in anabolic steroid cases. First, the proposed amendment amends § 2D1.1 to provide an increase of two levels if the offense involved the distribution of a masking agent. A masking agent is a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body. Second, the proposed amendment amends § 2D1.1 to provide an increase of two levels if the defendant distributed an anabolic steroid to a professional, college, or high school athlete. Third, the proposed amendment presents two options for increasing penalties for coaches who distribute anabolic steroids to their athletes. Option One provides, as an alternative to the proposed enhancement for distribution to an athlete, a two-level increase in § 2D1.1 if the defendant used the defendant's position as a coach of athletic activity to influence an athlete to use an anabolic steroid. Option Two amends Application Note 2 of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a coach who uses his or her position to influence an athlete to use an anabolic steroid in the list of special circumstances to which the two level adjustment in § 3B1.3 shall apply.

Two issues for comment follow the proposed amendment. The first pertains to whether the Commission, when it repromulgates the proposed amendment as a permanent amendment, should expand the scope of the enhancements to cover all controlled substances, not just anabolic steroids. The second issues pertains to whether the penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers.

Proposed Amendment: Section 2D1.1 is amended by redesignating subsections (b)(6) and (b)(7) as subsections (b)(8) and (b)(9), respectively; and by inserting the following after subsection (b)(5):

''(6) If the offense involved the distribution of (A) an anabolic steroid; and (B) a masking agent, increase by 2 levels.

(7) If the defendant distributed an anabolic steroid to a professional, college, or high school athlete[; Option 1(for coach): or (B) the defendant used the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid], increase by 2 levels.]''.

[Option 1 (for steroids): Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' by striking subdivision (G) and inserting the following:

''(G) In the case of anabolic steroids, one 'unit' means [25][50][100] mg of an anabolic steroid, regardless of the form (*e.g.*, patch, topical cream, tablet, liquid). [There shall be a rebuttable presumption that the label, shipping manifest, or other similar documentation describing the type and purity of the anabolic steroid accurately reflects the purity of that steroid.]''.]

[Option 2 (for steroids): Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' in subdivision (F) by striking ''(except anabolic steroids)''; and by adding at the end the following:

''For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.* patch, topical cream, aerosol), [(A) one 'unit' means [25] mg; and (B)] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.''.

Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' by striking subdivision (G).]

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking ''(b)(6)'' and inserting ''(b)(8)'' each place it appears; and by striking ''(b)(7)'' and inserting ''(b)(9)'' each place it appears.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''24. Application of Subsection (b)(6).—For purposes of subsection (b)(6), 'masking agent' means a product added to, or taken with, an anabolic steroid that prevents the detection of the anabolic steroid in an individual's body.

25. Application of Subsection (b)(7).—For purposes of subsection (b)(7):

'Athlete' means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

'Athletic activity' means an activity that (A) has officially designated coaches; (B) conducts regularly scheduled practices or workouts that are supervised by coaches; and (C) has established schedules for competitive events or exhibitions.

'College or high school athlete' means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

'Professional athlete' means an individual who competes in a major professional league.''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the ninth paragraph by striking ''(b)(6)(A)'' and inserting ''(b)(8)(A)''; and in the last paragraph by striking ''(b)(6)(B) and (C)'' and inserting ''(b)(8)(B) and (C)''.

[Option 2 (for coaches): The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in Note 2 in subdivision (A) by inserting ''Postal Service Employee.—'' before ''An employee''; in subdivision (B) by inserting ''Offenses Involving 'Means of Identification'.—'' before ''A defendant''; and by adding at the end the following:

''(C) Coach of Athletic Activity.—A defendant who uses the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid.

For purposes of this guideline:

(i) 'Athlete' means an individual who participates in an athletic activity conducted by (I) an intercollegiate athletic association or interscholastic athletic association; (II) a professional athletic association; or (III) an amateur athletic organization.

(ii) 'Athletic activity' means an activity that (I) has officially designated coaches; (II) conducts regularly

scheduled practices or workouts that are supervised by coaches; and (III) has established schedules for competitive events or exhibitions.

(iii) 'College, or high school athlete' means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

(iv) 'Professional athlete' means an individual who competes in a major professional league.]''.

Issues for Comment:

(1) The Commission requests comment regarding whether, when the Commission re-promulgates the temporary, emergency amendment as a permanent amendment, it should expand the proposed enhancements in § 2D1.1(b)(6) (pertaining to masking agents) and in § 2D1.1(b)(7) (pertaining to distribution of a steroid to an athlete) to cover offenses involving any controlled substance. Specifically, the proposed amendment defines ''masking agent'' as ''a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body.'' However, masking agents also can be taken to prevent the detection of other controlled substances. The Commission requests comment regarding whether it should expand the definition of masking agent, and thus application of the enhancement, in a manner that covers all controlled substances, not just anabolic steroids. Similarly, there are controlled substances other than anabolic steroids that enhance an individual's performance. The Commission requests comment regarding whether the proposed enhancement pertaining to distribution to an athlete should be expanded to cover offenses involving all types of controlled substances.

(2) The Commission requests comment regarding whether penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. For more serious drug types (*e.g.*, heroin, cocaine, marihuana), the Drug Quantity Table in § 2D1.1(c) provides an offense level of 26 for quantities typical of mid-level dealers and an offense level of 32 for quantities typical of high-level dealers. These levels also correspond to the statutory mandatory minimum penalties for mid- and high-level dealers. Although there are no statutory mandatory minimum penalties establishing thresholds for steroid offenses, the Commission has been informed that a steroids dealer who provides the equivalent of one complete cycle to 10 customers is considered to be a mid-level dealer, and a dealer who provides the equivalent of one complete cycle to 30 customers is considered to be a high-level dealer. Currently, offense levels in the Drug Quantity Table for anabolic steroids and other Schedule III substances begin at level 6 and are ''capped'' at level 20. Should the Commission provide a penalty structure within this range that targets offenses involving mid- and high-level steroid dealers, and if so, what offense levels should correspond to a mid-level dealer and to a high-level dealer?

B. Proposed Non-Emergency Amendments

1. Immigration

Synopsis of Proposed Amendment: This four part proposed amendment addresses issues involving immigration offenses. These issues were identified through review of HelpLine calls to the Commission, feedback from training seminars, receipt of public comment, and information staff gathered from an immigration roundtable discussion. Part One of the proposed amendment addresses issues relating to offenses sentenced under § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). Part Two is a proposal to amend § 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). Part Three addresses issues relating to offenses sentenced under § 2L1.2 (Unlawfully Entering or Remaining in the United States). Part Four presents issues for comment regarding the proposed amendment.

1. Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

This part of the proposed amendment covers offenses sentenced under § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

A. National Security Concerns

Currently, § 2L1.1(a)(1) provides a base offense level of level 23 if the defendant was convicted under 8 U.S.C. 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony. Title 8, United States Code, section 1327, provides a statutory maximum term of imprisonment of 10 years for cases involving aiding or assisting certain aliens who pose a heightened risk to the safety of the citizens of the United States. However, § 2L1.1(a)(1) only applies to a limited subgroup of those convicted under § 1327. This proposal provides three options to increase punishment for those defendants who assist ''inadmissible aliens'' in illegally entering the United States. All options retain the current base offense level of 23 for a defendant who has a conviction under 8 U.S.C. 1327 in a case in which the violation involved an alien ''who previously was deported after a conviction for an aggravated felony.'' Option One provides a base offense level of 25 for a defendant who is convicted of 8 U.S.C. 1327 involving an alien who is inadmissable because of ''security or related grounds'', as defined in 8 U.S.C. 1182(a)(3). Option Two provides a specific offense characteristic with an increase of [2–6] levels for defendants who smuggle, transport, or harbor an alien who was inadmissible under 8 U.S.C. 1182(a)(3). This option is relevant conduct based.

B. Number of Aliens

The proposed amendment provides two options to amend § 2L1.1(b)(2) regarding the number of aliens involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Option One amends the table to provide a nine-level increase for offenses involving 100 to 199 aliens, a [12]-level increase for offenses involving 200 to 299 aliens, and a [15]-level increase for offenses involving 300 or more aliens. Option Two, in part mirrors Option One by providing the same increases at the top end of the table for offenses involving 100 or more aliens. However, Option Two also provides smaller categories at the low end of the table. Offenses involving six to [15] aliens would receive an increase of three levels, [16 to 49] aliens would receive an increase of [six] levels, and [50 to 99] aliens would receive an increase of [nine] levels.

C. Endangerment of Minors

The proposed amendment presents two options and an issue for comment to address offenses in which an alien

minor was smuggled, harbored, or transported. Option One provides a [2][4][6] level increase if the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent. Option two provides a graduated increase, based upon the age of the minor smuggled, harbored, or transported. A four-level increase is provided for a defendant who smuggles a minor under the age of 12 who is unaccompanied by his or her parent. A two-level increase is provided for a defendant who smuggles a minor unaccompanied by his or her parent who has attained the age of 12 years, but has not attained the age of 16 years.

D. Offenses Involving Death

The amendment proposes several changes to the guideline in cases in which death occurred. First, the proposed amendment removes the increase of eight levels ''if death resulted'' from the current specific offense characteristic addressing bodily injury and places this increase in a stand alone specific offense characteristic. This new specific offense characteristic would provide an increase of [10] levels. Providing a separate specific offense characteristic for death allows for cumulative enhancements in a case in which both bodily injury and death occur. Additionally, the cross reference at § 2L1.1(c)(1) is expanded to cover deaths other than murder, if the resulting offense level is greater than the offense level determined under § 2L1.1.

E. Abducting Aliens, or Holding Aliens for Ransom

A [four]-level increase and a minimum offense level of [23] is proposed for cases in which an alien was kidnapped, abducted, or unlawfully restrained, or if a ransom demand was made. This proposed amendment addresses the concern about cases in which the unlawful aliens are coerced, with or without the use of physical force, or even with direct threats, into remaining in ''safe houses'' for long periods of time through coercion, implied threat, or deception. This is done so that the smugglers can get more money from the families of the aliens or so they will provide inexpensive labor. Currently, this conduct is not covered by § 3A1.3 (Restraint of Victim) because that guideline only covers ''physical restraint''. The extent of the increase (four levels) is consistent with a similar enhancement in subsection (b)(7)(B) of § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) and the minimum offense level of 23 is consistent with § 2A4.2 (Demanding or Receiving Ransom Money), which provides a base offense level of 23 for such offenses.

2. Sections 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; etc.) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; etc.)

This part of the proposed amendment covers offenses sentenced under §§ 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; etc.) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; etc.)

A. Number of Documents

The proposed amendment provides two options in § 2L2.1 to amend the specific offense characteristic involving the number of documents and passports involved in the offense. The two options are identical to the two options presented under § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to amend the specific offense characteristic (b)(2) regarding the number of aliens involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 documents, a six-level increase for offenses involving 25 to 99 documents, and a nine-level increase for offenses involving 100 or more documents. Option one amends the table to provide a nine-level increase for offenses involving 100 to 199 documents, a [12]-level increase for offenses involving 200 to 299 documents, and a [15]-level increase for offenses involving 300 or more documents. Option two, in part mirrors option one by providing the same increases at the top end of the table for offenses involving 100 or more documents. However, option two also provides smaller categories at the low end of the table. Offenses involving six to [15] documents would receive an increase of [three] levels, [16 to 49] documents would warrant an increase of [six] levels, and [50 to 99] documents would receive an increase of [nine] levels.

B. Fraudulently Obtaining or Using United States Passports or Foreign Passports

The proposed amendment provides a new specific offense characteristic at § 2L2.1(b)(5)(A) that provides a four-level increase in a case in which the defendant fraudulently used or obtained a United States passport. The same specific offense characteristic was added to § 2L2.2, effective November 1, 2004. Addition of this specific offense characteristic promotes proportionality between the document fraud guidelines, §§ 2L2.1 and 2L2.2. In addition, the proposed amendment also provides, at § 2L2.1(b)(1)(B) and § 2L2.2(b)(3)(B), a two-level increase if the defendant fraudulently obtained or used a foreign passport.

