UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also 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: (1) Proposed amendments that implement directives to the Commission contained in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (''PROTECT Act''), Public Law 108–21, regarding child pornography and sexual abuse offenses, and related issues for comment; (2) proposed amendments to Chapter Eight (Sentencing of Organizations) to provide a new guideline regarding compliance programs, and related issues for comment; (3) proposed new guideline at § 2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons) that addresses the new offense at 18 U.S.C. 931 pertaining to the possession of body armor by certain prohibited persons; (4) proposed amendments to Chapter Two, Part C (Offenses Involving Public Officials) that increase the penalties for offenses involving public corruption, and related issues for comment; (5) proposed amendments that (A) address the directive in section 608 of the PROTECT Act pertaining to increased penalties for offenses involving gamma hydroxybutyric acid (''GHB''); (B) provide a penalty structure for controlled substance analogues in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt and Conspiracy); (C) add white phosphorous and hypophosphorous acid to the Drug Quantity Table in § 2D1.1(c); and (D) make various technical changes to §§ 2D1.1, 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt and Conspiracy), and Appendix A (Statutory Index), and related issues for comment; (6) proposed amendment to repeal the ''mitigating role cap'' in § 2D1.1(b)(3) and replace it with an alternative approach, and a related issue for comment; (7) proposed amendments to the homicide and assault guidelines that implement the directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273, and that address proportionality concerns, and related issues for comment; (8) proposed amendments that makes various technical and conforming amendments to the guidelines, and related issues for comment; (9) proposed amendment to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) that increases the penalties for offenses involving man-portable air defense systems (''MANPADS'') and other similar destructive devices, and related issues for comment; (10) an issue for comment regarding aberrant behavior; and (11) issues for comment regarding the treatment under the guidelines of offenses involving the illegal transportation of hazardous materials.

DATES: 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 1, 2004.

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) 502–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal 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.

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] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission 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).

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

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

Diana E. Murphy,

Chair.

Proposed Amendment 1: Child Pornography and Sexual Abuse of Minors

Synopsis of Proposed Amendment: This proposed amendment contains a number of proposals designed to implement the directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the ''PROTECT Act''), Public Law 108–21.

Furthermore, this amendment addresses a number of issues in response to comments from the Department of Justice's Child Exploitation and Obscenity Section (''CEOS''), calls to the Commission's Helpline, and issues identified through case law regarding the sexual abuse and pornography guidelines. This proposed amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§ 3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index). Several issues for comment regarding these guidelines and § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) follow the proposed amendments.

I. Child Pornography Offenses

This part of the proposed amendment covers offenses sentenced under §§ 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). Issues for comment regarding the scope of specific enhancements in these guidelines and the application of the ''image tables'' and ''sado-masochistic'' enhancements at §§ 2G2.2 and 2G2.4 follow the proposed amendments.

A. Trafficking Offenses Under § 2G2.2

Section 103 of the PROTECT Act creates five year mandatory minimum terms of imprisonment for offenses related to trafficking of child pornography under 18 U.S.C. 2252(a)(1)–(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increases the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. As a result, this proposed amendment provides two options for increasing the base offense level in § 2G2.2 to reflect the new five year mandatory minimum term of imprisonment. Option 1 increases the base offense level for all offenses covered by this guideline from level 17 to level [22][24][25][26]. Option 2 provides alternative base offense levels of level [20][22][24] if the conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor and level [22][24][25][26] for all other offenses.

Section 503 of the PROTECT Act creates two new offenses in 18 U.S.C. 2252A. The new offense at 18 U.S.C. 2252A(a)(3)(B) prohibits advertising, promoting, presenting, distributing, or soliciting any material or purported material that the defendant believes, or intends to cause another to believe, contains actual or obscene child pornography. No actual materials need to exist in order to be convicted under this provision, thus even fraudulent offers to buy or sell such materials are covered under this provision. The new offense at 18 U.S.C. 2252A(a)(6) prohibits using any type of real or apparent child pornography to induce a child to commit a crime. Section 513(c) of the PROTECT Act directs the Commission to review and, as appropriate, amend the guidelines to ensure that penalties are adequate to deter and punish conduct that involves a violation of these new offenses. In addition, the Commission is directed to ''consider the relative culpability of promoting, presenting, describing, or distributing material'' in violation of 18 U.S.C. § 2252A(a)(3)(B) as compared to soliciting such material.

In response to this directive, several options are proposed. First, the amendment refers both of these new offenses to the trafficking guideline, § 2G2.2. Currently, § 2G2.2(b)(2) provides, for offenses involving distribution of child pornography, a two-to seven-level enhancement, depending on the type of distribution. Section 2G2.2(b)(2)(C) provides a five-level enhancement for offenses involving distribution to a minor, and § 2G2.2(b)(2)(D) provides a seven-level enhancement for ''distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct.'' In response to the new offense at 18 U.S.C. 2252(A)(a)(b), the proposed amendment adds a six-level enhancement at § 2G2.2(b)(2) if the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity.

This proposal addresses in two ways the directive to compare the relative culpability of a defendant who promotes, presents, describes, or distributes child pornographic material to the culpability of a defendant who merely solicits such material. First, the amendment provides an alternative base offense level ''if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material.'' Second, the proposal amends § 2G2.2(b)(2) and the commentary of that guideline to make clear that the enhancement only applies to defendants whose conduct involves some form of distribution. In addition, this proposal adds commentary to the definition of ''distribution'' that makes clear that distribution does not include merely soliciting child pornography. Therefore, defendants who merely solicit child pornography will not be subject to the distribution enhancement at § 2G2.2(b)(2) unless their conduct involves some other act related to the transfer of material involving the sexual exploitation of a minor. Third, the amendment contains an option in the distribution enhancement at § 2G2.2(b)(2) to change the enhancement from ''if the offense involved'' to ''if the defendant's conduct involved'', which would limit the defendant's exposure under the enhancement to that of the defendant's own conduct.

Section 504 of the PROTECT Act creates a new offense at 18 U.S.C. 1466A that prohibits producing, distributing, receiving, possessing, or possessing with intent to distribute visual depictions (including drawings, cartoons, sculptures or paintings) that depict (1) a minor engaging in sexually explicit conduct and is obscene; or (2) an image that is, or appears to be, a minor engaging in sexually explicit conduct and lacks serious literary, artistic, political, or scientific value. Trafficking in such materials is covered under subsection (a) and carries a mandatory minimum term of imprisonment of five years and a maximum term of imprisonment of 20 years. Simple possession of such materials is covered under 18 U.S.C. 1466A(b) and punishable by a term of imprisonment of not more than ten years. Although 18 U.S.C. 1466A covers offenses of trafficking in, possession with intent to traffic in, and simple possession of, obscene material, section 504 of the PROTECT Act directs the Commission to punish these offenses consistent with child pornography trafficking offenses sentenced under § 2G2.2. By strictly complying with the language of this directive, however, the Commission would create an anomaly with regard to simple possession cases. For example, a defendant convicted of

possessing an obscene cartoon drawing depicting minors engaged in sexually explicit conduct under 18 U.S.C. § 1466A(b) would receive a sentence equivalent to a five year mandatory minimum term of imprisonment under § 2G2.2, while a defendant convicted under 18 U.S.C. 2252(a)(4) of possessing a picture of actual minors engaged in sexually explicit conduct would receive a sentence of only two years' imprisonment under § 2G2.4.

According to the legislative history, the intent of the directive in section 504 was to ensure that offenses under 18 U.S.C. 1466A are ''subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity.'' See H.R. Conf. Rep. No. 66, 108th Cong. 1st Sess. (2003). Obscenity offenses are sentenced under § 2G3.1, which has a base offense level of level 10. Simple possession offenses under 18 U.S.C. 1466A(b) more appropriately may be covered under the simple possession guideline, § 2G2.4. Therefore, the proposed amendment refers offenses under 18 U.S.C. 1466A(a) involving trafficking and possession with intent to traffic to § 2G2.2, as directed by Congress, but refers offenses under 18 U.S.C. 1466A(b) involving simple possession to § 2G2.4.

This proposed amendment also makes a number of changes to Appendix A (Statutory Index) and the statutory provisions in § 2G2.2. Offenses under 18 U.S.C. 2252 and 2252A currently are referenced to both §§ 2G2.2 and 2G2.4 because these statutes contain prohibitions on both trafficking in and simple possession of child pornography. This proposal amends Appendix A and the statutory provisions in § 2G2.2 to refer trafficking offenses in 18 U.S.C. 2252(a)(1)–(3) and 2252A(a)(1), (2), (3), (4), and (6) to § 2G2.2 only, thereby ensuring that the trafficking offenses receive the appropriate base offense level which corresponds to the five year mandatory minimum term of imprisonment. This amendment makes a similar change with respect to offenses under 18 U.S.C. 2251(d)(1)(A) (formerly (c)(1)(A), redesignated by the PROTECT Act). This section prohibits making, printing, or publishing any notice or advertisement seeking to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction if the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct. Currently, these offenses are referenced to § 2G2.2 instead of § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) because they are more like trafficking offenses than production offenses. However, the PROTECT Act increases the mandatory minimum term of imprisonment for these offenses from 10 to 15 years. Therefore, these offenses are proposed to be referenced to the production guideline, § 2G2.1. Subpart D of the proposed amendment increases the base offense level in § 2G2.1 to level [30][32][34][35][36] to reflect the increased mandatory minimum term of imprisonment.

In response to comments from CEOS, calls to the Helpline, and issues identified through case law regarding inconsistencies in the application of the use of a computer enhancement at § 2G2.2(b)(5), the amendment proposes to broaden the enhancement in two ways. First, the amendment proposes to expand the enhancement to include ''interactive computer devices'' (*e.g.*, Internet access devices), as defined in 47 U.S.C. 230(f)(2). Currently, § 2G2.2(b)(5) provides an enhancement if only a computer was used for ''the transmission, receipt or distribution'' of the pornographic material, in contrast to similar enhancements in other pornography or sexual abuse guidelines that provide an enhancement for the use of a ''computer or Internet-access device''. (See *United States* v. *Albright,* 67 Fed. Appx. 751 (3d Cir. 2003)(unpub.) (use of a WebTV device used to access the Internet is not a computer for purposes of the enhancement)). Use of the term ''interactive computer device'' may be preferable to ''Internet access device'' in the applicable guidelines because it is statutorily defined. Conforming changes are proposed for §§ 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct), proposed 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Use of Interstate Facilities to Transport Information about a Minor), 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). Second, the amendment proposes to broaden the enhancement to apply to offenses in which the computer (or an interactive computer service) was used for the possession of pornographic material. Currently, the enhancement provides a two-level increase if only a computer was used for ''the transmission, receipt, or distribution'' of the pornographic material.