3. § 2L1.2 (Unlawfully Entering or Remaining in the United States)

This part of the proposed amendment addresses issues relating to offenses sentenced under § 2L1.2 (Unlawfully Entering or Remaining in the United States).

A. Alternative Approaches to Sentencing Under § 2L1.2

The current structure of § 2L1.2 requires the court, using the ''categorical approach'', to assess whether a prior conviction qualifies for a particular category under the guideline. This analysis is often complicated by lack of documentation, competing case law decisions, and the volume of cases. In addition, § 2L1.2 contains different definitions of covered offenses from the statute. Courts, then, are faced with making these assessments multiple times in the same case. The proposed amendment provides five options to address the complexity of this guideline.

The first, second, and third options amend the structure of § 2L1.2 by using the definition of aggravated felony in combination with the length of the sentence imposed for that prior felony conviction. Option one provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was less than 13 months; and an eight-level increase for all other aggravated felonies. Option two provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded two years; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was at least one year, but less than two years; and an 8 level increase for all other aggravated felonies. Option three, mirroring the criminal history guidelines, provides a 16-level increase for an aggravated felony in which the sentence imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence imposed

was at least 60 days but did not exceed 13 months; and an 8 level increase for all other aggravated felonies.

The fourth option maintains the current structure of § 2L1.2, except that the categories of offenses delineated under this guideline are defined by 8 U.S.C.1101(a)(43), the statute providing definitions for ''aggravated felonies''. Additionally, this option provides use of length of sentence of imprisonment imposed in conjunction with ''crime of violence'' to further distinguish between the numerous types of prior convictions that fall within this category.

Finally, the fifth option provides an increased base offense level and a reduction if the prior conviction is not a felony.

4. Issues for Comment

Part 4 of the proposed amendment sets forth multiple issues for comment regarding the immigration guidelines and the proposed amendment.

Proposed Amendment:

Part 1: § 2L1.1

[**Please Note:** For ease of presentation, the proposed amendments set forth in Part 1, Subparts A through E, are drafted independently of each other. If the Commission were to vote to adopt an amendment from each Subpart, technical and conforming amendments would be made to ensure proper redesignations of subsections and application notes.]

A. National Security Concerns

[Option 1: Section 2L1.1 is amended by redesignating subsections (a)(1) and (a)(2) as subsections (a)(2) and (a)(3), respectively; and by inserting after ''Level:'' the following:

''(1) [25], if the defendant was convicted under 8 U.S.C. 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. 1182(a)(3);''; and in subsection (a)(3), as redesignated by this amendment, by striking ''12'' and inserting ''[12][14]''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended by redesignating Notes 2 through 6 as Notes 3 through 7, respectively; and by inserting after Note 1 the following:

''2. Application of Subsection (a)(1).—Subsection (a)(1) applies in cases in which the defendant is convicted under 18 U.S.C. 1327 of knowingly smuggling certain aliens inadmissible under 8 U.S.C. 1182(a)(3). Section 1327 requires that the defendant know that the alien is ineligible to be admitted into the United States, however, it does not require that the defendant have specific knowledge as to why the defendant is ineligible for admission.''.]

[Option 2 (for national security): Section 2L1.1 is amended by redesignating subsections (b)(3) through (b)(6) as subsections (b)(4) through (b)(7), respectively; and by inserting after subsection (b)(2) the following:

''(3) If the defendant smuggled, transported, or harbored an alien who was inadmissible under 8 U.S.C. 1182(a)(3), increase by [2][4][6] levels.''.]

B. Number of Aliens

[Option 1: Section 2L1.1(b)(2) is amended by striking subdivision (C) and inserting the following:

''(C) 100–199 add 9
(D) 200–299 add [12]
(E) 300 or more add [15].''.]

[Option 2: Section 2L1.1(b)(2) is amended by striking subdivisions (A) through (C) and inserting the following:

''(A) 6–[15] add 3
(B) [16–49] add [6]
(C) [50–99] add [9]
(D) [100–199] add [12]
(E) [200–299] add [15]
(F) [300 or more] add [18].''.]

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 4 by inserting ''Application of Subsection (b)(2).—'' before ''If''; and by striking ''100'' and inserting ''300''.

C. Endangerment of Minors

Section 2L1.1 is amended by redesignating subsections (b)(3) through (b)(6) as subsections (b)(4) through (b)(7), respectively; and by inserting the following after subsection (b)(2):

[Option 1:

''(3) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent, increase by [2][4][6] levels.''.]

[Option 2:

''(3) If (A) the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent; and (B) the minor (i) had not attained the age of 12 years, increase by [4] levels; or (ii) had attained the age of 12 years but had not attained the age of 16 years, increase by [2] levels.''.]

D. Offenses Involving Death

Subsection (b)(6) is amended by striking ''died or''; by striking ''Death or''; by redesignating subdivisions (1) through (3) as subdivisions (A) through (C), respectively; by inserting a period after ''6 levels''; and by striking subdivision (4).

Section 2L1.1 is amended by inserting after subsection (b)(6) the following:

''(7) If the offense resulted in the death of any person, increase by [10] levels.''.

Subsection 2L1.1 is amended by striking subsection (c) and inserting the following:

''(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.''.

E. Abducting Aliens or Holding Aliens for Ransom

Section 2L1.1(b) is amended by adding at the end the following:

''(7) If an alien was kidnapped, abducted, or unlawfully restrained, or if a ransom demand was made, increase by [4] levels. If the resulting offense level is less than level [23], increase to level [23].''.

Part 2: §§ 2L2.1 and 2L2.2

A. Number of Documents

[Option 1: Subsection 2L2.1(b)(2) is amended by striking subdivision (C) and inserting the following:

''(C) 100–199 add 9
(D) 200–299 add [12]
(E) 300 or more add [15].''.]

[Option 2: Section 2L2.1(b)(2) is amended by striking subdivisions (A) through (C) and inserting the following:

''(A) 6–[15] add 3
(B) [16–49] add [6]
(C) [50–99] add [9]
(D) [100–199] add [12]
(E) [200–299] add [15]
(F) [300 or more] add [18].''.]

The Commentary to § 2L2.1 captioned ''Application Notes'' is amended in Note 5 by inserting ''Application of Subsection (b)(2).—'' before ''If''; and by striking ''100'' and inserting ''300''.

B. Fraudulently Obtaining or Using United States Passports or Foreign Passports

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

''(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.''.

Section 2L2.2(b)(3) is amended by inserting ''(A)'' after ''used'' and by inserting ''; or (B) a foreign passport, increase by 2 levels'' after ''4 levels''.

Part 3: § 2L1.2

[Option 1: Section 2L1.2(b)(1) is amended by striking subdivisions (A) and (B) and inserting the following:

''(A) a conviction for an aggravated felony for which a sentence of imprisonment exceeding 13 months was imposed, increase by 16 levels;

''(B) a conviction for an aggravated felony for which a sentence of imprisonment of 13 months or less was imposed, increase by 12 levels;''; and in subdivision (C) by inserting ''not covered by subdivision (b)(1)(A) or (b)(1)(B)'' after ''felony''.]

(Option 2: Section 2L1.2(b)(1) is amended by striking subdivisions (A) and (B) and inserting the following:

''(A) a conviction for an aggravated felony for which the sentence imposed exceeded 2 years, increase by 16 levels;

(B) a conviction for an aggravated felony for which the sentence imposed was at least 12 months but did not exceed 2 years, increase by 12 levels;''; and in subdivision (C) by inserting ''not covered by subdivision (b)(1)(A) or (b)(1)(B)'' after ''felony''.]

[Option 3: Section 2L1.2(b)(1) is amended by striking subdivisions (A) and (B) and inserting the following:

''(A) a conviction for an aggravated felony for which the sentence imposed exceeded 13 months, increase by 16 levels;

(B) a conviction for an aggravated felony for which the sentence imposed was at least 60 days but did not exceed 13 months, increase by 12 levels;''; and in subdivision (C) by inserting ''not covered by subdivision (b)(1)(A) or (b)(1)(B)'' after ''felony''.]

[**Please Note:** The following proposed Commentary amendments would be used with Options 1, 2, and 3)]:

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking subdivisions (B)(i) through (B)(viii) and inserting the following:

''(i) 'Aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) 'Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)' means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (*e.g.*, probation).

(iii) 'Felony' means any Federal, State, or local offense punishable by imprisonment for a term exceeding one year.

(iv) 'Sentence of imprisonment' has the meaning given that term 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 Commentary to § 2L1.2 captioned ''Application Notes'' is amended by striking Notes 2 and 3; and by redesignating Notes 4 through 6 as Notes 2 through 4, respectively.

[Option 4: Section 2L1.2(b) is amended in subdivision (A) by striking ''a felony'' and inserting ''an aggravated felony''; and by inserting ''for which the sentence imposed exceeded 13 months'' after ''violence''; in subdivision (B) by striking ''a felony'' and inserting ''an aggravated felony that is a (i)''; by striking the comma after ''less'' and inserting ''; (ii) crime of violence for which the sentence imposed was 13 months or less,''; and in subdivision (C) by inserting ''not covered by subdivision (b)(1)(A) or (b)(1)(B)'' after ''felony''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking subdivisions (B)(ii) through (B)(vi) and inserting the following:

''(ii) 'Child pornography offense' is an offense described in 8 U.S.C. 1101(a)(43)(I).

(iii) 'Crime of violence' has the meaning given that term in 18 U.S.C. 16.

(iv) 'Drug trafficking offense' has the meaning given that term in 18 U.S.C. 924(c).

(v) 'Firearms offense' is an offense described in 8 U.S.C. 1101(a)(43)(C) and (E).

(vi) 'Human trafficking offense' is an offense described in 8 U.S.C. 1101(a)(43)(K).''; and by striking subdivision (B)(viii) and inserting the following:

''(viii) 'National security or terrorism offense' is an offense described in 8 U.S.C. 1101(a)(43)(L).''.]

[Option 5: Section 2L1.2 is amended in subsection (a) by striking ''8'' and inserting ''[16][20][24]''; and by striking subsection (b)(1) and inserting the following:

''(1) If the defendant does not have a prior conviction for a felony, decrease by [8][6][4] levels.''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended by striking Notes 1, 3, 4, and 6; by redesignating Notes 2 and 5 as Notes 1 and 2, respectively.

Part 4. Issues for Comment

(1) The proposed amendment to § 2L1.1 provides options for addressing defendants who smuggle, transport, or harbor any alien who is inadmissible under 8 U.S.C. 1182(a)(3). Certain sections of 8 U.S.C. 1182(a)(3), however, are very broad, such as subsection (a)(3)(A)(iii) (pertaining to inadmissibility due to an intent to commit ''any other unlawful activity''), or are unrelated to the national security risks associated with terrorism, such as subsections (a)(3)(D) (pertaining to membership in a totalitarian party) and (a)(3)(E) (pertaining to participants in Nazi persecutions). The Commission requests comment regarding whether it should more specifically identify, for purposes of either a heightened base offense level or a specific offense characteristic, the subsections of 8 U.S.C. 1182(a)(3) that pertain to terrorism or to other national security provisions. For example, should either a heightened base offense level or a specific offense characteristic be limited to 8 U.S.C. 1182(a)(3)(A)(i) (pertaining to espionage or sabotage), (a)(3)(A)(iii) (pertaining to overthrow of the United States Government), (a)(3)(B) (pertaining to terrorist activities), and (a)(3)(F) (pertaining to association with terrorist organizations)?

Additionally, the Commission requests comment regarding whether § 2L1.1 should provide a heightened base offense level if the defendant were convicted under 8 U.S.C. 1327 (Aiding or assisting certain aliens to enter) and a specific offense characteristic that would apply cumulatively if the defendant smuggled, transported, or harbored an alien the defendant knew to be inadmissible under 8 U.S.C. 1182(a)(3).

(2) The proposed amendment provides new specific offense characteristics that are defendant-based (*i.e.*, the defendant's liability is limited to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused) rather than offense-based (*i.e.*, expanded relevant conduct). See proposed amendment, § 2L1.1(b)(3) (pertaining to smuggling inadmissible aliens) and (b)(4) (pertaining to smuggling a minor unaccompanied by the minor's parent). The Commission requests comment regarding whether these specific offense characteristics should be offense based rather than defendant based. Alternatively, should the proposed enhancement in § 2L1.1(b)(10) (pertaining to kidnapping an alien) be defendant-based rather than offense-based, as it is currently proposed?

(3) The proposed amendment to § 2L1.1 includes an enhancement for a defendant who smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent. The Commission requests comment regarding whether such conduct is better addressed in the context of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).

(4) The Commission requests comment regarding whether it should increase the base offense levels in §§ 2L2.1 and 2L2.2.

(5) Currently, § 2L2.2 provides an increase of four levels if the defendant fraudulently obtained or used a United States passport. The proposed amendment would add this

enhancement to § 2L2.1 and also provide an enhancement of two levels in both §§ 2L2.1 and 2L2.2 if the defendant fraudulently obtained or used a foreign passport. As an alternative to the proposed amendment, the Commission requests comment regarding whether it should provide a [four-level] enhancement in both §§ 2L2.1 and 2L2.2 regardless of whether the passport was issued by the United States or a foreign country. Additionally, the Commission requests comment regarding whether other types of documents should be included in the enhancement. If so, what types of documents should be included? For example, should the proposed 2-level enhancement also apply in the case of a defendant who fraudulently obtains or used a driver's license?

Additionally, the Commission requests comment regarding whether it should provide an application note in §§ 2L2.1 and 2L2.2 that instructs the court not to apply § 2L2.1(b)(2), proposed § 2L2.1(b)(5), or § 2L2.2(b)(3) if the documents are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny. The guidelines currently provide such an application note in § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

(6) The Commission requests comment regarding whether the prior convictions used to increase a defendant's offense level under § 2L1.2 should be subject to the rules of criminal history found at § 4A1.2. For example, if a prior conviction is too old to be counted for the purposes of criminal history, should that prior conviction also be too old to count for the purposes of § 2L1.2? Alternatively, should such a conviction be the basis for a reduction?

(7) Before May 1997, the table for number of aliens in § 2L1.1(b)(2) provided increases of two level increments. In May 1997, in response to a directive to increase the enhancement in § 2L1.1(b)(2) by at least 50 percent (see section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208), the Commission amended the table to provide increases of three level increments. At that time, the Commission also similarly amended the table in § 2L2.1 pertaining to the number of documents. The Commission requests comment regarding whether it should amend these tables to provide increases of two level increments. Any such change would be done in a manner that complies with the directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(8) As an alternative to Option 5 for amending § 2L1.2, the Commission requests comment regarding whether it should provide a guideline that is in essence an inversion of the current structure of § 2L1.2. Currently, § 2L1.2 provides increases based on the type of prior conviction. Should the Commission consider multiple reductions based on the type of prior conviction?

2. Firearms

Synopsis of Proposed Amendment: This proposed amendment addresses various issues pertaining to the firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and to other firearm provisions in the guidelines.

First, the proposed amendment addresses offenses involving a weapon described in 18 U.S.C. 921(a)(30), which expired on September 13, 2004. Although possession of such a weapon is no longer covered by 18 U.S.C. 921, possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level. The proposed amendment presents two options for providing increases for possession of weapons previously covered by 18 U.S.C. 921(a)(30). Currently, § 2K2.1 has four base offense level provisions that are triggered by the offense involving such a weapon. Under Option One, each of the four base offense level provisions would be based on whether ''the offense involved a firearm that is a high-capacity, semiautomatic firearm.'' ''High-capacity, semiautomatic firearm'' would be defined as ''a semiautomatic firearm that has a magazine capacity of more than [15] cartridges.'' Option Two would provide an upward departure if the offense involved a high-capacity semiautomatic firearm. The proposed amendment also presents an issue for comment regarding this definition and whether any similar changes should be made to § 5K2.17 (High-capacity, Semiautomatic Firearms).

Second, the proposed amendment provides a [2-][4-]level enhancement in § 2K2.1 if the defendant engaged in the trafficking of [2–24] firearms, and a [6-][8-] level enhancement if the defendant engaged in the trafficking of [25 or more] firearms. Although there is no definition of trafficking in the firearm statutes, the proposed amendment borrows from the statutory definition of ''traffic'' found in other sections of the United States Code (see, *e.g.*, 18 U.S.C. 1028(d)(12), and 2318). The proposed amendment, however, modifies the statutory definition in two ways. The first modification pertains to consideration and two options are presented. Option One would result in application of the enhancement whenever a firearm was transferred as consideration for anything of value. (This option would be consistent with the statutory definitions of ''traffic''.) Option Two would result in application of the enhancement only if the transfer was made for pecuniary gain. The second modification is to include ongoing schemes to transport or transfer firearms to another individual, even if nothing of value was exchanged. The proposed amendment also presents an issue for comment regarding the proposed definition of ''trafficking''.

Third, the proposed amendment modifies § 2K2.1(b)(4) to increase the penalties for offenses involving altered or obliterated serial numbers. Under the proposed amendment, a 2-level enhancement would continue to apply to offenses involving a stolen firearm. However, the proposed amendment would provide a 4-level enhancement for offenses involving altered or obliterated serial numbers. The 4-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers. The proposed amendment also makes slight technical changes to the corresponding application note.

Fourth, the proposed amendment addresses a circuit conflict pertaining to application of §§ 2K2.1(b)(5) and (c)(1), specifically with respect to the meaning of use of a firearm ''in connection with'' another offense in the context of burglary and drug offenses. The majority of circuits have adopted a standard consistent with *Smith* v. *United States*, 508 U.S. 223 (1993), in which the Supreme Court determined the scope of ''in relation to'' as that term is used in 18 U.S.C. 924(c). The proposed amendment accordingly provides that §§ 2K2.1(b)(5) and (c)(1) apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, the courts are split as to how this standard then applies with respect to burglary and drug offenses. For ease of presentation, the proposed amendment presents options in terms of whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense ''facilitated or had the potential of facilitating'' another offense. Option One provides that the mere presence of a firearm during the course of burglary or a drug offense is

sufficient because the firearm emboldens the defendant. Option Two states that the mere presence of a firearm is not sufficient except in a drug offense. Accordingly, the enhancement in § 2K2.1(b)(5), or the cross reference in § 2K2.1(c)(1) would not apply in the case of a defendant who takes a firearm during a burglary, but it would apply in a drug offense because the mere presence of a firearm in a drug offense increases the risk of violence. Option Three provides that the mere presence is not enough to trigger either § 2K2.1(b)(5) or § 2K2.1(c)(1). (Please note that the proposed definitions of ''another felony offense'' and ''another offense'', as well as the upward departure note, are not new—the proposed language is a technical reworking of current Application Notes 4, 11, and 15.)

Fifth, the proposed amendment modifies § 5K2.11 (Lesser Harms) to prohibit a downward departure in any case in which a defendant is convicted under 18 U.S.C. 922(g).

Finally, the proposed amendment addresses the circuit conflict regarding whether pointing or waving a firearm at a specific person constitutes ''brandishing'' or ''otherwise using''. The proposed amendment presents three options. Option One combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual. Under this approach, otherwise using and brandishing with respect to a firearm would result in the same sentencing increase in §§ 2B3.1 (Robbery) and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). However, the proposed amendment would maintain the distinction between otherwise using or brandishing with respect to other dangerous weapons. Additionally, this option provides that generally waving a firearm would constitute otherwise used. Following this option, the proposed amendment presents an issue for comment regarding whether the Commission, if it adopts this approach, should make similar changes to other guidelines that have an enhancement for brandishing and otherwise using a firearm. Option Two presents the majority and minority circuit court views. The majority view holds that generally waiving or pointing a firearm constitutes brandishing but pointing a firearm at a specific individual to make an explicit or implicit threat, or as a means of forcing compliance, constitutes otherwise used. The minority view holds that pointing a firearm, even if it is pointed at a specific person, is brandishing. In the non-firearms context, otherwise used necessarily includes the most extreme thing that can be done with a weapon (*i.e.*, using it to injure or attempt to injure a victim). Accordingly, these courts hold a firearm must similarly be used to injure or attempt to injure a victim in order to constitute otherwise used, and to hold otherwise would be to obliterate the guidelines' definition of otherwise used.

Proposed Amendment

(A) 18 U.S.C. 921(a)(30)

[Option 1:

Section 2K2.1(a) is amended by striking subdivision (1) and inserting the following:

''(1) 26, if (A) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''; by striking subdivision (3) and inserting the following:

''(3) 22, if (A) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''; by striking subdivision (4)(B) and inserting the following:

''(B) the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. 5845(a); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. 922(d);''; and by striking subdivision (5) and inserting the following:

''(5) 18, if the offense involved a firearm that is a high-capacity, semiautomatic firearm, or that is described in 26 U.S.C. 5845(a);''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Firearms' has'' the following:

''High-capacity, semiautomatic firearm'' means a semiautomatic firearm that has a magazine capacity of more than [15] cartridges.''.]

[Option 2:

Section 2K2.1(a) is amended in subdivision (1) by inserting ''(A)'' after ''26, if''; by striking ''or 18 U.S.C. 921(a)(30),'' and inserting a colon; and by inserting ''(B)'' before ''the defendant''; in subdivision (3) by inserting ''(A)'' after ''22, if''; by striking ''or 18 U.S.C. 921(a)(30),'' and inserting a colon; and by inserting ''(B)'' before ''the defendant''; in subdivision (4)(B) by striking ''or 18 U.S.C. 921(a)(30)''; and in subdivision (5) by striking ''or 18 U.S.C. 921(a)(30)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Note 11, as redesignated by Part D of this proposed amendment, and inserting the following:

''11. Upward Departure Provision.''—An upward departure may be warranted in any of the following circumstances: (A) the offense involved a high-capacity, semiautomatic firearm; (B) the number of firearms substantially exceeded 200; (C) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable (''plastic'') firearms (defined at 18 U.S.C. 922(p); (D) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. 921(a)(17)(B)); or (E) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 8). For purposes of this guideline, 'high-capacity, semiautomatic firearm' means a semiautomatic firearm that has a magazine capacity of more than [15] cartridges.''.]

Issue for Comment: The proposed amendment uses as a basis for providing enhanced base offense levels or, alternatively, for an upward departure. The Commission requests comment regarding whether there is an alternative definition that it should consider. Additionally, are there other categories of firearms or types of firearms that should form the basis for either an enhanced base offense level or for an upward departure? Finally, should the Commission make similar changes to the definition of ''high-capacity, semiautomatic firearm'' in § 5K2.17 (High-Capacity, Semiautomatic Firearms)?

(B) Trafficking SOC

Section 2K2.1(b) is amended by adding at the end the following:

''(7) If the defendant engaged in the trafficking of (A) [[2]–24] firearms, increase by [2][4] levels; or (B) [25 or more] firearms, increase by [6][8] levels.''.

The Commentary to § 2K2.1 captioned ''Application Notes'', as amended by Part D of this proposed amendment, is amended by adding at the end the following:

''13. Application of Subsection (b)(7).—

(A) Definition of 'Trafficking'.—For purposes of subsection (b)(7), 'trafficking' means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.

(B) Use of the Term 'Defendant'.—Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.''.