Finally, in response to CEOS comments, calls to the Helpline, and issues identified through training, this proposal makes the following minor changes to the commentary to § 2G2.2:

(1) Provides a definition of ''computer''.

(2) Makes clear that the definition of ''minor'' includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represents to a participant (i) had not attained the age of 18 years, and (ii) could be provided to a participant for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

(3) Provides a definition of ''image'' for purposes of applying the enhancement at § 2G2.2(b)(6).

(4) Makes clear that ''distribution'' includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material.

B. Simple Possession Offenses Under § 2G2.4

The PROTECT Act raised the statutory maximum term of imprisonment for simple possession offenses from five to ten years. As a result, this proposed amendment includes an option for increasing the base offense level from level 15 to level [18][20]. An increase in the base offense level also may be justified to maintain proportionality with the child pornography trafficking guideline because of a proposed increase in the base offense level at § 2G2.2 for trafficking and receipt cases (see subpart A of this amendment).

In response to comments from CEOS, the proposed amendment addresses a recent Seventh Circuit decision in *United States* v. *Sromalski,* 318 F.3d 748 (7th Cir. 2003), regarding the cross reference at § 2G2.4(c)(2). Currently, the

cross reference requires application of § 2G2.2 if the offense ''involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic)''. In *Sromalski,* the appellate court found that in cases involving possession of child pornography where receipt can be shown, the cross reference at § 2G2.4(c)(2) applies only if the receipt involved the intent to traffic. Thus, under the Seventh Circuit's interpretation of the guidelines, convictions for receipt of child pornography (which do not require proof of an intent to traffic) are sentenced under § 2G2.2, but convictions for possession of child pornography, even where receipt can be shown, are sentenced under § 2G2.4 unless there is proof of receipt with an intent to traffic. The proposed amendment provides an option that clarifies that the cross reference should be applied without regard to whether or not there was offense conduct that involved receipt with an intent to traffic.

In addition, the proposed amendment makes the following clarifying and conforming changes to § 2G2.4 in response to changes made to § 2G2.2:

(1) Expands use of a computer enhancement at § 2G2.4(b)(3) to include ''interactive computer services''.

(2) Provides a definition of ''computer''.

(3) Provides a definition of ''image'' for purposes of applying the enhancement at § 2G2.4(b)(5).

(4) Makes clear that, for purposes of the cross reference at § 2G2.4(c)(1), the definition of ''minor'' includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

C. Consolidation of §§ 2G2.2 and 2G2.4

This part of the proposed amendment consolidates §§ 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct, into one guideline, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners regarding difficulties in determining the appropriate guideline (§ 2G2.2 or § 2G2.4) for cases involving convictions of 18 U.S.C. 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

This proposed consolidation provides two options for the base offense level. Option One provides alternative base offense levels of (1) level [15][18][20] if (A) the conduct was limited to the possession, receipt, or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; (2) level [22][24][26] for all other offenses. Option Two provides three alternative base offense levels of (1) level [15][18][20] if the defendant's conduct was limited to the possession of material involving the sexual exploitation of a minor without an intent to traffic in, or distribute, such material; (2) level [20][22][24] if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (3) level [22][24][25][26] for all other offenses sentenced at this guideline. The proposed consolidation would subject § 2G2.4 cases to enhancements if the offense involved distribution or if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. Currently, these enhancements do not exist in § 2G2.4

D. Production Offenses Under § 2G2.1

Section 103 of the PROTECT Act increases the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to production of child pornography under 18 U.S.C. 2251. This section also increases the statutory maximum term of imprisonment for these offenses from 20 to 30 years. As a result, this proposed amendment increases the base offense level in § 2G2.1 from level 27 to level [30][32][34][35][36] to reflect the new 15 year mandatory minimum term of imprisonment. Furthermore, the proposed amendment adds a number of enhancements that may be associated with the production of child pornography. The addition of these enhancements also helps to maintain the proportionality between these offenses and offenses covered under § 2G2.2. The proposed enhancements increase the offense level if the offense involved any of the following: (1) Material that portrays sadistic or masochistic conduct; (2) the commission of a sexual act or sexual contact; (3) conduct described in 18 U.S.C. 2241(a) or (b); and (4) distribution.

The proposed amendment also adds to the commentary of § 2G2.1 definitions of ''sexual act'', ''sexual contact'', ''sexually explicit conduct'', ''computer'', ''interactive computer service'', ''minor'', and ''distribution''.

II. Travel and Transportation Cases

This proposed amendment creates a new guideline, § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under Chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Currently, Chapter 117 offenses, primarily 18 U.S.C. 2422 (coercion and enticement) and 2423 (transportation of minors), are referenced by Appendix A to either § 2G1.1 or § 2A3.2. Offenses under 18 U.S.C. 2422 and 2423(a) (transportation with intent to engage in criminal sexual activity) are referenced to § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct) but are cross referenced from § 2G1.1 to § 2A3.2 (Statutory Rape) to account for underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. 2423(b) (travel with intent to engage in sexual act with a juvenile) are referenced to § 2A3.1, § 2A3.2, or § 2A3.3, but most are sentenced at § 2A3.2. Until recently, the majority of cases sentenced under § 2A3.2 were statutory rape cases that occurred on Federal property (*e.g.* military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline were coercion, travel, and transportation offenses.

Creating a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from § 2A3.2 will permit the Commission more appropriately to tailor the guideline to statutory rape cases.

Currently, § 2A3.2 provides alternative base offense levels of (1) level 24 for a Chapter 117 violation with a sexual act, (2) level 21 for a Chapter 117 violation with no sexual act (*e.g.*, a sting case), or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. 2422 and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. However, the PROTECT Act did not increase the penalties for offenses under 18 U.S.C. 2243 (sexual abuse of a minor), which prohibits statutory rape.

The proposed guideline provides a base offense level of level [22][24][25][26] to account for the new mandatory minimum terms of imprisonment as required by the PROTECT Act. The guideline proposes a number of enhancements, including enhancements for offenses involving victims under the age of 12 years, commission of a sexual act, use of force, use of a computer, misrepresentation of identity, and custody issues. The proposed amendment also provides two options for a specific offense characteristic to address the conduct from 18 U.S.C. 2423(d), a new offense created by the PROTECT Act. Offenses under 18 U.S.C. 2423(d) prohibit a person, for the purpose of commercial advantage or private financial gain, from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in an illicit sexual act. The maximum term of imprisonment for an offense under 18 U.S.C. 2423(d) is 30 years.

The proposed amendment also makes conforming changes to § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

In addition, an issue for comment regarding which guideline is the most appropriate for violations of 18 U.S.C. 2425, use of interstate facilities to transport information about a minor, follows the proposed amendments.

III. Misleading Domain Names

Section 521 of the PROTECT Act creates a new offense at 18 U.S.C. 2252B (misleading domain names on the Internet). Section 2252B of title 18, United States Code, prohibits the knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity, and offenses under this statute are punishable by a maximum term of imprisonment of two years, or if the misleading domain name was intended to deceive a minor into viewing material that is harmful to minors, a maximum term of imprisonment of four years. The proposed amendment refers the new offense to § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include ''Misleading Domain Names'', and provides a two-level enhancement if ''the offense involved the use of a misleading domain name on the Internet with the intent to deceive a [minor][person] into viewing material on the Internet that is harmful to minors.'' In addition, the proposed amendment also provides enhancements for the following: (1) Distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; (2) use of a computer or interactive computer service; and (3) material that was advertised or described to include minors engaged in sexually explicit conduct. Finally, the proposed amendment adds § 2G3.1 to the list of guidelines at subsection (d) of § 3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to § 3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are continuous and ongoing in nature. The proposal makes other minor technical changes to the Commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

IV. Conditions of Supervised Release

In response to a circuit conflict, this amendment proposes amending §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to add a condition ''limiting [or prohibiting] the use of a computer or an interactive computer service'' in cases in which the [defendant used][the offense involved the use of] such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete restrictions on computer use and Internet access (see *United States* v. *Sofsky,* 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); *United States* v. *Freeman,* 316 F.3d 386 (3d Cir. 2003) (same)), but some circuit courts have upheld restrictions on computer use and Internet access with probation officer permission (see *United States* v. *Fields,* 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); *United States* v. *Walser,* 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); *United States* v. *Zinn,* 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release. (See *United States* v. *Paul,* 274 F.3d 155 (5th Cir. 2001) (upholding complete ban of Internet use)).

In addition, this proposed amendment amends § 5D1.2 (Term of Supervised Release) to make the guideline consistent with changes provided in the PROTECT Act to the applicable terms of supervised release under 18 U.S.C. 3583 for sex offenders.

V. Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

Section 401(i)(2) of the PROTECT Act directs the Commission to ''amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses'' under sections 2243(b) (sexual abuse of a ward), 2244(a)(4) (sexual contact), and 2244(b) (sexual contact with a person without that person's permission) of title 18, United States Code. This amendment proposes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address the directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the Commentary to make the definitions in these guidelines consistent with the definitions in the pornography guidelines.

An issue for comment regarding proportionality issues and implementation of the directive follows the proposed amendments.

Proposed Amendment:

I. Child Pornography Offenses

A. Trafficking Offenses Under § 2G2.2

Proposed Amendment: Section 2G2.2 is amended in the heading by inserting ''Soliciting,'' after ''Shipping,''.

[Option 1:

Section 2G2.2(a) is amended by striking ''17'' and inserting ''[22][24][25][26]''.]

[Option 2:

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

''(a) Base Offense Level:

(1) [20][22][24], if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or

(2) [22][24][25][26], otherwise.''.]

[Section 2G2.2(b)(2) is amended by striking ''If the offense involved'' and inserting ''If the defendant's conduct involved''];

by redesignating subdivisions (D) and (E) as subdivisions (E) and (F), respectively; and by inserting after subdivision (C) the following new subdivision (D):

''(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, increase by 6 levels.'';

in subdivision (F), as redesignated by this amendment, by striking ''(D)'' and inserting ''(E)''.

Section 2G2.2(b)(5) is amended by inserting ''or an interactive computer service'' before ''was used''; and by inserting [''possession,''] before ''transmission,''.