Issue for Comment: The Commission requests comment regarding whether the definition of trafficking should be restricted to offenses in which the defendant knew, had reason to believe, or was wilfully blind to the fact, that the transfer would be to an individual whose possession or receipt would be unlawful. Additionally, should the definition include receiving firearms from another individual.

(C) Stolen and Altered or Obliterated Serial Numbers

Section 2K2.1(b) is amended by striking subdivision (4) and inserting the following:

''(4) (Apply the greater):

(A) If any firearm was stolen, increase by 2 levels; or

(B) If any firearm had an altered or obliterated serial number, increase by 4 levels.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Note 8, as redesignated by Part D of this amendment, and inserting the following:

''8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which § 2K2.1 applies is 18 U.S.C. 922(i), (j), or (u), or 18 U.S.C. 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, it the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which § 2K2.1 applies is 18 U.S.C. 922(k) or 26 U.S.C. 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.''.

(D) ''In Connection with'' in Burglary and Drug Offenses

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Notes 4, 11, and 15; and by redesignating Notes 5 through 10 as Notes 4 through 9, respectively; and by redesignating Notes 12 through 14 as Notes 10 through 12, respectively.''.

The Commentary to § 2K2.1 captioned ''Application Notes'', as amended by Part (B) of this amendment, is amended by adding at the end the following:

''14. 'In Connection With'.—

(A) In General.—Subsections (b)(5) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

[Option One (mere coincidence enough because emboldens defendant):

(B) 'Mere Coincidence'.—Subsection (b)(5) and (c)(1) apply in a case in which the firearm is present by mere coincidence because the firearm has the potential of facilitating another felony offense, or another offense, respectively. For example, subsections (b)(5) and (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and takes the firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. Similarly, in a case involving a drug offense, the mere presence of a firearm is sufficient for application of subsections (b)(5) and (c)(1).]

[Option Two (mere coincidence not enough except in drug cases):

(B) 'Mere Coincidence'.—Except as provided in subdivision (C), application of subsection (b)(5) or (c)(1) requires that the firearm be present by more than mere coincidence. For example, neither subsection (b)(5) nor subsection (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and merely takes the firearm, without engaging in any other conduct with that firearm during the course of the burglary. However, if the defendant subsequently engages in conduct that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) would apply.

(C) Application in Drug Cases.—In a case involving a drug offense, the mere presence of a firearm is sufficient for application of subsections (b)(5) and (c)(1) because of the increased risk of violence when a firearm is present during a drug offense. For example, subsections (b)(5) and (c)(1) would apply in the case of a defendant who, in the course of a drug trafficking offense, keeps a firearm in close proximity to the drugs, to drug-manufacturing materials, or to drug paraphernalia.]

[Option Three (mere coincidence not enough):

(B) 'Mere Coincidence'.—Application of subsection (b)(5) or (c)(1) requires that the firearm be present by more than mere coincidence. For example, neither subsection (b)(5) nor subsection (c)(1) would apply in a case in which a defendant who, during the course of a burglary, finds and merely takes the firearm, without engaging in any other conduct with that firearm during the course of the burglary. Similarly, in a case involving a drug offense, the mere presence of a firearm is not sufficient for purposes of applying subsection (b)(5) or (c)(1); there must be some indication that the firearm was used or possessed to protect the defendant engaged in the drug offense or to protect the drugs from theft.]

[**Please Note:** Subdivisions (C) and (D) to be used with Options One, Two, and Three]

(C) Definitions.—

'Another felony offense', for purposes of subsection (b)(5), means any Federal, State, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

'Another offense', for purposes of subsection (c)(1), means any Federal, State, or local offense other than the explosive or firearms possession or trafficking offense.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.]''.

(E) Lesser Harms and Felon in Possession

Section 5K2.11 is amended in the second paragraph by adding at the end the following:

''However, lesser harms is not an appropriate basis for a downward departure in any case in which a defendant is convicted under 18 U.S.C. 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm.''.

(F) ''Brandished'' or ''Otherwise Used''

[Option 1 (Combining Brandished and Otherwise Used plus modified majority view):

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

''For example, using a firearm or a bat to hit a victim would constitute 'otherwise used'. Additionally, with respect to a firearm, generally pointing or waving a firearm in a threatening manner constitutes 'otherwise used'.''.

Section 2B3.1(b)(2) is amended in subdivision (B) by inserting ''brandished or'' after ''firearm was''; and in subdivision (C) by striking ''brandished or'' before ''possessed,''.

Section 2B3.2(b)(3) is amended in subdivision (A)(ii) by inserting ''brandished or '' after ''firearm was''; and in subdivision (A)(iii) by striking ''brandished or'' before ''possessed''.].

[Option 2 (presenting majority and minority views):

[(Option 2A) (majority view): The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (C) and inserting the following:

''(C) 'Brandished' with reference to a dangerous weapon (including a firearm) means (i) all or part of the weapon was displayed; (ii) a weapon was generally pointed or waved in a threatening manner; or (iii) the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Although the dangerous weapon does not have to be directly visible, the weapon must be present.''; and in subdivision (I) by adding at the end the following:

''Pointing a firearm at a specific individual, or group of individuals, to make an explicit or implicit threat, or as a means of forcing compliance, constitutes 'otherwise used'.''.]

[Option 2B (Minority View): The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in subdivision (I) by adding at the end the following:

''Use of a dangerous weapon (including a firearm) to injure or attempt to injure a victim would constitute 'otherwise used'. For example, using a firearm or a bat to hit a victim would constitute 'otherwise used' but pointing a firearm at a specific individual would not constitute 'otherwise used'.''.]

Issue for Comment: The proposed amendment provides an option for consolidating the enhancements for otherwise used and brandishing with respect to a case involving a firearm. The Commission requests comment regarding whether, if it adopts this approach in §§ 2B3.1 (Robbery) and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), it should also adopt this approach in §§ 2A2.2 (Aggravated Assault) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means).

3. Steroids

Synopsis of Proposed Amendment: This proposed amendment would repromulgate the proposed temporary, emergency amendment set forth in Part A of this Notice as a permanent amendment. The proposed amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the ''ASC Act''). The ASC Act directs the Commission to ''review the Federal sentencing guidelines with respect to offenses involving anabolic steroids'' and ''consider amending the * * * guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use * * *.''

The proposed amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Currently, one unit of an anabolic steroid ''means a 10 cc vial of an injectable steroid or fifty tablets.'' The proposed amendment presents two options for increasing penalties. Option One bases the offense level in an anabolic steroid offense on the ''actual'' quantity of steroid involved in the offense and provides that one unit of an anabolic steroid means [25][50][100] mg of an anabolic steroid, regardless of the form involved in the offense (*e.g.*, patch, cream, tablet, liquid). At 25 mg, sentencing penalties would be increased approximately 6–8 levels above current offense levels, and would closely approximate a 1:1 ratio with other Schedule III substances. At 50 mg, sentencing penalties would be increased approximately 4–6 levels above current offense levels, and at 100 mg, sentencing penalties would be increased approximately 2–4 levels above current offense levels. This option also includes a rebuttable presumption that the label, shipping manifest, or other similar documentation accurately reflects the purity of the steroid. Option Two eliminates the sentencing distinction between anabolic steroids and other Schedule III substances. Accordingly, if an anabolic steroid is in a pill, tablet, capsule, or liquid form, the court would sentence as it would in any other case involving a Schedule III substance. For anabolic steroids in other forms, the proposed amendment instructs the court that [1 unit means 25 mg and that] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.

The proposed amendment also provide new enhancements designed to capture aggravating harms involved in anabolic steroid cases. First, the proposed amendment amends § 2D1.1 to provide an increase of two levels if the offense involved the distribution of a masking agent. A masking agent is a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body. Second, the proposed amendment amends § 2D1.1 to provide an increase of two levels if the defendant distributed an anabolic steroid to a professional, college, or high school athlete. Third, the proposed amendment presents two options for increasing penalties for coaches who distribute anabolic steroids to their athletes. Option One provides, as an alternative to the proposed enhancement for distribution to an athlete, a two-level increase in § 2D1.1 if the defendant used the defendant's position as a coach of athletic activity to influence an athlete to use an anabolic steroid. Option Two amends Application Note 2 of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a coach who uses his or her position to influence an athlete to use an anabolic steroid in the list of special circumstances to which

the two level adjustment in § 3B1.3 shall apply.

Three issues for comment follow the proposed amendment. The first pertains to whether the Commission, when it repromulgates the proposed amendment as a permanent amendment, should expand the scope of the enhancements to cover all controlled substances, not just anabolic steroids. The second issue pertains to whether the penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. The third issue pertains to whether the Commission should amend the guidelines to address offenses involving human growth hormone (HGH) and if so, how.

Proposed Amendment: Section 2D1.1 is amended by redesignating subsections (b)(6) and (b)(7) as subsections (b)(8) and (b)(9), respectively; and by inserting the following after subsection (b)(5):

''(6) If the offense involved the distribution of (A) an anabolic steroid; and (B) a masking agent, increase by 2 levels.

(7) If the defendant distributed an anabolic steroid to a professional, college, or high school athlete[; Option 1(for coach): or (B) the defendant used the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid], increase by 2 levels.''.

[Option 1 (for steroids): Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' by striking subdivision (G) and inserting the following:

''(G) In the case of anabolic steroids, one ''unit'' means [25][50][100] mg of an anabolic steroid, regardless of the form (*e.g.*, patch, topical cream, tablet, liquid). [There shall be a rebuttable presumption that the label, shipping manifest, or other similar documentation describing the type and purity of the anabolic steroid accurately reflects the purity of that steroid.]''.]

[Option 2 (for steroids): Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' in subdivision (F) by striking ''(except anabolic steroids)''; and by adding at the end the following:

''For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.* patch, topical cream, aerosol), [(A) one ''unit'' means [25] mg; and (B)] the court may determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense.''.

Section 2D1.1(c) is amended in the ''*Notes to the Drug Quantity Table'' by striking subdivision (G).]

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking ''(b)(6)'' and inserting ''(b)(8)'' each place it appears; and by striking ''(b)(7)'' and inserting ''(b)(9)'' each place it appears.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''24. Application of Subsection (b)(6).—For purposes of subsection (b)(6), ''masking agent'' means a product added to, or taken with, an anabolic steroid that prevents the detection of the anabolic steroid in an individual's body.

25. Application of Subsection (b)(7).—For purposes of subsection (b)(7):

'Athlete' means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

'Athletic activity' means an activity that (A) has officially designated coaches; (B) conducts regularly scheduled practices or workouts that are supervised by coaches; and (C) has established schedules for competitive events or exhibitions.

'College or high school athlete' means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

'Professional athlete' means an individual who competes in a major professional league.''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the ninth paragraph by striking ''(b)(6)(A)'' and inserting ''(b)(8)(A)''; and in the last paragraph by striking ''(b)(6)(B) and (C)'' and inserting ''(b)(8)(B) and (C)''.

[Option 2 (for coaches): The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in Note 2 in subdivision (A) by inserting ''Postal Service Employee.—'' before ''An employee''; in subdivision (B) by inserting ''Offenses Involving 'Means of Identification'.—'' before ''A defendant''; and by adding at the end the following:

''(C) Coach of Athletic Activity.—A defendant who uses the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid.

For purposes of this guideline:

(i) 'Athlete' means an individual who participates in an athletic activity conducted by (I) an intercollegiate athletic association or interscholastic athletic association; (II) a professional athletic association; or (III) an amateur athletic organization.

(ii) 'Athletic activity' means an activity that (I) has officially designated coaches; (II) conducts regularly scheduled practices or workouts that are supervised by coaches; and (III) has established schedules for competitive events or exhibitions.

(iii) 'College, or high school athlete' means an athlete who is a student at an institution of higher learning (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) or at a secondary school (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

(iv) 'Professional athlete' means an individual who competes in a major professional league.]''.

Issues for Comment:

(1) The Commission requests comment regarding whether, when the Commission re-promulgates the temporary emergency amendment as a permanent amendment, it should expand the proposed enhancements in § 2D1.1(b)(6) (pertaining to masking agents) and in § 2D1.1(b)(7) (pertaining to distribution of a steroid to an athlete) to cover offenses involving any controlled substance. Specifically, the proposed amendment defines ''masking agent'' as ''a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body.'' However, masking agents also can be taken to prevent the detection of other controlled substances. The Commission requests comment regarding whether it should expand the definition of masking agent, and thus application of the enhancement, in a manner that covers all controlled substances, not just anabolic steroids. Similarly, there are controlled substances other than anabolic steroids that enhance an individual's performance. The Commission requests comment regarding whether the proposed enhancement pertaining to distribution to an athlete should be expanded to cover offenses involving all types of controlled substances.

(2) The Commission requests comment regarding whether penalties for steroid offenses should be based on quantities typical of offenses involving mid- and high-level dealers. For more serious drug types (*e.g.*, heroin, cocaine, marihuana), the Drug Quantity Table in § 2D1.1(c) provides an offense level of 26 for quantities typical of mid-level dealers and an offense level of 32 for

quantities typical of high-level dealers. These levels also correspond to the statutory mandatory minimum penalties for mid- and high-level dealers. Although there are no statutory mandatory minimum penalties establishing thresholds for steroid offenses, the Commission has been informed that a steroids dealer who provides the equivalent of one complete cycle to 10 customers is considered to be a mid-level dealer, and a dealer who provides the equivalent of one complete cycle to 30 customers is considered to be a high-level dealer. Currently, offense levels in the Drug Quantity Table for anabolic steroids and other Schedule III substances begin at level 6 and are ''capped'' at level 20. Should the Commission provide a penalty structure within this range that targets offenses involving mid- and high-level steroid dealers, and if so, what offense levels should correspond to a mid-level dealer and to a high-level dealer?

(3) Application Note 4 of § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) states that ''[t]he Commission has not promulgated a guideline for violations of 21 U.S.C. 333(e) (offenses involving human growth hormone).'' The Commission requests comment regarding whether it should specifically address offenses involving the distribution of human growth hormone (HGH), and if so, how.

4. Intellectual Property

Synopsis of Proposed Amendment: This proposed amendment proposes to re-promulgate as a permanent amendment the temporary, emergency amendment that implemented the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9. The emergency amendment became effective on October 24, 2005.

The directive instructs the Commission to ''review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes * * *''

''In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements * * * are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.''

Pre-Release Works

The proposed amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The proposed amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing, particularly peer-to-peer models. The Department of Justice has explained that Application Note 3, which expands on the definition of ''uploading'', may be read to exclude peer-to-peer activity from application of the current enhancement in § 2B5.3(b)(2) for offenses that involve the manufacture, importation, or uploading of infringing items. In particular, the concern pertains to the third sentence, which reads, ''For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.'' The proposed amendment builds on the current definition of ''uploading'' to include making an infringing item available on the Internet by storing an infringing item as an openly shared file (*i.e.*, a file that is stored on a peer-to-peer network). The proposed amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the proposed amendment deletes the application note from the guideline.

Indeterminate Number

The proposed amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The proposed note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items. The Commission's empirical analysis of cases sentenced under this guideline suggests that courts often determine the infringement amount in this manner. This proposed amendment simply codifies into the guideline the practice currently employed by the courts.

New Offense

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. 2319B. This offense is proposed to be referenced to § 2B5.3.

Proposed Amendment: Section 2B5.3(b) is amended by redesignating subsections (b)(2) through (b)(4) as subsections (b)(3) through (b)(5), respectively; and by inserting after subsection (b)(1) the following:

''(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels.''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 1 by striking the last paragraph and inserting the following:

'''Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the

infringing item, including by storing the infringing item as an openly shared file. 'Uploading' does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

'Work being prepared for commercial distribution' has the meaning given that term in 17 U.S.C. 506(a)(3).''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended in Note 2 in subdivision (A) by inserting after subdivision (v) the following:

''(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the 'retail value of the infringed item' is the value of that item upon its initial commercial distribution.''; and by inserting after subdivision (D) the following:

''(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended by striking Note 3; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

Appendix A (Statutory Index) is amended by inserting after the line reference to ''18 U.S.C. 2319A'' the following:

''18 U.S.C. 2319B2B5.3''.

5. Terrorism/Obstruction of Justice

Synopsis of Proposed Amendment: This proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment that responded to section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the ''Act''), Pub. L. 108–458. That amendment became effective on October 24, 2005.

The Act directed the Commission ''to provide for an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title.'' The Act also increased the penalties for offenses under 18 U.S.C. 1001 (false statements) and 1505 (obstruction of proceedings before departments, agencies, and committees of the United States) from not more than 5 years to not more than 8 years if the offense involves international or domestic terrorism. The Commission was subsequently directed by the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005 Pub. L. 109–76 to promulgate an amendment under emergency amendment authority not later than November 27, 2005. See Supplement to Appendix C (Amendment 676).

The proposed amendment provides a 12-level enhancement in § 2J1.2 (Obstruction of Justice) if the defendant is convicted under 18 U.S.C. 1001 or 1505 and the enhanced statutory sentencing provision pertaining to international or domestic terrorism applies. The proposed amendment also provides an application note that instructs the court not to apply the new enhancement if an adjustment under § 3A1.4 (Terrorism) applies.

Proposed Amendment: Section 2J1.2(b) is amended by striking subdivision (1) and inserting the following:

''(1) (Apply the greater):

(A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(B) If (i) defendant was convicted under 18 U.S.C. 1001 or 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by 12 levels.''.

The Commentary to § 2J1.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1503'' and inserting the following:

''18 U.S.C. 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended in Note 1 by inserting after ''Definitions.—For purposes of this guideline:'' the following:

'''Domestic terrorism'' has the meaning given that term in 18 U.S.C. 2331(5).

International terrorism'' has the meaning given that term in 18 U.S.C. 2331(1).''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended by striking Note 2 and inserting the following:

''2. Chapter Three Adjustments.—

(A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

(B) Interaction with Terrorism Adjustment.—If § 3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B).''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. 1001'' by inserting '', 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable'' after 2B1.1''.

6. Transportation

Synopsis of Proposed Amendment: This proposed amendment implements a number of provisions of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. 109–59 (hereinafter the ''Transportation Act''). Specifically:

(A) Section 3042 of the Transportation Act amends the definition of ''mass transportation'' in 18 U.S.C. 1993 so that it now refers to ''public transportation'' and expands the definition to include the control of mass transportation vehicles.

The proposed amendment responds to section 3042 by revising §§ [2A1.4 (Involuntary Manslaughter)], 2A5.2 (Interference with Flight Crew Member of Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) and 2K1.4 (Arson; Property Damage by Use of Explosives) so that the guideline term definition of ''mass transportation'' mirrors the statutory change to ''public transportation''. It also proposes to amend the heading of Chapter Two, Part A, Subpart 5 to reflect the revised terminology and proposes to amend the heading of § 2A5.2 to include the control of mass transportation vehicle, in conformance with the amendments to 18 U.S.C. 1993 made by section 3042.

(B) Section 4102 of the Transportation Act amends 49 U.S.C. 31310 to provide increased penalties for out-of-service violations and false records related to commercial vehicle safety. The Transportation Act creates a new criminal penalty of up to one year imprisonment for employers who knowingly and willfully allow or require employees to violate ''out-of-service'' orders (''OOS orders''). The Secretary of Transportation's statutory authority for issuing OOS orders is predicated upon a finding that a regulatory violation ''poses an imminent hazard to safety.'' The term ''imminent hazard'' is defined as ''any condition'likely to result in serious injury or death. . . .'' Previously, the statute imposed only a maximum fine of $10,000 for knowingly requiring or allowing an employee to operate an out of service commercial motor vehicle.

According to the Senate's report language on this provision, it is

increasingly more difficult for enforcement officers to monitor out of service vehicles, particularly when the orders cover entire fleets of commercial motor vehicles. As such, ''Many OOS orders are violated.'' Congress intends the new penalty provisions—including increased fines for violating OOS orders—to deter such violations in the future.

In response, the proposed amendment references the new criminal provision at 49 U.S.C. 31310 to a new guideline already proposed for Class A misdemeanors. (See proposed amendment relating to the implementation of miscellaneous enacted legislation.)

(C) Section 4210 of the Transportation Act creates a new section at 49 U.S.C. 14915 covering penalties for failure to give up possession of household goods. Failure to give up household goods is defined as ''the knowing and willful failure, in violation of a contract, to deliver to, or unload at, the destination of a shipment of household goods that is subject to jurisdiction under subchapter I or III of chapter 135 of this title, for which charges have been estimated by the motor carrier providing transportation of such goods, and for which the shipper has tendered a payment described in clause (i), (ii), or (iii) of section 13707(b)(3)(A).''. The criminal penalty for failure to give up possession of household goods is a term of imprisonment of up to two years.

The proposed amendment refers this new offense to § 2B1.1, the guideline covering fraud, theft, and property destruction.

(D) The proposed amendment provides an issue for comment regarding whether the Commission should amend the guidelines to implement section 7121 of the Transportation Act, which pertains to the transportation of hazardous waste, and if so how.

Proposed Amendment

(A) Implementation of Section 3042 of Transportation Act

The Commentary to § 2A1.4 captioned ''Application Note'' is amended in Note 1 in the paragraph that begins '''Means of transportation''' by striking ''mass transportation'' and inserting ''public transportation''; and by striking '''Mass transportation''' and inserting '''Public transportation'''.

Chapter 2, Part A, Subpart 5, is amended in the heading by striking ''MASS'' and inserting ''PUBLIC''.

Section 2A5.2 is amended in the heading by inserting ''Control,'' after ''Operation,''; and by striking ''Mass'' and inserting ''Public''.

Section 2A5.2(a) is amended in subdivisions (1)(B) and (2)(B) by striking ''mass'' and inserting ''public'' each place it appears.

The Commentary to § 2A5.2 captioned ''Application Note'' is amended in Note 1 in the last paragraph by striking '''Mass'' and inserting '''Public''.

Section 2K1.4(a) is amended by striking ''mass'' and inserting ''public'' each place it appears.

The Commentary to § 2K1.4 captioned ''Application Note'' is amended in Note 1 by striking ''Mass'' and inserting ''Public''.

(B) Implementation of Section 4102 of Transportation Act

[**Please Note:** This amendment proposes to add a statutory reference to the guideline proposed for Class A Misdemeanors in Proposed Amendment 9 (Miscellaneous Laws), Part E.]

Chapter Two, Part X, Subpart 5, as amended by Proposed Amendment 9, Part E, is further amended in the Commentary to § 2X5.2 captioned ''Statutory Provisions'' by inserting ''; 49 U.S.C. 31310(i)(2)(D)'' after ''14133''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 30170'' the following:

''49 U.S.C. 31310(i)(2)(D) 2X5.2''.

(C) Implementation of Section 4210 of the Transportation Act

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''14915,'' before ''30170,''.

Appendix A (Statutory Provisions) is amended by inserting after the line referenced to 49 U.S.C. 14912 the following:

''49 U.S.C. 149152 B1.1''.

Issue for Comment: The Commission requests comment on how it should implement provisions of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. 109–59 (hereinafter the ''Transportation Act'') relating to the transportation of hazardous materials. Specifically, the Commission requests comment regarding whether, and if so how, the Commission should amend the guidelines to implement section 7121 of the Transportation Act.