The Commentary to § 2G2.2 captioned ''Statutory Provisions'' is amended by striking ''2251(c)(1)(A), 2252(a)(1)–(3), 2260'' and inserting ''[1466A(a),] 2252(a)(1)–(3), 2252A(a)(1)(4), (6), 2260(b)''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 1 by striking:

''For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.''

and inserting:

''Definitions.—For purposes of this guideline:

'Computer'—has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Image' means any visual depiction described in 18 U.S.C. 2256(5) and (8).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant.'';

by striking '''Minor' means an individual who had not attained the age of 18 years.'' and inserting the following:

'''Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.'';

and in the paragraph that begins '' 'Pattern of activity'' by striking ''victims'' and inserting ''minors''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively; and by inserting after Note 1 the following new Note 2:

''2. Application of Subsection (b)(4).—Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in the first paragraph of Note 3, as redesignated by this amendment, by inserting ''Upward Departure Provision.—'' before ''If the defendant''; and by striking ''Prior convictions'' and all that follows through ''(Criminal History).''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, by inserting ''Cross Reference at Subsection (c)(1).—'' before ''The cross reference''.

B. Simple Possession Offenses Under § 2G2.4

Section 2G2.4(a) is amended by striking ''15'' and inserting ''[18][20]''.

Section 2G2.4(b) is amended [by striking subdivision (2) in its entirety;] by striking subdivision (3) in its entirety; by redesignating subdivisions (4) and (5) as subdivisions (3) and (4), respectively; and by inserting after subdivision (1) the following new subdivision (2):

''(2) If the [defendant's possession of the material resulted from the defendant's][offense involved the] use of a computer or an interactive computer service, increase by 2 levels.''.

Section 2G2.4(c)(2) is amended by striking ''(including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic)'' and inserting ''including (A) receiving material involving the sexual exploitation of a minor [with intent to traffic]; (B) transporting, shipping, or advertising material involving the sexual exploitation of a minor; or (C) possessing with intent to traffic material involving the sexual exploitation of a minor''.

The Commentary to § 2G2.4 captioned ''Statutory Provision'' is amended by striking ''Provision: 18 U.S.C. 2252(a)(4)'' and inserting ''Provisions: 18 U.S.C. 1466A(b), 2252(a)(4), 2252A(a)(5)''.

The Commentary to § 2G2.4 captioned ''Application Notes'' is amended in Note 1 by striking:

''For purposes of this guideline—''

and inserting:

''Definitions.—For purposes of this guideline:

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Image' means any visual depiction described in 18 U.S.C. 2256(5) and (8).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).''.

[The Commentary to § 2G2.4 captioned ''Application Notes'' is amended by striking Note 2 in its entirety.]

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

''2. Cross Reference at Subsection (c)(1).—For purposes of subsection (c)(1), ''minor'' includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

3. Upward Departure Provision.—If the offense involved substantially more than 600 images, an upward departure may be warranted, regardless of whether subsection (b)(5) applies.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1466 the following new lines:

''18 U.S.C. 1466A(a) 2G2.2
18 U.S.C. 1466A(b) 2G2.4'';

by striking the following:

18 U.S.C. 2252 2G2.2, 2G2.4
18 U.S.C. 2252A 2G2.2, 2G2.4'',

and inserting the following:

''18 U.S.C. 2252 (a)(1)–(3) 2G2.2
18 U.S.C. 2252(a)(4) 2G2.4
18 U.S.C. 2252A(a)(1)–(4), (6) 2G2.2
18 U.S.C. 2252A(a)(5) 2G2.4'';

and by striking the following:

''18 U.S.C. 2260 2G2.1, 2G2.2'',

and inserting the following:

''18 U.S.C. 2260(a) 2G2.1

18 U.S.C. 2260(b) 2G2.2''.

C. Consolidation of §§ 2G2.2 and 2G2.4

Chapter Two, Part G, Subpart 2, is amended by striking §§ 2G2.2 and 2G2.4 in their entirety and inserting the following new guideline and replacement commentary:

''§ 2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor With Intent To Traffic; Possessing Material Depicting a Minor Engaged in Sexually Explicit Conduct

(a) Base Offense Level

[Option 1: (1) [15][18][20], if (A) the defendant's conduct was limited to the possession, receipt, or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or

(2) [22][24][25][26], otherwise.]

[Option 2:(a) (1) [15][18][20], if the defendant's conduct was limited to the possession of material involving the sexual exploitation of a minor without an intent to traffic in, or distribute, such material;

(2) [20][22][24], if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or

(3) [22][24][25][26], otherwise.]

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of 12 years, increase by 2 levels.

(2) (Apply the Greatest) If the [defendant's conduct] [offense] involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, increase by 6 levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

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

(5) If a computer or an interactive computer service was used for the possession, transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.

(6) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. 1466A, 2252, 2252A, 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Image' means any visual depiction described in 18 U.S.C. 2256(5) and (8).

'Interactive computer service' has the meaning given that term in 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

'Distribution for pecuniary gain'' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. ''Sexual abuse or exploitation' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. 2256.

2. Application of Subsection (b)(4).—Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

4. Cross Reference at Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.'.

D. Production Offenses Under § 2G2.1

Section 2G2.1(a) is amended by striking ''27'' and inserting ''[30][32][34][35][36]''.

Section 2G2.1(b) is amended in subdivision (1) by striking ''victim'' and inserting ''minor''; by redesignating subdivisions (2) and (3) as subdivisions (6) and (7), respectively; and by inserting after subdivision (1) the following:

'(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by [2][4] levels.

(3) If the offense involved the commission of a sexual act or sexual contact, increase by 2 levels.

(4) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by [2][4] levels.

(5) If the offense involved distribution, increase by [2][5][7] levels.''.

Section 2G2.1(b) is amended in subdivision (7), as redesignated by this amendment, by striking ''Internet-access device'' and inserting ''interactive computer service''.

Section 2G2.1 is amended by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following:

''(c) Cross reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.''.

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by striking ''(a), (b), (c)(1)(B)''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by striking Notes 1, 2, 3, and 4 in their entirety and inserting the following:

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

'Conduct described in 18 U.S.C. 2241(a) or (b)' is: Using force against the minor; threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the minor unconscious; or administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

'Sexual contact' has the meaning given that term in 18 U.S.C. 2246(3).

'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. 2256.

2. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(6) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

(B) Inapplicability of Enhancement.—If the adjustment in subsection (b)(6) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).'';

by redesignating Note 5 as Note 3; by inserting after Note 3, as redesignated by this amendment, the following:

''4. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.'';

and by redesignating Note 6 as Note 5.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by inserting before ''The enhancement in subsection'' the following:

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

(A) Misrepresentation of Participant's Identity.—

by striking ''(3)(A)'' each place it appears and inserting ''(7)(A)''; by striking ''Subsection (b)(3)(B)(i) provides'' and inserting:

''(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(7)(b)(i) provides'';

by striking ''(b)(3)(B)(i) is intended'' and inserting ''(b)(7)(B)(i) is intended''; and

by striking ''Internet-access device'' each place it appears and inserting ''interactive computer service''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 5, as redesignated by this amendment, by striking ''victims'' and inserting ''minors''.

II. Travel and Transportation Cases

Chapter Two, Part G, Subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct With a Minor; Transportation of Minors To Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel To Engage in Commercial Sex Act or Prohibited Sexual Conduct With a Minor; Use of Interstate Facilities To Transport Information About a Minor

(a) Base Offense Level: [22][24][25][26]

(b) Specific Offense Characteristics

(1) If the offense involved a sexual act or sexual contact, increase by 2 levels.

(2) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.

[Option 1A: (3) If the offense involved a minor who had not attained the age of 12 years, increase by [4][6][8] levels.]

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

(5) If the defendant was a parent, relative, or legal guardian of the minor; or the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(6) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of the minor to engage in a commercial sex act or prohibited sexual conduct, increase by 2 levels.

(7) If [the defendant used][the offense involved the use of] a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in a commercial sex act or prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in a commercial sex act or prohibited sexual conduct with the minor, increase by 2 levels.

[Option 2A: (8) If, for the purposes of commercial advantage or private financial gain, the defendant knowingly arranged, induced, procured, or facilitated the travel of a participant knowing that the participant was traveling for the purpose of engaging in illicit sexual conduct, increase by [2] levels.]

[Option 2B: (8) If the offense involved conduct described in 18 U.S.C. 2423(d), increase by [2] levels.]

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

[Option 1B: (3) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the 'consent' of the minor.]

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. 1328 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense); 18 U.S.C. 1591 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 2421 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 2422 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 2422(b), 2423, [2425].

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial sex act' has the meaning given that term in 18 U.S.C. 1591(c)(1).

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

'Illicit sexual conduct' has the meaning given that term in 18 U.S.C. 2423(f).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

'Participant' has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).

'Permanent or life-threatening bodily injury,' 'serious bodily injury,' and 'abducted' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions). However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

'Sexual contact' has the meaning given that term in 18 U.S.C. 2246(3).

2. Application of Subsection (b)(2).—'Conduct described in 18 U.S.C. 2241(a) or (b)' is: using force against the minor; threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the minor unconscious; or administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to

appraise or control conduct was substantially impaired by drugs or alcohol.

3. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

(B) Inapplicability of Enhancement.—If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act or prohibited sexual conduct. Subsection (b)(6) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act or prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

5. Use of a Computer or an Interactive Computer Service.—Subsection (b)(7) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(7) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

6. Cross Reference.—The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256.

7. Special Instruction for Cases Involving Multiple Victims at Subsection (d)(1).—

(A) In General.—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under § 3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

(B) Definition of Victim.—For purposes of subsection (d)(1), a victim includes (A) an individual who had not attained the age of 18 years; or (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

8. Aggravating Role.—For the purposes of § 3B1.1 (Aggravating Role), a minor, as defined in this guideline, is considered a participant only if that minor assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another minor.

9. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than ten victims.

Background: This guideline covers offenses under Chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means.''.

Chapter Two, Part G, Subpart 1 is amended by striking § 2G1.1 and accompanying commentary in its entirety and inserting the following new guideline:

§ 2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct With an Individual Other Than a Minor

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved the use of physical force, fraud, or coercion, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. 1328 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense); 18 U.S.C. 1591 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2421 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2422(a) (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial sex act' has the meaning given that term in 18 U.S.C. 1591(c)(1).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

'Promoting a commercial sex act' means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

'Victim' means a person transported, persuaded, induced, enticed, or coerced

to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, 'victim' may include an undercover law enforcement officer.