Section 7121 of the Transportation Act amends 49 U.S.C. 5124, which criminalizes knowing or willful violations of chapter 51 of title 49, United States Code, regarding the transportation of hazardous materials, in two ways. First, it defines ''knowing,'' ''willful,'' and ''reckless'' violations of the Hazardous Materials Act. Second, it provides a new ten year maximum for aggravated felonies in which a defendant knowingly or willfully violated the hazardous materials act (or its accompanying regulations), a release of hazardous materials occurs, and such a release results in death or serious bodily injury. Section 7127 of the Transportation Act added section 5124 to the provisions set forth in 18 U.S.C. 3663 that allow the Department of Justice to seek restitution.

Offenses under 49 U.S.C. 5124 currently are referenced to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The Commission amended § 2Q1.2 in 2004 to provide for a 2-level increase for offenses involving the unlawful transportation of hazardous materials. This enhancement is to apply whenever a defendant is convicted under 49 U.S.C. 5124 or 49 U.S.C. 46312 and is intended to capture the increased risk of harm associated with these types of offenses. Is this enhancement adequate to account for the seriousness of conduct involving the unlawful transportation of hazardous materials and/or the increased risk of harm associated with these offenses, particularly for offenses involving the knowing, willful, and/or reckless transportation of hazardous materials?

7. Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004

Synopsis of Proposed Amendment: This proposed amendment implements a number of provisions of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458. Specifically:

(A) Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. 1324 that increases the otherwise applicable penalties by up to ten years for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(1) aliens were transported in a manner that endangered their lives; or (2) the aliens presented a life-threatening health risk to people in the United States.

Criminal penalties for violations of 8 U.S.C. 1324 include fines and terms of imprisonment ranging from 1 year for knowingly bringing in an alien who does not have permission to enter the country, 8 U.S.C. 1324(a)(2)(A), up to life if a death occurs during a violation, 8 U.S.C. 1324(a)(1)(B)(iv). Offenses under 18 U.S.C. 1324 are referenced to

§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

In response to the new offense, the proposed amendment provides three options. Option One amends § 2L1.1 by adding a specific offense characteristic to account for offenses of conviction under 8 U.S.C. 1324(a)(4). Option Two amends § 2L1.1 by adding a specific offense characteristic to account for offenses that involve an ongoing commercial organization or enterprise. Option Three provides an upward departure for such conduct.

(B) Section 6702 of the Act creates a new offense at 18 U.S.C. 1038 (False Information and Hoaxes), which provides as follows:

(1) In General—Whoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information may indicate that an activity has taken, is taking, or will take place that would constitute a violation of chapter 2, 10, 11B, 39, 40, 44, 111, or 113B of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284) or section 46502, the second sentence of section 46504, section 46505(b)(3) or (c), section 46506 if homicide or attempted homicide is involved, or section 60123(b) of title 49, shall—

(A) be fined under this title or imprisoned not more than 5 years, or both;

(B) if serious bodily injury results, be fined under this title or imprisoned not more than 20 years, or both; and

(C) if death results, be fined under this title or imprisoned for any number of years up to life or both.

(2) Armed Forces—Any person who makes a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces of the United States during a war or armed conflict in which the United States is engaged—

(A) shall be fined under this title or imprisoned not more than 5 years, or both;

(B) if serious bodily injury results, shall be fined under this title or imprisoned not more than 20 years, or both; and

(C) if death results, shall be fined under this title or imprisoned for any number of years or for life or both.

The proposed amendment references the new offense to § 2A6.1 (Threatening or Harassing Communications) and adds a cross reference to § 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction.

(C) Section 6803 creates a new offense at 18 U.S.C. 832, relating to participation in nuclear, and weapons of mass destruction, threats to the United States. The new offense reads in part as follows:

(a) Whoever, within the United States or subject to the jurisdiction of the United States, willfully participates in or knowingly provides material support or resources (as defined in section 2339A) to a nuclear weapons program or other weapons of mass destruction program of a foreign terrorist power, or attempts or conspires to do so, shall be imprisoned for not more than 20 years.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

(c) Whoever without lawful authority develops, possesses, or attempts or conspires to develop or possess a radiological weapon, or threatens to use or uses a radiological weapon against any person within the United States, or a national of the United States while such national is outside of the United States or against any property that is owned, leased, funded, or used by the United States, whether that property is within or outside of the United States, shall be imprisoned for any term of years or for life.

Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. 2332b(g)(5)(B)(i) and amends §§ 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)) to cover the participation of an individual in the development of special nuclear material.

The proposed amendment references 18 U.S.C. 832 to § 2M6.1.

(D) Section 6903 of the Act creates a new offense at 18 U.S.C. 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. Specifically, section 2332g reads in part:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (3), it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use or possess and threaten to use—

(A) an explosive or incendiary rocket or missile that is guided by any system designed to enable the rocket or missile to—

(i) seek or proceed toward energy radiated or reflected from an aircraft or toward an image locating an aircraft; or

(ii) otherwise direct or guide the rocket or missile an aircraft;

(B) any device designed or intended to launch or guide a rocket or missile described in subparagraph (A); or

(C) any part or combination of parts designed or redesigned for use in assembling or fabricating a rocket, missile, or device described in subparagraph (A) or (B).

The new offense conduct provides for different criminal penalties. First, any individual who ''violates, attempts, or conspires to violate, subsection (a),'' the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. 2332g(c)(1). Second, any person who in the course of a violation of subsection (a) who ''uses, attempts or conspires to use, or possesses or threatens to use,'' any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. 2332g(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. 2332g(c)(3).

The proposed amendment references 18 U.S.C. 2332g to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapon described in the offense would seem to be covered as destructive devices under 26 U.S.C. 5845(a).

(E) Section 6905 of the Act creates a new offense at 18 U.S.C. 2332h prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. Section 2332h reads in part as follows:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use—

(A) any weapon that is designed or intended to release radiation or radioactivity at a level dangerous to human life; or

(B) any device or other object that is capable of and designed or intended to endanger human life through the release of radiation or radioactivity.

The new offense conduct provides for different criminal penalties. First, any individual who ''violates, attempts, or conspires to violate, subsection (a),'' the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. 2332h(c)(1). Second, any person who in the course of a violation of subsection (a) who ''uses, attempts or conspires to use, or possesses or threatens to use,'' any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. 2332h(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. 2332h(c)(3).

The proposed amendment references 18 U.S.C. 2332h to § 2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

(F) Section 6906 of the Act creates a new offense prohibiting the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. Specifically, 18 U.S.C. 175c (Variola Virus), reads, in part:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use, variola virus.

The new offense conduct provides for different criminal penalties. First, any individual who ''violates, attempts, or conspires to violate, subsection (a),'' the criminal penalties range from a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. 175c(c)(1). Second, any person who in the course of a violation of subsection (a) who ''uses, attempts or conspires to use, or possesses or threatens to use,'' any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. 175c(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. 175c(c)(3).

The proposed amendment references 18 U.S.C.175c to § 2M6.1. The variola virus may be used as a biological agent or toxin and, therefore, should be covered under this guideline.

(G) The proposed amendment provides an issue for comment regarding whether the Commission should define the term ''ongoing commercial organization'' and if so, how.

Proposed Amendment

(A) Implementation of Section 5401 of the Act

Section 2L1.1(b) is amended by adding at the end the following:

''(7) If [Option One: the defendant was convicted under 8 U.S.C. 1324(a)(4)] [Option Two: the offense was part of an ongoing commercial organization or enterprise], increase by [2] levels.''.

[Option Three:

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

''7. Offenses Involving Ongoing Commercial Organizations or Enterprises.—If [the defendant was convicted under 8 U.S.C. 1324(a)(4)] [the offense involved an ongoing commercial organization or enterprise], an upward departure may be warranted.]''.

(B) Implementation of Section 6702 of the Act

Chapter Two, Part A, Subpart 6, is amended in the heading by inserting ''HOAXES,'' after ''COMMUNICATIONS,''.

Section 2A6.1 is amended in the heading by adding at the end ''; Hoaxes''; by adding after subsection (b) the following:

''(c) Cross Reference

(1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D), apply § 2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.''; and in the Commentary captioned ''Statutory Provisions'' by inserting ''1038,'' after ''879,''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1037 the following:

''18 U.S.C. 1038 2A6.1''.

(C) Implementation of Section 6803 of the Act

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''832,'' after ''831,''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 831 the following:

''18 U.S.C. 832 2M6.1''.

(D) Implementation of Section 6903 of the Act

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by inserting '', 2332g'' after ''(k)–(o)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2332f the following:

''18 U.S.C. 2332g 2K2.1''.

(E) Implementation of Section 6905 of the Act

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting '', 2332h'' before ''; 42 U.S.C.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2332f the following:

''18 U.S.C. 2332h 2M6.1''

(F) Implementation of Section 6906 of the Act

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''175c,'' after ''175b,''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 175b the following:

''18 U.S.C. 175c 2M6.1''.

(G) Issue for Comment

Issue for Comment: Section 5401 of the Intelligence Reform and Terrorism Prevention Act of 2004 added a new subsection (a)(4) to 8 U.S.C. 1324 that increases the otherwise applicable penalties by up to 10 years if, among other things, the conduct is part of an ongoing commercial organization. However, the Act did not provide a definition of the term ''ongoing commercial organization.'' If the Commission were to promulgate one of the proposed options that relies on this term as a basis for a sentencing increase (either by application of a specific offense characteristic or as an upward departure), should the Commission define the term ''ongoing commercial organization'' and if so, how?

8. False Domain Names and CAN–SPAM

Synopsis of Proposed Amendment: This proposed amendment (A) implements the directive to the

Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004; and (B) implements the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''CAN–SPAM Act'') (15 U.S.C. 7704(d)).

False Registration of Domain Name

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directs the Commission—

to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts * * * In carrying out this [directive], the Sentencing Commission shall provide sentencing enhancements for anyone convicted of any felony offense furthered through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name use in connection with the offense.

The proposed amendment implements this directive by providing a new guideline in Chapter Three (Adjustments) for cases in which a statutory enhancement under 18 U.S.C. 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. 3559(f)(1) satisfies the directive.

CAN–SPAM

Section 5(d)(1) of the CAN–SPAM Act prohibits the transmission of commercial electronic messages that contain ''sexually oriented material'' unless such messages include certain marks, notices, and information. Specifically, the statute requires that the sender of a commercial e-mail message containing sexually oriented material:

(a) include in the subject heading of the e-mail the ''marks and notices'' prescribed by the Federal Trade Commission; and

(b) include in the message initially viewable to the recipient (i) the FTC's marks and notices; (ii) clear and conspicuous identification that the message is an advertisement or solicitation; (iii) clear notice of the recipient's option to decline to receive further messages from the sender; and (iv) the sender's valid physical postal address.

The sender of a commercial e-mail message that contains sexually oriented material within the meaning of the statute is exempted from these notice and labeling requirements only ''if the recipient has given prior affirmative consent to the receipt of the message.'' Otherwise, a sender who ''knowingly'' transmits sexually oriented commercial messages e-mail without including the required marks and information shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

The proposed amendment references the new offense, found at 15 U.S.C. 7704(d), to § 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Currently, § 2G2.5 applies to violations of 18 U.S.C. 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. 7704(d) do not involve the recording and reporting functions at issue in cases currently sentenced under § 2G2.5, section 7704(d) offenses are essentially regulatory in nature and in this manner are similar to other offenses sentenced under § 2G2.5. In addition to the statutory reference changes, the proposed amendment also expands the heading of § 2G2.5 specifically to cover offenses under 15 U.S.C. 7704(d).

Proposed Amendment:

(A) False Registration of Domain Name

Proposed Amendment: Chapter Three, Part C is amended in the heading by adding at the end ''AND RELATED ADJUSTMENTS''.

Chapter Three, Part C is amended by adding at the end the following:

''§ 3C1.3. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. 3559(f)(1) applies, increase by [1][2][3][4] levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108–482.''.

(B) CAN–SPAM

Proposed Amendment: Section 2G2.5 is amended in the heading by adding at the end ''; Failure to Provide Required Marks in Commercial Electronic Email''.

The Commentary to § 2G2.5 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; and by inserting ''15 U.S.C. 7704(d);'' after the colon.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. 6821 the following:

''15 U.S.C. 7704(d)2G2.5''.

9. Miscellaneous Laws

Synopsis of Proposed Amendment: This proposed amendments implements miscellaneous enacted laws as follows:

(A) The Veterans' Memorial Preservation and Recognition Act of 2003, section 2, created a new offense at 18 U.S.C. 1369 that prohibits the destruction of Veterans' Memorials, with a ten-year statutory maximum. Previously, in response to the Veteran's Cemetery Protection Act of 1997, the Commission added a two-level enhancement at § 2B1.1(b)(6) for vandalizing a National Cemetery.

The proposed amendment refers the new offense to both §§ 2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources). Reference to both guidelines mirrors the treatment of other offenses involving property damage to veterans' memorials. The proposed amendment also provides an increase of [2][4][6] levels in §§ 2B1.1 and 2B1.5 if the offense involved a veterans' memorial.

(B) The Plant Protection Act of 2002 increased penalties under 7 U.S.C. 7734, for knowingly importing or exporting plant, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum for the first offense is five years, and for subsequent offenses, ten years.

Appendix A (Statutory Index) currently references 7 U.S.C. 7734 to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6. The proposed amendment provides two options in response to the increased penalties. Option One increases the base offense level in consideration of the increased statutory penalties. Option Two provides an upward departure provision within the guideline. This option recommends an upward departure because of the expected

infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis.

(C) The Clean Diamond Trade Act of 2003 created a new offense at 19 U.S.C. 3901, related to the import and export of rough diamonds or any transaction by a United States citizen anywhere, or any transaction that occurs in whole or in part within the United States. The new offense prohibits an import or export of rough diamonds that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Act. The statutory maximum is ten years.

This offense involves importing ''conflict'' diamonds into the United States for profits used towards the overthrow or subverting of legitimate governments in Sierra Leone, Angola, Liberia, and the Democratic Republic of Congo. The diamonds, referred to as ''blood diamonds'' or ''conflict diamonds,'' are imported or exported without being controlled by a process known as the Kimberley Process Certification Scheme, which legitimizes the quality and original source of the diamond. The violation occurs when the diamonds are imported/exported without first being certified through this process or when a United States citizen enters into a transaction involving these diamonds without the proper certification. The profits from the sale of these rough diamonds are used to fund rebel and military activities in the countries mentioned earlier.

The proposed amendment references the new offense to § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). The proposed amendment also revises introductory commentary more specifically to indicate that uncertified diamonds are contraband covered by § 2T3.1 even if other types of contraband are covered by other, more specific guidelines.

(D) The Unborn Victims of Violence Act of 2004 (''Laci & Conner'' Law) created a new offense at 18 U.S.C. 1841 for causing a death or serious bodily injury to a child in utero while engaging in conduct violative of any one of several enumerated offenses. Under 18 U.S.C. 1841(a)(1) and (a)(2)(A), the statutory maximum for the conduct that ''caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.'' Otherwise, under 18 U.S.C. 1841(a)(2)(C), if the person engaging in the conduct intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. 1111, 1112, and 1113 for intentionally killing or attempting to kill a human being.

The proposed amendment references 18 U.S.C. 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. 1111, 1112, and 1113.

The proposed amendment references 18 U.S.C. 1841(a)(1) to § 2X5.1 (Other Offenses). Reference is made to § 2X5.1 because, under 18 U.S.C. 1841(a)(2)(A), the punishment for the offender is determined by the penalty for the conduct which caused the death or injury to a child in utero had that injury or death occurred to the unborn child's mother. For example, if the offender committed aggravated sexual abuse against the unborn child's mother and it caused the death of a child in utero, the punishment for the offender would be the same as the penalty for aggravated sexual abuse, not the penalty for first or second degree murder. There are approximately 65 other statutes listed under 18 U.S.C. 1841(b) that require a similar approach. Properly designating guidelines for these offenses would be challenging, and perhaps confusing.

In order to permit the courts to determine the most analogous guideline on a case-by-case basis, a special instruction is provided in § 2X5.1 that the most analogous guideline for these offenses is the guideline that covers the underlying offense conduct.

(E) The Farm Security and Rural Investment Act of 2002, created a new offense at 7 U.S.C. 2156 that prohibits the interstate movement of animals for animal fighting, with a one year statutory maximum.

The Social Security Administration Act created a new offense under 42 U.S.C. 1129(a) for prohibiting corrupt or forcible interference with the administration of the Social Security Administration Act. The statutory maximum is one year if the offense was committed only by threats of force, otherwise the statutory maximum is three years.

The Consumer Product Protection Act of 2002 created a new offense under 18 U.S.C. 1365(f) for prohibiting the illegal tampering with a consumer product with a statutory maximum of one year for the first offense, and three years for subsequent offenses.

The Justice for All Act of 2004 created a new offense under 42 U.S.C. 14133 for prohibiting the misuse or unauthorized disclosure of DNA analyses. The maximum penalty is one year.

The Video Voyeurism Prevention Act of 2004 created a new offense under 18 U.S.C. 1801 for prohibiting the knowing capture of an image of an individual's ''private area'' without that individual's consent, under circumstances in which the individual has a reasonable expectation of privacy. The statutory maximum for this offense is one year.

To address these Class A misdemeanors offenses, the proposed amendment creates a new guideline at § 2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise provided for in a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, which is the offense level typically applicable to Class A misdemeanor and regulatory offenses. A specific offense characteristic is provided for repeated violations.

Proposed Amendment:

(A) The Veterans' Memorial Preservation and Recognition Act of 2003

Section 2B1.1(b)(6) is amended by inserting ''or veterans' memorial'' after ''national cemetery''; and by striking ''2'' and inserting ''[2][4][6]''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1369,'' after ''1363,''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Trade secret' '' the following paragraph:

'' 'Veterans' memorial' means any structure, plaque, statue, or other monument described in 18 U.S.C. 1369(a).''.

Section 2B1.5(b)(2) is amended by inserting ''or veterans' memorial'' after ''cemetery''; and by striking ''2'' and inserting ''[2][4][6]''.

The Commentary to § 2B1.5 captioned ''Statutory Provisions'' is amended by inserting ''1369,'' after ''1361,''.

The Commentary to § 2B1.5 captioned ''Application Notes'' is amended in Note 3 in subdivision (B) by striking ''has the meaning given that term'' and inserting ''and 'veterans' memorial' have the meaning given those terms''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1366 the following:

''18 U.S.C. 13692B1.1, 2B1.5''.

(B) The Plant Protection Act of 2002

[Option One: Section 2N2.1 is amended by striking subsection (a) and inserting the following:

''(a) Base Offense Level:

(1) [8][10], if the defendant was convicted under 7 U.S.C. 7734; or

(2) 6, otherwise.''.]

[Option Two: The Commentary to § 2N2.1 captioned ''Application Notes''

is amended by striking Note 3 and inserting the following:

''3. Upward Departure Provisions.—The following are circumstances under which an upward departure may be warranted:

(A) Death or bodily injury, extreme psychological injury, property damage or monetary loss resulted. See Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. 7734.''.]

(C) The Clean Diamond Trade Act of 2003

Chapter Two, Part T, Subpart 3 is amended in the ''Introductory Commentary'' in the first sentence by inserting ''and 3901,'' after ''1708(b),''; in the second sentence by inserting ''intended to deal with some types of contraband, such as certain uncertified diamonds, but is'' after ''It is''; and by striking ''importation of contraband'' and inserting ''importation of other types of contraband''; and in the last sentence by inserting ''not specifically covered by the Subpart'' after ''stolen goods''; and by inserting ''if there is not another more specific applicable guideline'' after ''upward''.

The Commentary to § 2T3.1 captioned ''Statutory Provisions'' is amended by inserting '', 3901'' after ''1708(b)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 19 U.S.C. 2401f the following:

''19 U.S.C. 3901 2T3.1''.

(D) The Unborn Victims of Violence Act of 2004

The Commentary to § 2A1.1 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1111,''.

The Commentary to § 2A1.2 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1111,''.

The Commentary to § 2A1.3 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1112,''.

The Commentary to § 2A1.4 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1112,''.

The Commentary to § 2A2.1 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1751(c),''.

The Commentary to § 2A2.2 captioned ''Statutory Provisions'' is amended by inserting ''1841(a)(2)(C),'' after ''1751(e),''.

Section 2X5.1 is amended by striking ''(b)'' after ''18 U.S.C. 3553''; and by adding at the end the following:

''If the defendant is convicted under 18 U.S.C. 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. 1841(a)(1) and listed in 18 U.S.C. 1841(b).''.

The Commentary the § 2X5.1 is amended by inserting before ''Application Note:'' the following:

''Statutory Provision: 18 U.S.C. 1841(a)(1).''.

The Commentary the § 2X5.1 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; in Note 1 by inserting ''In General.—'' before ''Guidelines''; and by adding at the end the following:

2. Convictions under 18 U.S.C. 1841(a)(1).—

(A) In General.—If the defendant is convicted under 18 U.S.C. 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. 1841(b) and that results in the death of or bodily injury to a child in utero at the time of the offense of conviction.

(B) Upward Departure Provision.—For offenses under 18 U.S.C. 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero.''.

The Commentary to § 2X5.1 captioned ''Background'' is amended by striking ''That statute'' and all that follows through ''subsection (a)(2).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1832 the following:

''18 U.S.C. 1841(a)(1) 2X5.1

18 U.S.C. 1841(a)(2)(C) 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2''.

(E) Guideline for Class A Misdemeanors

Chapter Two, Part X, Subpart 5 is amended in the heading by inserting ''FELONY'' after ''OTHER'' and by adding at the end ''AND CLASS A MISDEMEANORS''.

Section 2X5.1 is amended in the heading by inserting ''Felony'' after ''Other''.

Section 2X5.1 is amended by striking ''or Class A misdemeanor''; by striking ''(b)'' after ''18 U.S.C. 3553''; and by adding at the end the following:

''If the offense is a Class A misdemeanor that has not been referenced in Appendix A (Statutory Index) to a specific offense guideline, apply § 2X5.2 (Class A Misdemeanors (Not Covered by another Specific Offense Guideline)).''.

Chapter Two, Part X, Subpart 5 is amended by adding at the end the following:

''§ 2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

(a) Base Offense Level: 6

(b) Specific Offense Characteristic:

(1) If the defendant committed the instant offense of conviction subsequent to sustaining a conviction under the same provision of law as the instant offense of conviction, increase by 2 levels.

Commentary

Statutory Provisions: 7 U.S.C. 2156; 18 U.S.C. 1365(f), 1801; 42 U.S.C. 1129(a), 14133.

Application Note:

1. In General.—This guideline applies to Class A misdemeanors that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanors that have not been referenced in Appendix A to another specific offense guideline in Chapter Two. Do not apply this guideline to a Class A misdemeanor that has been referenced in the Statutory Index to a guideline other than this one.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. 2024(c) the following:

''7 U.S.C. 2156 2X5.2''; by inserting after the line referenced to 18 U.S.C. 1121 the following:

''18 U.S.C. 1129(a) 2X5.2''; by inserting after the line referenced to 18 U.S.C. 1365(e) the following:

''18 U.S.C. 1365(f) 2X5.2''; by inserting after the line referenced to 18 U.S.C. 1792 the following:

''18 U.S.C. 1801 2X5.2''; and by inserting after the line referenced to 42 U.S.C. 9603(d) the following:

''42 U.S.C. 14133''.

Issue for Comment: The Commission requests comment regarding whether it should reference to proposed § 2X5.2 any other Class A misdemeanor offense currently referenced in Appendix A to a guideline that does not provide a higher offense level than proposed § 2X5.2. Are there additional Class A misdemeanor offenses not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed § 2X5.2?