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion, that occurs as part of a commercial sex act offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), 'coercion' includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. Application of Aggravating Role Enhancement.—For the purposes of § 3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

5. Cross Reference at Subsection (c)(1).—Subsection (c)(1) provides a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. 2241 or 2242. For example, the cross reference to § 2A3.1 shall apply if the offense involved criminal sexual abuse and the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. 2242(1)).

6. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than ten victims.

Background: This guideline covers offenses that involve promoting prostitution or prohibited sexual conduct with an adult through a variety of means. Offenses that involve promoting prostitution or prohibited sexual conduct are sentenced under this guideline, unless criminal sexual abuse occurs as part of the offense, in which case the cross reference would apply.

This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.

Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under § 2G1.3 (Promoting Prostitution or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Use of Interstate Facilities to Transport Information about a Minor).''.

II. Misleading Domain Names

Section 2G3.1 is amended in the heading by adding at the end ''; Misleading Domain Names'' after ''Minor''.

Section 2G3.1(b)(1) is amended by redesignating subdivisions (D) and (E) as subdivisions (E) and (F), respectively; and by inserting after subdivision (C) the following new subdivision:

''(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, increase by 6 levels.'';

and in subdivision (F), as redesignated by this amendment, by striking ''(D)'' and inserting ''(E)''.

Section 2G3.1(b) is amended by redesignating subdivision (2) as subdivision (4); by inserting after subdivision (1) the following new subdivisions (2) and (3):

''(2) If the offense involved the use of a misleading domain name on the Internet with the intent to deceive a [minor][person] into viewing material on the Internet that is harmful to minors, increase by 2 levels.

(3) If [the defendant used][the offense involved the use of] a computer or an interactive computer service, increase by 2 levels.''[;

and by adding at the end the following new subdivision:

''(5) If the offense involved material that was advertised or described to include a minor engaged in sexually explicit conduct, increase by [2][4] levels.''].

The Commentary to § 2G3.1 captioned ''Statutory Provisions'' is amended by inserting ''; 2252B'' after ''1470''.

The Commentary to § 2G3.1 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; in Note 1 by striking ''For purposes of this guideline.—'' and inserting ''Definitions.—For purposes of this guideline:''; in the paragraph that begins '' 'Distribution' means'' by inserting ''Accordingly, distribution includes posting material on a website for public viewing.'' after ''obscene matter.''; by striking the paragraph that begins '' 'Minor' means'' and inserting the following:

'' 'Material that is harmful to minors' has the meaning given that term in 18 U.S.C. 2252B(d)(3).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.'';

by adding at the end the following new paragraph:

'' 'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. 2256(2)(A).'';

and by adding after Note 1 the following new note:

''2. Use of a Computer or an Interactive Computer Service.—Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(5) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.''.

Appendix A (Statutory Index) is amended by inserting before the line reference to ''18 U.S.C. 2257'' the following new line:

''18 U.S.C. 2252B 2G3.1''.

Section 3D1.2(d) is amended by inserting '', 2G3.1'' after ''2G2.4''.

III. Conditions of Supervised Release

Section 5B1.3(d)(7) is amended by striking ''If the instant'' and all that follows through ''sex offenders.'' and inserting the following:

''If the instant offense of conviction is a sex offense, as defined in § 5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

[(B) A condition limiting [or prohibiting] the use of a computer or an interactive computer service in cases in which the [defendant used][offense involved] the use of such items.]''.

Section 5D1.2 is amended in subsection (a) by striking ''Subject to'' and inserting ''Except as provided in''; in subsection (b) by inserting ''(1)'' before ''shall''; and by inserting before the period the following:

''; or (2) in the case of a sex offense conviction, shall be not less than the minimum term of years specified for that class of offense under subdivisions (a)(1) through (a)(3), and may be up to life''.

Section 5D1.3(d)(7) is amended by striking ''If the instant'' and all that follows through ''sex offenders.'' and inserting the following:

''If the instant offense of conviction is a sex offense, as defined in § 5D1.2 (Terms of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

[(B) A condition limiting [or prohibiting] the use of a computer or an interactive computer service in cases in which the [defendant used][the offense involved] the use of such items.]''.

IV. Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

[Option 1:

Section 2A3.1 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level:

(1) [30][32][34][36], if the offense involved a minor; or

(2) [27–30], otherwise.]''.

[Option 2:

Section 2A3.1 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level: [27–30]'';

Section 2A3.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the offense involved conduct described in 18 U.S.C. 2241(a) or (b), increase by 4 levels.''.]

Section 2A3.1(b) is amended in subdivision (6) by striking ''Internet-access device'' and inserting ''interactive computer service''.

[Option 2:

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

''(7) If (A) a minor was involved; and (B) the offense was committed in connection with the possession, distribution, or production of child pornography, increase by [3][5][7] levels.''.]

[Option 3:

Section 2A3.1(c) is amended by striking ''Cross Reference'' and inserting ''Cross References''; and by adding at the end the following:

''(2) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.''].

Section 2A3.1(c)(1) is amended by inserting '', if the resulting offense level is greater than that determined above'' after ''Murder)''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

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

'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant.

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

'Participant' has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).

'Permanent or life-threatening bodily injury,' 'serious bodily injury,' and 'abducted' are defined in the Commentary to § 1B1.1 (Application Instructions). However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

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

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

'Victim' includes an undercover law enforcement officer.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Notes 2 and 3 in their entirety and inserting the following:

''2. Custody, Care, or Supervisory Control Enhancement.—Subsection (b)(5) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

3. Inapplicability of Enhancement.—If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of

Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 4 by inserting before ''The enhancement'' the following:

''Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—'';

and by striking the last paragraph in its entirety and inserting the following new paragraph:

''(B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 5 by inserting ''Upward Departure Provision.—'' before ''If a victim''.

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

''6. Application of Subsection (b)(7).—Subsection (b)(7) is intended to apply in cases in which the offense involved the production of child pornography. For purposes of this subsection, 'child pornography' has the meaning given that term in 18 U.S.C. 2256.''.]

Section 2A3.2 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level: 18''.

Section 2A3.2(b) is amended by striking subsections (2) through (4) in their entirety and inserting the following:

''(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct or a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct, increase by 2 levels.

(3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, increase by 2 levels.''.

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

'' 'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).'';

by striking '' 'Sexual act' '' and all that follows through ''16 years.'' and inserting the following:

'' 'Victim' means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 2 by striking ''and'' after ''Care,'' in the heading and inserting ''or''; by inserting ''(A) In General.—'' before ''Subsection (b)(1)''; and by adding at the end the following new paragraph:

''(B) Inapplicability of Enhancement.—If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 3 in its entirety; and by redesignating Notes 4 through 7 as Notes 3 through 6, respectively.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by striking ''(b)(2)(A)'' each place its appears and inserting ''(b)(2)(B); by striking ''(A) persuade'' and inserting ''persuade''; by striking ''; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct'' each place it appears; by striking ''(b)(2)(B)'' and inserting ''(b)(2)(B)(ii)''; and by striking ''If the victim'' and all that follows through ''(c)(1) will apply.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 4, as redesignated by this amendment, in its entirety and inserting the following:

''4. Use of Computer or an Interactive Computer Service.—Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the victim from an airline's Internet site.''.

The Commentary to § 2A3.2 captioned ''Background'' is amended by striking ''or chapter 117 of title 18, United States Code''.

Section 2A3.3(a) is amended by striking ''9'' and inserting ''[10][12]''.

Section 2A3.3(b) is amended by striking ''(A)'' each place it appears; and by striking ''; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct'' each place it appears; and in subdivision (2) by striking ''Internet-access device'' and inserting ''interactive computer service''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following: ''Definitions.—For purposes of this guideline:

'Computer' has the meaning given that term in 18 U.S.C. 1030(e)(1).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Notes 2 and 3 in their entirety and inserting the following:

''2. Misrepresentation of a Participant's Identity.—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the

intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. Use of a Computer or an Interactive Computer Service.—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.''.

Section 2A3.4(a) is amended by striking subdivisions (1) and (2) in their entirety and inserting the following:

''(1) 16, if the offense involved conduct described in 18 U.S.C. 2241(a) or (b);

(2) 12, if the offense involved conduct described in 18 U.S.C. 2242;''.

Section 2A3.4(b) is amended by striking subdivisions (4) through (6) in their entirety and inserting the following:

''(4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

(5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline''—and all the follows through ''18 years.'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 2 by striking '' 'The means set forth'' and inserting ''Application of Subsection (a)(1).—'Conduct described''; by striking ''are'' and inserting ''is''; and by striking ''by'' each place it appears.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 3 by striking '' 'The means set forth'' and inserting ''Application of Subsection (a)(2).—'Conduct described''; by striking ''are'' and inserting ''is''; and by striking ''by'' each place it appears.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 4 by inserting before ''Subsection (b)(3)'' the following:

''Custody, Care, or Supervisory Control.—

(A) In General.—'';

and by adding at the end the following new paragraph:

''(B) Inapplicability of Enhancement.—If the adjustment in subsection (b)(3) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Note 5 in its entirety; and by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 5, as redesignated by this amendment, by inserting ''Misrepresentation of a Participant's Identity.—'' before ''The enhancement in subsection (b)(4) applies''; by striking ''(A)'' each place it appears; and by striking ''; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct'' each place it appears.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 6, as redesignated by this amendment, by striking the text and inserting the following:

''Use of a Computer or an Interactive Computer Service.—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.''.

The Commentary to § 2A3.4 captioned ''Background'' is amended by striking ''For cases involving'' and all that follows through ''level 6.''.

Issues for Comment:

1. The PROTECT Act contains substantial increases in penalties for defendants sentenced under a number of the sexual abuse and pornography guidelines, including new mandatory minimum penalties. Do the increased penalties provided in the PROTECT Act necessitate amending the base offense levels and specific offense characteristics in these guidelines to target more accurately the specific conduct of the defendant, thereby reserving the most severe penalties for the most serious offenders? Guidelines 2G2.1, 2G2.2, and 2G2.4 contain numerous specific offense characteristics addressing a wide variety of conduct involved in the production of, trafficking in, or possession of, child pornography. Currently, the application of these specific offense characteristics is based on either (A) the actions of only the defendant (*e.g.,* § 2G2.4(b)(3) provides a two-level increase ''if the defendant's possession of the material resulted from the defendant's use of a computer''), or (B) all the conduct within the scope of relevant conduct (*e.g.*, § 2G2.1(b)(3) provides, in part, a two-level increase if the ''offense involved'' the use of a computer or Internet-access device). Specifically, the Commission requests comment on whether the specific offense characteristics in these guidelines should be based on all conduct within the scope of relevant conduct, or based on only the actions of the defendant; *i.e.*, should the enhancement apply if the defendant used or directed the use of a computer, rather than if others within the defendant's jointly undertaken criminal activity used a computer?

2. Sections 401(i)(1)(B) and (C) of the PROTECT Act added new subsections in §§ 2G2.2 and 2G2.4 which provide a two- to five-level enhancement based on the number of child pornography ''images'' involved in the offense. See §§ 2G2.2(b)(6) and 2G2.4(b)(5). The PROTECT Act did not, however, define what constitutes an ''image'' for purposes of applying these new ''image tables.'' The Commission seeks comment regarding whether a definition of ''image,'' or instructions for counting images, for purposes of applying these subsections, is necessary. If the Commission provides instructions, how should the Commission decide how to count images? For example, is a photograph of two minors engaged in sexually explicit conduct to be considered one image, or two images? How should videos, films, or AVI files be considered? For example, if a video includes numerous scenes, each of which portrays the same minor engaging in sexually explicit conduct with a different adult, is each scene with a different adult to be considered a separate image?

3. The Commission seeks comment regarding whether it should address a circuit conflict involving the application

of the specific offense characteristics in §§ 2G2.2 and 2G2.4 (effective April 30, 2003) for material portraying sadistic or masochistic conduct or other depictions of violence. Currently, the circuit courts are split on this issue, with three circuits finding that application of the enhancement requires proof that the defendant intended to possess or traffic material portraying sadistic or masochistic conduct, or other depictions of violence (see *United States* v. *Kimbrough,* 69 F.3d 723 (5th Cir. 1995); *United States* v. *Burnette,* 234 F.3d 1270 (6th Cir. 2000)(unpub.); *United States* v. *Tucker,* 136 F.3d 763 (11th Cir. 1998)), while the Seventh Circuit requires a strict liability standard (see *United States* v. *Richardson,* 238 F.3d 837 (7th Cir. 2001)). The Commission requests comment on whether it should resolve this circuit conflict. If so, how should the Commission handle this issue?

Further, the Commission seeks comment regarding whether it should provide a definition of sadistic or masochistic conduct or other depictions of violence for purposes of application of the specific offense characteristic. Circuit courts have struggled with whether material portraying sexual penetration of prepubescent minors is per se sadistic or violent; whether the enhancement requires that depictions contain material portraying bondage or restraints; whether sadistic or masochistic conduct requires purposefully degrading or humiliating conduct that causes mental, psychological, or emotional injury; or whether the conduct depicted must be painful, coercive, degrading, and abusive. See *United States* v. *Delmarle,* 99 F.3d 80 (2d Cir. 1996); *United States* v. *Kimbrough,* 69 F.3d 723 (5th Cir. 1995); *United States* v. *Turchen,* 187 F.3d 735 (7th Cir. 1999); *United States* v. *Parker,* 267 F.3d 839 (8th Cir. 2001); *United States* v. *Hall,* 312 F.3d 1250 (11th Cir. 2002). If the Commission provides a definition of these terms, what should that definition be?

Finally, some argue that material that depicts bestiality or excretory functions is just as harmful as material that depicts sadistic or masochistic conduct or other depictions of violence and should be treated accordingly. The Commission seeks comment regarding whether the enhancement for material portraying sadistic or masochistic conduct or other depictions of violence in §§ 2G2.2, 2G2.4, and 2G3.1 (as well as the proposed enhancement in § 2G2.1) should be expanded to include material portraying bestiality or excretory functions.

4. The Commission seeks comment regarding which guideline is the most appropriate for violations of 18 U.S.C. 2425, relating to use of interstate facilities to transport information about a minor. Section 2425 prohibits the use of interstate facilities to transmit the name, address, telephone number, social security number, or e-mail address of a minor, with the intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with that minor. Violations of this section carry a statutory maximum term of imprisonment of five years and are currently covered by § 2G1.1 (proposed § 2G1.3). Other offenses covered by § 2G1.1 carry a five year mandatory minimum term of imprisonment and substantially higher statutory maximums. Some practitioners claim that section 2425 offenses might be more like harassment or threatening communications offenses covered by § 2A6.1 (Threatening or Harassing Communications). Is § 2G1.1 (proposed § 2G1.3) or § 2A6.1 the more appropriate guideline for section 2425 offenses? If § 2G1.1 (proposed § 2G1.3) is not the most appropriate guideline, what guideline should be used to sentence violators of section 2425? Is there conduct specific to section 2425 offenses that necessitates the addition of any specific offense characteristic (*e.g.,* age, intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with a minor)?

5. The Commission seeks comment regarding whether the offense levels in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse), specifically, §§ 2A3.1, 2A3.2, and 2A3.3, 2A3.4, should be increased to maintain proportionality with increases proposed for the Chapter Two, Part G guidelines, in response to statutory penalty changes provided by the PROTECT Act. If so increased, what should be the appropriate offense levels? Are there additional specific offense characteristics, cross references, or departure considerations that should be added to these guidelines? Additionally, how should the Commission address the interaction between the pattern of activity enhancement at § 4B1.5 (Repeat and Dangerous Sex Offender Against Minor) and offenses sentenced under § 2A3.2. The PROTECT Act changed the definition of pattern of activity so that, instead of requiring the abuse of two minors on two separate occasions, a pattern of activity now requires two separate occasions of prohibited sexual conduct with only one minor. Therefore, under the new definition, repeat acts against one minor will lead to a five-level increase under § 4B1.5. Preliminary data suggest this enhancement will apply to the majority of defendants sentenced at § 2A3.2. Thus, should the Commission consider this enhancement when deciding whether to increase the base offense level at § 2A3.2?

6. The Commission requests comment regarding whether the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) and Chapter Two, Part G (Offenses Involving Commercial Sexual Acts, Sexual Exploitation of Minors, and Obscenity) should provide an enhancement if the offense involved incest. Some commentators have argued that offenses involving incest result in a violation of trust, making these offenses more egregious than offenses in which a defendant has care, custody, or control of the victim but is not a family member. If the Commission added this enhancement to the Chapter Two, Part A, Subpart 3 offenses, should the enhancement apply as an alternative or as an additional enhancement to the current two-level enhancement that applies ''if the victim was in the custody, care, or supervisory control of the defendant''? Furthermore, if the Commission added this enhancement, what relationships should be covered under the definition of incest?

Proposed Amendment 2: Effective Compliance Programs in Chapter Eight

Synopsis of Proposed Amendment: The proposed amendment is intended to provide greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law (''compliance programs''). The proposed amendment adds to Chapter Eight, Part B, a new guideline, § 8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies the purposes of an effective compliance program, sets forth seven minimum steps for such a program, and provides guidance for their implementation. This proposed amendment was developed by the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines empaneled by the Commission for the purpose of reviewing the general effectiveness of the guidelines for organizations, with particular emphasis on examining the criteria for an effective compliance program. The Advisory Group's review and analysis can be found in its report of October 7, 2003, to the Commission at *www.ussc.gov*.

Under subsection (g) of § 8C2.5 (Culpability Score), the existence of an effective compliance program is a

mitigating factor that reduces an organization's culpability score and ultimately its fine range. Also, the implementation of a compliance program may be a condition of probation for organizations under § 8D1.4(c) (Recommended Conditions of Probation—Organizations).

The proposed amendment incorporates the seven minimum steps for a compliance program, currently located in the commentary to § 8A1.2 (Application Instructions—Organizations) at Application Note 3(k), into a new guideline at § 8B2.1 in order to emphasize the importance of compliance programs and provide more prominent guidance on the attributes of such programs. The proposed amendment defines the obligations and purposes of such programs, adds more detail to the seven minimum requirements, and provides definitions throughout the associated commentary.

The proposed amendment expands the scope of the objective of a compliance program by defining the term ''violation of law'' more broadly than in the current guidelines, which refer only to violations of criminal law and prevention of criminal conduct. The proposed amendment expands the objective of a compliance program more broadly to include prevention and detection of ''violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.'' This language also replaces the prior reference to ''employees and agents'', relying instead on the legal standard of vicarious liability.

The proposed amendment retains the requirement that an organization exercise due diligence to prevent and detect violations of law, and adds at subsection (a) the requirement that an organization shall also ''otherwise promote an organizational culture that encourages a commitment to compliance with the law.'' This proposed addition is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations.

The proposed amendment retains the existing seven minimum steps of an effective compliance program but provides greater guidance regarding some of the requirements by adding definitions and clarifying terms at subsection (b). First, for the requirement of the ''establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct'', Application Note 1 defines ''compliance standards and procedures'' as ''standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.''

Second, for the requirement that ''specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance'', subsection (b)(2) defines the specific roles and reporting relationships of particular categories of high-level personnel with respect to compliance programs. In particular, the proposed amendment provides that the ''organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.'' The accompanying commentary at Application Note 1 defines ''organizational leadership'' as ''(A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel'' and retains existing definitions for the terms ''high-level personnel of the organization'' and ''substantial authority personnel''.

The proposed amendment also provides at subsection (b)(2) that the ''organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.'' Application Note 1 defines ''governing authority'' as ''(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.'' Subsection (b)(2) retains the existing requirement that ''specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility for the program,'' and specifies that their responsibility is to ''ensure the implementation and effectiveness of the program.'' The proposed amendment also requires that the individual responsible for compliance be given adequate resources and authority to carry out such responsibility, and provides that such individual shall report directly to the governing authority.

Third, the proposed amendment at subsection (b)(3) replaces the current requirement that substantial authority personnel be screened for their ''propensity to engage in violations of law'' with a requirement that the organization ''use reasonable efforts and due diligence not to include within the substantial authority personnel any individual whom the organization knew, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective program''. For purposes of this subsection only, the proposed amendment defines the term ''violations of law'' as ''any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).'' This is meant to ensure that an individual is screened on the basis of his or her culpability and not on the basis of an organization's vicarious liability. The corresponding commentary enumerates factors to be considered in this determination, among them, the recency of the individual's violations of law and other misconduct, the relatedness of the individual's violations of law and other misconduct to his or her responsibilities, and whether the individual has engaged in a pattern of such violations of law and other misconduct.

Fourth, the proposed amendment at subsection (b)(4) makes compliance training a requirement, and specifically extends the training requirement to the upper levels of an organization as well as to the organization's employees and agents, as appropriate.