10. Application Issues

Synopsis of Proposed Amendment: This proposed amendment addresses several issues of guideline application identified through inquiries made on the Commission's Helpline and at guideline seminars. The proposed

amendment would make the following changes:

(A) Modifies the cross reference in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the court to apply § 2A1.2 (Second Degree Murder) for cases in which the conduct involved is second degree murder. Currently the cross reference only allows the court to apply § 2A1.1(First Degree Murder) even if the conduct does not constitute first degree murder. The proposed amendment also adds language that the cross reference to § 2A1.1 or § 2A1.2 should be applied if the offense level is greater than that determined under § 2D1.1.

(B) Adds to Chapter Three a new guideline, § 3C1.3 (Offenses Committed While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. 3147 (Penalty for an offense committed while on release) applies. Currently, § 2J1.7 (Commission of an Offense While on Release) corresponds to the statutory enhancement at 18 U.S.C. 3147 and provides for a three-level enhancement that is added to the offense level for the offense the defendant committed while on release. However, despite its reference in Appendix A (Statutory Index), 18 U.S.C. 3147 is not a statute of conviction, so there is no basis for requiring application of Appendix A. Accordingly, § 2J1.7 may be overlooked. Creating a Chapter Three adjustment for 18 U.S.C. 3147 cases is consistent with other adjustments currently in Chapter Three, all of which also apply to a broad range of offenses. The proposed amendment also eliminates commentary regarding a notice requirement. The majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. 3147 to apply.

(C) Deletes from the Drug Quantity Table in § 2D1.1 language that indicates the court should apply ''the equivalent amount of Schedule I or II Opiates'' (in the line referenced to Heroin), ''the equivalent amount of Schedule I or II Stimulants'' (in the line referenced to Cocaine), and ''the equivalent amount of Schedule I or II Hallucinogens'' (in the line referenced to LSD). Although Application Note 10 sets forth the marihuana equivalencies for substances not specifically referenced in the Drug Quantity Table, some guideline users erroneously calculate the base offense level without converting the controlled substance to its marihuana equivalency. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marihuana and determining the base offense level on that marihuana equivalency (resulting in a BOL of 34), some guideline users are determining the base offense level on the 10 KG of morphine (resulting in a BOL of 36). The proposed amendment would delete the problematic language and also clarify in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marihuana equivalency for that controlled substance.

Proposed Amendment:

(A) Cross Reference to Murder Guidelines

Proposed Amendment: Section 2D1.1(d) is amended by inserting ''or § 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline'' after ''Murder)''.

(B) § 2J1.7 (Commission of Offense While on Release)

Proposed Amendment: The Commentary to § 1B1.1 captioned ''Application Notes'' is amended by striking Note 6 and by redesignating Note 7 as Note 6.

Chapter Two, Part J is amended by striking section § 2J1.7.

Chapter Three, Part C is amended in the heading by adding at the end ''AND RELATED ADJUSTMENTS''.

Chapter Three, Part C is amended by adding at the end the following:

''3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the ''total punishment'' (*i.e.*, the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30–37 months and the court determines 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. 3147 would satisfy this requirement.

Background: ''This guideline enables the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.''.

(C) ''or Equivalent Amount''

Proposed Amendment: Section 2D1.1(c) is amended by striking ''(or the equivalent amount of other Schedule I or II Opiates)'' each place it appears; by striking ''(or the equivalent amount of other Schedule I or II Stimulants)'' each place it appears; and by striking ''(or the equivalent amount of other Schedule I or II Hallucinogens)'' each place it appears.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the first paragraph by striking the third and fourth sentences and inserting the following:

''In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

(A) use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana;

(B) find the equivalent quantity of marihuana in the Drug Quantity Table; and

(C) use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables, one gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of five kilograms of marihuana. In a case involving 100 g of oxymorphone, the equivalent quantity of marihuana would be 5000 KG, which corresponds to a base offense level of 28 in the Drug Quantity Table.''.

11. Circuit Conflicts (§ 3C1.1)

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict regarding whether pre-investigative conduct can form the basis of an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Seventh, Tenth, and District of Columbia Circuits have concluded that

pre-investigation conduct can be used to support an obstruction adjustment. *See United States* v. *McGovern*, 329 F.3d 247, 252 (1st Cir. 2003) (holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though the administrative audits were not part of a criminal investigation because there was a ''close connection between the obstructive conduct and the offense of conviction''); *United States* v. *Snyder*, 189 F.3d 640, 649 (7th Cir. 1999) (holding that adjustment was appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus obstructing justice during the course of the investigation); *United States* v. *Mills*, 194 F.3d 1108, 1115 (10th Cir. 1999) (holding that destruction of tape that occurred before an investigation began warranted application of the enhancement for obstruction of justice because the defendant knew an investigation would be conducted and understood the importance of the tape in that investigation); *United States* v. *Barry*, 938 F.2d 1327, 1333–34 (D.C. Cir. 1991) (''Given the commentary and the case law interpreting § 3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction.''). The Fourth, Sixth, and Eighth Circuits have held that pre-investigation conduct cannot support application of the obstruction of justice adjustment. *See United States* v. *Self*, 132 F.3d 1039 (4th Cir. 1997) (conduct occurring before any investigation begins is not encompassed within obstruction of justice provision of Sentencing Guidelines); *United States* v. *Baggett*, 342 F.3d 536, 542 (6th Cir. 2003) (holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); *United States* v. *Stolba*, 357 F.3d 850, 852–53 (8th Cir. 2004) (holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); *see also United States* v. *Clayton*, 172 F.3d 347, 355 (5th Cir. 1999) (holding that defendant's threats to witnesses warrant the enhancement under § 3C1.1, but stating in dicta that the guideline ''specifically limits applicable conduct to that which occurs during an investigation * * *.'').

The proposed amendment would permit application of § 3C1.1 to pre-investigative conduct if that conduct was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction. Consistent with current application of the adjustment, the pre-investigative conduct also must relate to the offense of conviction and all relevant conduct or to a closely related offense.

The proposed amendment also addresses two other circuit conflicts by amending Application Note 4(b) to include ''perjury in the course of a civil proceeding (if the perjury pertains to conduct comprising the offense of conviction)'' and ''false statements on a financial affidavit in order to obtain court appointed counsel'' as examples of conduct to which § 3C1.1 normally would apply.

Proposed Amendment: Section 3C1.1 is amended by striking ''If'' and all that follows through ''2 levels.'' and inserting the following:

''If—

(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice;

(2) the conduct or attempted conduct described in subdivision (1) occurred (A) prior to the investigation of the instant offense of conviction, and was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction; or (B) during the course of the investigation, prosecution, or sentencing of the instant offense of conviction; and

(3) the conduct or attempted conduct described in subdivision (1) related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense,

increase by 2 levels.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. In General.—Subdivision (3) makes clear that, in order for an adjustment under this section to apply, the obstructive or attempted obstructive conduct must be related to the defendant's offense of conviction and any relevant conduct, or to an otherwise closely related case, such as the case of a co-defendant.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Limitations on Applicability of Adjustment.—'' before ''This provision''; in Note 3 by inserting ''Covered Conduct Generally.—'' before ''Obstructive''; in Note 4 by inserting ''Examples of Covered Conduct.—'' before ''The following''; in Note 5 by inserting ''Examples of Conduct Not Covered.—'' before ''Some types''; in Note 6 by inserting '' 'Material' Evidence Defined.—'' before '' 'Material' evidence''; in Note 7 by inserting ''Inapplicability of Adjustment in Certain Circumstances.—'' before ''If the defendant''; in Note 8 by inserting ''Grouping.—'' before ''If the defendant''; and in Note 9 by inserting ''Accountability for § 1B1.3(a)(1)(A) Conduct.—''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 in subdivision (b) by inserting '', including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction'' after ''perjury''; by striking the period at the end of subdivision (j) and inserting a semi-colon; and by adding at the end the following:

''(k) threatening the victim of the offense in order to prevent the victim from reporting the conduct constituting the offense of conviction;

(l) making false statements on a financial affidavit in order to obtain court-appointed counsel.''.

12. Chapter Eight—Privilege Waiver

Issue for Comment: The Commission has been asked to reconsider a portion of its 2004 amendments to Chapter Eight, the Organizational Sentencing Guidelines, namely, a single sentence of commentary at § 8C2.5(g). Section 8C2.5 provides for the calculation of the culpability score for defendant organizations, and subsection (g) provides for graduated decreases in the culpability score if a defendant organization has self-reported, cooperated with the authorities, and accepted responsibility. In 2004, the Commission added the following sentence to the commentary:

Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

In the Reason for Amendment (see Supplement to Appendix C (Amendment 673)), the Commission stated that it expects such waivers will be required on a limited basis, consistent with statements of the Department of Justice in the United States Attorneys' Bulletin, November 2003, Volume 51, Number 6, pp. 1 and 8.

In light of requests to modify or remove this language submitted to the

Commission in the past year, the Commission listed as one of its priorities for the current amendment cycle, the ''review and possible amendment'' of the waiver language in Application Note 12. At its public meeting on November 15, 2005, the Commission heard testimony from five representatives on behalf of various organizations (the American Bar Association, the Association of Corporate Counsel, National Association of Manufacturers, the Chemistry Council, the Chamber of Commerce, the National Association of Criminal Defense Lawyers, and former officials of the Department of Justice) about what they perceived as the unintended but potentially deleterious effects on the criminal justice process of this commentary language.

Accordingly, the Commission solicits comment on the following: (1) whether this commentary language is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.

13. Crime Victims' Rights

Synopsis of Proposed Amendment: As part of the Justice for All Act of 2004, Pub. L. 108–405, Congress provided crime victims various rights during the criminal justice process. These rights are set forth at 18 U.S.C. 3771. Included is the ''right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.'' 18 U.S.C. 3771(a)(4). This proposed amendment amends Chapter Six (Sentencing Procedures and Plea Agreements) to provide a policy statement regarding crime victims' rights.

Proposed Amendment: Chapter Six is amended in the heading by striking ''AND'' and inserting a comma; and by adding at the end '', AND CRIME VICTIMS' RIGHTS''.

Chapter Six, Part A is amended by adding at the end the following:

''§ 6A1.5. Crime Victims' Rights (Policy Statement).

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, 'crime victim' has the meaning given that term in 18 U.S.C. 3771(e).''.

14. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

Synopsis of Proposed Amendment: This proposed amendment implements the directive in 28 U.S.C. 994(t) that the Commission ''in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.''

The proposed amendment provides a new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant no longer is a danger to the community. Proposed Application Note 1 has two purposes. First, it provides a rebuttable presumption with respect to a Bureau of Prisons motion for a reduction based on extraordinary and compelling reasons. Second, as stated in 28 U.S.C. 994(t), the Note states that rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason warranting a reduction.

Proposed Amendment: Chapter One, Part B is amended by adding at the end the following:

''1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement).

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. 3553(a), the court determines that—

(1) (A) an extraordinary and compelling reason warrants the reduction; or

(B) the defendant is (i) at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community pursuant to 18 U.S.C. 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subdivision (1)(A).—

(A) Extraordinary and Compelling Reasons.—A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement implements 28 U.S.C. 994(t).''.

Issue for Comment: The Commission requests comment regarding:

(1) Whether the provisions of subdivision (1)(B) should be expanded to cover defendants who are at least 70 years old and have served at least 30 years in prison pursuant to a sentence imposed under any statute provided that the sentence imposed for offense(s) for which the defendant is imprisoned was not life imprisonment.

(2) If the Commission does so expand subdivision (1)(B) as described in paragraph (1), should certain offenses be excluded from application of subdivision (1)(B), such as terrorism offenses or sexual offenses involving minors.

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