Fifth, the proposed amendment at subsection (b)(5) expands the existing criterion for using auditing and monitoring systems by expressly providing that such systems are to be designed to detect violations of law. The proposed amendment adds the specific requirement that there be periodic evaluation of the effectiveness of its compliance program. The proposed amendment replaces the existing reference to ''reporting systems without fear of retribution'' with the more specific requirement for the implementation of ''mechanisms to allow for anonymous reporting.'' The proposed amendment expands the stated focus of internal reporting from ''the criminal conduct * * * of others'' to using internal systems for both ''seeking guidance and reporting potential or actual violations of law.''

Sixth, the proposed amendment at subsection (b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through ''appropriate incentives to perform in accordance with a [compliance] program.'' Finally, at subsection (b)(7) the amendment retains the existing requirement that an organization take reasonable steps to respond to and prevent further similar violations of law.

In addition to the seven criteria for a compliance program, the proposed

amendment expressly provides at subsection (c) that ongoing risk assessment is an essential component of the design, implementation, and modification of an effective program. The proposed amendment includes at Application Note 5(A) certain requirements in conjunction with the performance of risk assessments, namely, that organizations assess the nature and seriousness of potential violations of law, the likelihood that certain violations of law may occur because of the nature of the organization's business, and the prior history of the organization. Corresponding commentary specifies that organizations must prioritize the actions taken to implement an effective compliance program and modify such actions in light of the risks identified in the risk assessment.

The proposed amendment also provides additional guidance with respect to the implementation of compliance programs by small organizations by making more frequent references to small organizations throughout the commentary and providing illustrations (*e.g.*, § 8B2.1, Application Note 2(B)(ii)).

This proposed amendment also makes two changes to the factors that affect the culpability score of an organization under § 8C2.5 (Culpability Score). First, rather than precluding an organization from obtaining the compliance program credit if certain categories of high-level personnel are involved in the offense of conviction, the proposed subsection (f) establishes that ''an offense by an individual within high-level personnel of the organization results in a rebuttable presumption'' that effective prevention and detections program did not exist.

Under the existing guidelines, an organization cannot receive the three-point reduction in its culpability score under § 8C2.5(f) if any one of three categories of individuals participated in, condoned, or was willfully ignorant of the offense: (1) An individual within high-level personnel of the organization; (2) a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed; or (3) an individual responsible for the administration or enforcement of a compliance program. The existing guidelines also provide for a rebuttable presumption that an organization did not have an effective compliance program if an individual within substantial authority personnel participated in an offense. The proposed amendment provides for a rebuttable presumption that the organization did not have an effective compliance program where high-level personnel of the organization participated in, condoned, or were wilfully ignorant of the offense. This modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under § 8C2.5(f).

Second, the proposed amendment addresses concerns about the relationship between obtaining credit under subsection (g) of § 8C2.5 and waiving the attorney-client privilege and the work product protection doctrine. Pursuant to § 8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it ''fully cooperated in the investigation'' of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and § 8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorney's Offices (all of which are described at Part V of the Advisory Group Report of October 17, 2003, located at *www.ussc.gov*). The commentary in the proposed amendment addresses some of these concerns by providing that waiver of the attorney-client privilege and of work product protections ''is not a prerequisite to a reduction in culpability score under subsection (g)'' but in some circumstances ''may be required in order to satisfy the requirements of cooperation.''

Proposed Amendment:

Chapter Eight is amended in the Introductory Commentary by striking ''criminal conduct'' each place it appears and inserting ''violations of law''.

Section 8A1.2(a) is amended by inserting '', Subpart 1'' after ''Part B''.

Section 8A1.2(b)(2)(D) is amended by adding at the end the following: ''To determine whether the organization had an effective program to prevent and detect violations of law for purposes of § 8C2.5(f), apply § 8B2.1 (Effective Program to Prevent and Detect Violations of Law).''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(c) in the second sentence by inserting ''of the organization'' after ''high-level personnel''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended by striking Note 3(k) in its entirety.

Chapter Eight, Part B is amended by striking the heading and inserting the following:

''PART B—REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF LAW

1. REMEDYING HARM FROM CRIMINAL CONDUCT'';

and by adding at the end the following new subpart:

''2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§ 8B2.1. Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—

(1) exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.

(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing

authority regarding the implementation and effectiveness of the program to prevent and detect violations of law.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.

(4)(A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individual's respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law;

(B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.

(7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.

(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Compliance standards and procedures' means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.

'Governing authority' means the (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

'Organizational leadership' means (A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms 'high-level personnel of the organization' and 'substantial authority personnel' have the meaning given those terms in the Commentary to § 8A1.2 (Application Instructions—Organizations). The term 'high-level personnel of a unit of the organization' has the meaning given that term in the Commentary to § 8C2.5 (Culpability Score).

'Violations of law' means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable, or in the case of Application Note 4(A), for which the individual would be liable.

2. Factors to Consider in Meeting Requirements of Subsections (a) and (b).—

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of law through relatively informal means. For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily ''walk-arounds'' or continuous observation while managing the business. In appropriate circumstances, such reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a much larger organization, would only be demonstrated through more formally planned and implemented systems.

(C) Applicable Government Regulations.—The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an ''effective program to prevent and detect violations of law'' within the meaning of this guideline.

3. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's compliance efforts.

(B) High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization who are assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must

be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report to the governing authority, or to an appropriate subgroup of the governing authority, the effectiveness and operation of the program to detect and prevent violations of law.

In addition to receiving reports from the foregoing individual(s), individual(s) with day-to-day operational responsibility for the program should periodically provide to the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the program to detect and prevent violations of law.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2); to perform their assigned duties consistent with the exercise of due diligence; and to promote an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. Application of Subsection (b)(3).—

(A) Violations of Law.—Notwithstanding Application Note 1, ''violations of law,'' for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3, subdivision (C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual's violations of law and other misconduct (*i.e.*, other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Periodically, prioritizing as most likely to occur and most serious, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A).

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter 'are sufficient to deter and punish organizational criminal misconduct.'

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 2 by striking ''(Larceny, Embezzlement, and Other Forms of Theft)'' and inserting (Theft, Property Destruction, and Fraud)''.

The Commentary to § 8C2.4 captioned ''Background'' is amended in the fourth sentence by striking ''criminal conduct'' each place it appears and inserting ''violations of law''.

Section 8C2.5 is amended by striking subsection (f) in its entirety and inserting the following:

''(f) Effective Program to Prevent and Detect Violations of Law

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in § 8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points.

(2) This section does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) Participation in, condoning of, or willful ignorance of, an offense by an individual within high-level personnel of the organization results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. Definitions.—For purposes of this guideline, 'condoned,' 'prior criminal adjudication,' 'similar misconduct,' 'substantial authority personnel,' and 'willfully ignorant of the offense' have the meaning given those terms in the Commentary to § 8A1.2 (Application Instructions—Organizations).''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 3 in the last sentence by striking ''entire organization'' and inserting ''organization in its entirety''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 10 by striking ''The second proviso in subsection (f)'' and inserting ''Subsection (f)(2)''; and by striking ''this proviso'' and inserting ''subsection (f)(2)''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 12 by adding at the end the following:

''If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation.''.

Section 8C2.8(a) is amended in subdivision (9) by striking ''and''; in subdivision (10) by striking the period and inserting ''; and''; and by adding at the end the following:

''(11) whether the organization failed to have, at the time of the instant offense, an effective program to prevent and detect violations of law within the meaning of § 8B2.1 (Effective Program to Prevent and Detect Violations of Law).''.

The Commentary to § 8C2.8 captioned ''Application Notes'' is amended in Note 4 in the first sentence by inserting ''within high-level personnel of'' after ''organization or''.

The Commentary to § 8C4.1 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; in Note 1 by inserting ''Intent of Provision.—'' before ''Departure'' [; and by adding at the end the following:

''2. Waiver of Certain Privileges and Protections.—If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure.'']

Section 8C4.10 is amended by adding at the end the following paragraph:

''Similarly, if, at the time of the instant offense, the organization was required by law to have an effective program to prevent and detect violations of law, but the organization did not have such a program, an upward departure may be warranted.''.

Section 8D1.1(a) is amended by striking subdivision (3) in its entirety and inserting the following:

''(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required by law to have an effective program to prevent and detect violations of law; and (B) the organization does not have such a program;''.

Section 8D1.4(b)(4) is amended by striking ''(1)'' and inserting ''(A)''; by striking ''(2)'' and inserting ''(B)''; and by striking ''(3)'' and inserting ''(C)''.

Section 8D1.4(c) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) The organization shall develop and submit to the court an effective program to prevent and detect violations of law, consistent with § 8B2.1 (Effective Program to Prevent and Detect Violations of Law). The organization shall include in its submission a schedule for implementation of the program.'';

and in subdivisions (2), (3), and (4) by striking ''to prevent and detect violations of law'' each place it appears and inserting ''referred to in subdivision (1)''.

The Commentary to § 8D1.4 captioned ''Application Notes'' by striking ''Notes'' and inserting ''Note''; and in the third sentence by striking '', provided'' and inserting ''as long as''; by inserting ''§ 8B2.1 (Effective Program to Prevent and Detect Violations of Law), and'' after ''with''; and by striking ''or regulatory requirement'' and inserting ''and regulatory requirements''.

Chapter Eight, Part D, Subpart One is amended by striking § 8D1.5 and accompanying commentary.

Chapter Eight is amended by adding at the end the following:

''PART F—VIOLATIONS OF PROBATION—ORGANIZATIONS

§ 8F1.1. Violations of Conditions of Probation—Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§ 8D1.3 (Conditions of Probation—Organizations) and 8D1.4 (Recommended Conditions of Probation—Organizations).''.

Issues for Comment:

1. Subsection (f) of § 8C2.5 (Culpability Score) currently prohibits receipt of the three-point reduction in the culpability score for an effective program to prevent and detect violations of law if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The proposed amendment retains that prohibition. The Commission requests comment regarding whether the prohibition should be eliminated so that an organization could be considered for the reduction under § 8C2.5(f) regardless of whether the organization unreasonably delayed reporting the offense after its detection. Elimination of this prohibition may be appropriate in light of the fact that § 8C2.5(g) provides for a five-point decrease for cooperation with authorities, including reporting the offense to authorities within a reasonable time.

2. Subsection (f) of § 8C2.5 also currently precludes receipt of the three-point reduction for an effective program to prevent and detect violations of law if certain high-level individuals within the organization participated in, condoned, or were willfully ignorant of the offense. The proposed amendment changes this automatic preclusion to a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law under such circumstances. The Commission requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?

3. The reduction in the culpability score under § 8C2.5(f) for an effective

program to prevent and detect violations of law currently is a three-point reduction. Should the extent of that reduction be increased to four points given the heightened requirements for an effective program to prevent and detect violations of law under the proposed amendment?

4. Generally, are there factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly § 8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs?

Proposed Amendment 3: Body Armor

Synopsis of Proposed Amendment: This proposed amendment implements the new offense at 18 U.S.C. 931, which was created by section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273. Section 931 of title 18, United States Code, prohibits individuals with a prior state or federal felony conviction for a crime of violence from purchasing, owning, or possessing body armor. The statutory maximum term of imprisonment for 18 U.S.C. 931 is three years.

The proposed amendment provides a new guideline at § 2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons) because there is no other guideline that covers conduct sufficiently analogous to a violation of 18 U.S.C. 931. Although § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) covers felons in possession of a firearm, the alternative base offense levels and specific offense characteristics of that guideline address offenses involving the more serious conduct of weapon possession or trafficking. The proposed new guideline provides a base offense level of [8][10][12].

The proposed amendment also (A) provides a specific offense characteristic for cases in which the body armor was possessed in connection with [a ''crime of violence'' or ''drug trafficking crime''][another offense]; and (B) adds an application note to § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence) that addresses the interaction between the two guidelines.

Proposed Amendment: Chapter Two, Part K, Subpart 2, is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2K2.6 Possessing, Purchasing, or Owning Body Armor by Violent Felons

(a) Base Offense Level: [8][10][2].

(b) Specific Offense Characteristic

(1) If the defendant used the body armor in connection with [a crime of violence or drug trafficking crime] [another offense], increase by [4] levels.

Commentary

Statutory Provision: 18 U.S.C. 931.

Application Notes:

1. Definitions.—For purposes of this guideline:

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

'Drug trafficking crime' has the meaning given that term in 18 U.S.C. 924(c)(2).]

'Offense' has the meaning given that term in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Subsection (b)(1).—Consistent with § 1B1.3 (Relevant Conduct), the term ''defendant'', for purposes of subdivision (b)(1), 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.''.

The Commentary to § 3B1.5 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. If the defendant is convicted of 18 U.S.C. 931, do not apply this enhancement with respect to that offense of conviction. However, if, in addition to the count of conviction under 18 U.S.C. 931, the defendant is convicted of a crime of violence or a drug trafficking crime and the body armor was used in connection with that offense, this enhancement may be applied with respect to that crime of violence or drug trafficking crime.''.

Proposed Amendment 4: Public Corruption

Synopsis of Proposed Amendment: This proposed amendment addresses offenses involving public corruption. The proposed amendment consolidates §§ 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) and 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions). Also, the proposed amendment consolidates §§ 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) and 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper). This proposed amendment aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense. While the proposed amendment generally provides increased punishment for all bribery and gratuity offenses, it also provides enhancements in both consolidated guidelines to address some of the aggravating factors that are involved in public corruption cases.

Base Offense Level Increases

The proposed amendment increases the base offense level for all bribery and gratuity cases. Currently, bribery offenses sentenced under § 2C1.1 or § 2C1.7 begin with a base offense level of level 10. The proposed consolidated guideline at § 2C1.1 would increase the base offense level for bribery cases to level [12]. With respect to gratuity offenses, § 2C1.2 and § 2C1.6 currently have a base offense level of level 7. The proposed consolidated guideline at § 2C1.2 increases the base offense level to level [9]. The proposed increases in the base offense levels for bribery and gratuity cases will ensure continued proportionality between these cases and those sentenced under §§ 2B1.1 (Theft, Fraud, and Property Destruction) and 2J1.2 (Obstruction of Justice).

18 U.S.C. §§ 1341–1343 Offenses

Under a consolidated § 2C1.1, 18 U.S.C. 1341–1343 offenses, which are currently sentenced under § 2C1.7, would be referenced in Appendix A (Statutory Index) to § 2C1.1 provided that the offense was a fraud involving the deprivation of the intangible right to honest services, as set forth in the proposed parenthetical in the Commentary captioned ''Statutory Provisions''. The proposed amendment also builds on Application Note 12 in § 2B1.1 (Theft, Property Destruction, and Fraud) which deals with application of the cross references in § 2B1.1(c). The note currently explains that in cases in which broad fraud statutes are used primarily for jurisdictional purposes, the offense may be covered more appropriately by another guideline. The proposed amendment adds fraud involving the deprivation of the intangible right to honest services as an example of an offense more aptly covered by § 2C1.1. The parenthetical and the expansion of Application Note 14 address concerns expressed by the Public Integrity Section of Department of Justice that 18 U.S.C. 1341–1343 offenses be sentenced under § 2C1.1 and not under the fraud guideline.

''Loss'' and ''Public Official'' Enhancements

Under the current structure of § 2C1.1, an enhancement exists that provides for the application of the greater of either (A) the number of offense levels from the fraud/theft loss table corresponding to the value of the payment, the benefit received or to be received in return for the payment, and the loss to the government from the offense, whichever is greatest; and (B) 8 levels if the offense involved a payment to influence an elected official or an official holding a high-level decision-making or sensitive position. Similar enhancements exist in §§ 2C1.2 and 2C1.7. The proposed amendment makes two major changes to this enhancement in both proposed consolidated guidelines. First, it makes the enhancement cumulative so that the court would apply the appropriate number of levels from the loss table and also the revised public official enhancements, if applicable. Second, the proposed amendment proposes two new enhancements that focus on public officials. The first new enhancement modifies the current ''high-level or sensitive position'' enhancement. This enhancement provides [two] [four] levels, and in §§ 2C1.1 and 2C1.2, a minimum offense level of 18 and 15, respectively, if the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust. Although the concept is the same as the current enhancement, the proposed amendment draws on case law interpreting the current enhancement and on the notion of ''public trust'' from § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to give more guidance with respect to the type of case to which the enhancement applies. The proposed minimum offense level of level 18 in § 2C1.1 and of level 15 in § 2C1.2 ensures that an offense involving bribery of a higher level public official receives at least as high a sentence as it currently receives (*i.e.*, that the new construct does not result in lower sentences). This enhancement will apply regardless of whether the defendant was the giver or the recipient of the bribe.

The corresponding application note also explains that public officials in high positions of public trust are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and also by their substantial influence over the decision-making process. The note also includes jurors in the scope of the enhancement's application in order to be consistent with case law regarding the current enhancement and with the scope of 18 U.S.C. 201, the primary bribery and gratuity statute.

The second new enhancement pertaining to public officials provides a [two] [four]-level increase if the defendant was a public official at the time of the offense. Commission data indicate that the defendant was a public official in approximately half of all public corruption cases. This enhancement recognizes that although all bribery involving public officials corrupts the public trust in government, it is the public official who violates that public trust. Currently, application notes in §§ 2C1.1, 2C1.2, 2C1.6, and 2C1.7 instruct the court not to apply the abuse of position of trust enhancement in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), suggesting that in all cases sentenced under these guidelines, there is some element of abuse of public trust. The proposed enhancement would distinguish among cases in which there is an abuse of a position of public trust on the part of the public official.

Enhancement for Obtaining Entry into United States and for Obtaining Certain Documents

The proposed amendment also provides a new [two] [four]-level enhancement if the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document. The definition of ''government issued identification document'' is derived from the definition of ''identification document'' in 18 U.S.C. 1028(d)(3). This enhancement addresses cases in which a small payment may be given to obtain such a document, but the harm that results from an individual obtaining an identification or immigration document cannot be quantified by use of the loss table. It also addresses cases, as identified by the Commission, in which a third party steers an individual to the public official in order for that individual to obtain, through bribery or a gratuity, such a document. The enhancement also recognizes the increased risk of domestic terrorism from foreign nationals who illegally enter or remain in the United States through the use of illegally obtained identification documents. Similarly, the enhancement addresses concerns identified by the Department of Homeland Security regarding bribery of customs inspectors who have the discretion to permit individuals, vehicles, and cargo into the United States without inspection.

Miscellaneous Amendments

The proposed amendment provides a definition of ''public official'' that builds on the current definition provided in § 2C1.7. It modifies this definition by explicitly incorporating the notion that public officials hold positions of public trust. This definition is derived from relevant case law and statutory provisions, as well as § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). One difference to note regarding the definition of ''public official'' in §§ 2C1.1 and 2C1.2 is that the definition in § 2C1.2 includes former public officials in order to be consistent with the scope of the primary gratuity statute, 18 U.S.C. 201(c)(1).

The proposed amendment also (A) clarifies that an unlawful payment may be anything of value, not necessarily a monetary payment; (B) adds to § 2C1.1 an application note currently found in § 2C1.2 regarding consideration of whether the public official was the instigator of the offense as an appropriate factor to determine the placement of the sentence within the applicable sentencing guideline range; and (C) updates Appendix A (Statutory Index) by deleting references to § 2C1.4, which was consolidated with § 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation), effective November 1, 2001.

Several issues for comment follow the proposed amendment.

Proposed Amendment:

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 14 by adding at the end the following:

''For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials).''.

Section 2C1.1 is amended in the heading by adding at the end ''; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials''.

Section 2C1.1(a) is amended by striking ''10'' and inserting ''[12]''.

Section 2C1.1(b)(1) is amended by striking ''bribe or extortion'' and inserting ''incident''.

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

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

Section 2C1.1(b) is amended by adding at the end the following:

''(3) If the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust, increase by [2][4] levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official at the time of the offense, increase by [2][4] levels.

(5) If the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document, increase by [2][4] levels.''.

The Commentary to § 2C1.1 captioned ''Statutory Provisions'' is amended by inserting after ''872,'' the following:

''1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services),''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

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

['Bribe' means anything of value given or accepted with the corrupt intent to influence, or to be influenced in, an official act. A bribe involves an agreed upon quid pro quo.]

'Government issued identification document' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

'Official act' has the meaning given that term in 18 U.S.C. 201(a)(3).

'Public official,' means (A) an officer or employee in, or selected to be in, a position of public trust in a federal, state, or local government department or government agency; or (B) a juror. ''Public official'' also includes a government contractor if such contractor is in a position of public trust with respect to a government department or government agency.

'Unlawful payment' means anything of value. An 'unlawful payment' need not be monetary.''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Application of Subsection (b)(2).—'' before '''Loss'''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended by striking ''5. Where the court finds'' and all that follows through ''(Departures).''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively; by inserting after Note 2 the following:

''3. Application of Subsection (b)(3).—Subsection (b)(3) applies in cases involving federal, state, or local public officials who hold high positions of public trust. Such officials are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and by their substantial influence over the decision-making process. Examples of public officials in high positions of public trust include (A) a legislator; (B) a judge or magistrate; (C) a prosecuting attorney; (D) an agency administrator; and (E) a [supervisory] law enforcement officer. Certain individuals may be considered, for purposes of subsection (b)(3), to be a public official who holds a high position of public trust because of the importance of the process over which the individual has substantial influence, as for example, a juror.

The degree of public trust involved in a high position of public trust is greater than that required for application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Accordingly, the fact that a particular public official has managerial discretion does not, in and of itself, determine whether the public official holds a high position of public trust.'';

and in Note 4, as redesignated by this amendment, by inserting ''Inapplicability of § 3B1.3.—'' before ''Do not apply''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 5, as redesignated by this amendment, by inserting ''Upward Departure Provisions.—'' before ''In some cases''; and by adding at the end the following new paragraph:

''In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See § 5K2.7 (Disruption of Governmental Function).''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 6 by inserting ''Related Payments.—'' before ''Subsection (b)(1)''; by striking ''either bribery or extortion'' in the first sentence and inserting ''bribery, extortion under color of official right, or fraud involving the deprivation of the intangible right to honest services''; by striking ''of bribery or extortion'' in the second sentence; by striking ''single bribe or extortion'' in the second sentence and inserting ''single incident''; and by adding at the end the following new paragraph:

''In a case involving more than one incident of bribery, extortion, or fraud involving the deprivation of the intangible right to honest services, the applicable amounts under subsection (b)(2) (*i.e.*, the greatest of the value of the unlawful payment, the benefit received or to be received, or the loss to the government) are determined separately for each incident and then added together.''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 7 by inserting ''Application of Subsection (c).—'' before ''For the purposes''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. Determining Sentence Within Guideline Range.—In some cases, the public official is the instigator of the offense. In others, a private citizen may be the instigator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.''.

The Commentary to § 2C1.1 captioned ''Background'' is amended by inserting before the paragraph that begins ''Offenses involving attempted'' the following new paragraph:

''Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of

government officials under 18 U.S.C. 1341–1343. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.''.

Section 2C1.2(a) is amended by striking ''7'' and inserting ''[9]''.

Section 2C1.2 is amended by striking subsections (b)(1) and (b)(2) in their entirety and inserting the following:

''(b) (1) If the offense involved more than one incident, increase by 2 levels.

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

(3) If the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust, increase by [2][4] levels. If the resulting offense level is less than level 15, increase to level 15.

(4) If the defendant was a public official at the time of the offense, increase by [2][4] levels.

(5) If the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document, increase by [2][4] levels.''.

The Commentary to § 2C1.2 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' after ''18 U.S.C. § ''; and by inserting '', 212–214, 217'' after ''201(c)(1)''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

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

'Government issued identification document' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

['Gratuity' means anything of value given, or accepted for or because of an official act performed or to be performed.]

'Official act' has the meaning given that term in 18 U.S.C. 201(a)(3).

'Public official,' means (A) an officer or employee in, formerly in, or selected to be in, a position of public trust in a federal, state, or local government department or government agency; or (B) a juror. 'Public official' also includes a government contractor if such contractor is in a position of public trust with respect to a government department or government agency.

'Unlawful payment' means anything of value. An 'unlawful payment' need not be monetary.''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended by redesignating Notes 2, 3, and 4 as Notes 3, 4, and 5, respectively; and by inserting after Note 1 the following new Note 2:

''2. Application of Subsection (b)(3).—Subsection (b)(3) applies in cases involving federal, state, or local public officials who hold high positions of public trust. Such officials are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and by their substantial influence over the decision-making process. Examples of public officials in high positions of public trust include (A) a legislator; (B) a judge or magistrate; (C) a prosecuting attorney; (D) an agency administrator; and (E) a [supervisory] law enforcement officer. Certain individuals may be considered, for purposes of subsection (b)(3), to be a public official who holds a high position of public trust because of the importance of the process over which the individual has substantial influence, as for example, a juror.

The degree of public trust involved in a high position of public trust is greater than that required for application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Accordingly, the fact that a particular public official has managerial discretion does not, in and of itself, determine whether the public official holds a high position of public trust.''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by inserting ''Inapplicability of § 3B1.3.—'' before ''Do not''; in Note 4, as redesignated by this amendment, by inserting ''Determining Sentence Within Guideline Range.—'' before ''In some''; by striking ''may be the initiator'' and inserting ''may be the instigator''; and in Note 5, as redesignated by this amendment, by inserting ''Related Payments.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident.'' before ''Related payments that,''.

The Commentary to § 2C1.2 captioned ''Background'' is amended by striking the second and third sentences and inserting the following:

''It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.''.

Chapter Two, Part C, is amended by striking §§ 2C1.6, 2C1.7, and all accompanying commentary.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 209 by striking ''2C1.4'' and inserting ''2C1.3'';

in the line referenced to 18 U.S.C. 212 by striking ''2C1.6'' and inserting ''2C1.2'';

in the line referenced to 18 U.S.C. 213 by striking ''2C1.6'' and inserting ''2C1.2'';

in the line referenced to 18 U.S.C. 214 by striking ''2C1.6'' and inserting ''2C1.2'';

in the line referenced to 18 U.S.C. 217 by striking ''2C1.6'' and inserting ''2C1.2'';

in the line referenced to 18 U.S.C. 371 by striking ''2C1.7,'';

in the line referenced to 18 U.S.C. 1341 by striking ''2C1.7'' and inserting ''2C1.1'';

in the line referenced to 18 U.S.C. 1342 by striking ''2C1.7'' and inserting ''2C1.1'';

in the line referenced to 18 U.S.C. 1343 by striking ''2C1.7'' and inserting ''2C1.1'';

in the line referenced to 18 U.S.C. 1909 by striking '', 2C1.4''; and

in the line referenced to 41 U.S.C. 423(e) by striking '', 2C1.7''.

Issues for Comment:

1. The Commission requests public comment regarding the proposed consolidation of §§ 2C1.1 and 2C1.7, and §§ 2C1.2 and 2C1.6. Should the Commission instead consolidate all four guidelines into one comprehensive guideline that would apply to bribery, gratuity, extortion under color of official right, and fraud involving the deprivation of the intangible right to honest services? For example, such a guideline could distinguish between bribery and gratuity offenses by alternative base offense levels in a structure that would be consistent with § 2E5.1 (Offering, Accepting or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare

or Pension Plan). Should a consolidated § 2C1.1 or § 2C1.2 specifically include conspiracy and attempts? Alternatively, should the Commission maintain the current structure of Chapter Two, Part C (Offenses Involving Public Officials) and not consolidate any of the guidelines in that part?

2. The Commission requests comment regarding whether it should eliminate any or all of the cross references in § 2C1.1. For example, the Commission has received input that the cross reference in subsection (c)(2) is confusing and may result in circular application of multiple cross references. This cross reference instructs the court to apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice) if the offense was committed to conceal, or obstruct justice in respect to, another offense. If § 2J1.2 is applied, for example, and the offense involved obstructing the investigation or prosecution of an offense, then the cross reference in § 2J1.2(c)(1) instructs the court to apply § 2X3.1. For these reasons, should the Commission eliminate the cross reference in § 2C1.1(c)(2)?

3. The proposed amendment adds to § 2C1.1 an application note indicating that whether the initiator of the offense is the public official or a private citizen is relevant in determining the placement of the sentence within the applicable guideline range. This note currently exists in § 2C1.2. The Commission requests comment regarding whether solicitation of a bribe or gratuity is a more serious offense than receipt of a bribe or gratuity. If so, should the Commission provide an enhancement in § 2C1.1 for the solicitation of a bribe and in § 2C1.2 for the solicitation of a gratuity? If so, what would be an appropriate offense level increase for such an enhancement?

4. The proposed amendment provides three new enhancements in both consolidated guidelines: (A) A two-level increase for offenses that involve an unlawful payment (i) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (ii) to obtain a government issued identification document; or (iii) to obtain a United States passport, or a document relating to naturalization, citizenship, legal entry, or legal resident status; (B) a [two][four]-level increase for offenses involving public officials in high positions of public trust; and (C) a [two][four]-level increase if the defendant was a public official at the time of the offense. Are there other enhancements that the Commission should consider adding to the proposed consolidated guidelines, and if so, what are those enhancements? For example, should the Commission provide a specific offense characteristic for bribery, extortion, and honest services offenses that affect the integrity of the election process? With respect to the proposed enhancement for a public official in a high position of public trust, are there additional categories of public officials that the Commission should include within the scope of this enhancement? As an alternative to the proposed enhancement, should the Commission provide a two part enhancement that provides for different offense level increases based on the degree of public trust held by the public official involved in the offense? For example, should the Commission provide a two-level increase if the offense involved an unlawful payment for the purpose of influencing a public official holding a supervisory or managerial position, and a four-level enhancement if the offense involved an unlawful payment for the purposes of influencing a public official holding a high-level decision making or sensitive position? If so, what distinguishes one category from the other? Should any such enhancement, or any other proposed enhancement, provide for a minimum offense level and if so, what would be an appropriate minimum offense level?

5. According to Commission data, the enhancement for multiple incidents applies in approximately 64% of all § 2C1.1 cases and in approximately 69% of all § 2C1.2 cases. The Commission requests comment regarding whether the two levels from this enhancement should be incorporated into the base offense levels in §§ 2C1.1 and 2C1.2 to increase the proposed base offense level in those two guidelines an additional two levels.

6. The Commission requests comment regarding whether, in light of the proposed amendments to Chapter Two, Part C, it should amend other guidelines pertaining to bribery, gratuity, and extortion, and other similar offenses. For example, should the Commission increase the base offense levels for bribery and gratuity offenses in § 2E5.1 in order to maintain consistent and proportionate sentencing with respect to §§ 2C1.1 and 2C1.2? Should the Commission consider making any amendments to § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), or § 2B3.3 (Blackmail and Similar Forms of Extortion)?

Proposed Amendment 5: Drugs

Synopsis of Proposed Amendment: This proposed amendment makes a number of amendments to §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and Appendix A (Statutory Index).

First, the proposed amendment addresses section 608 of the PROTECT Act, Public Law 108–21, by increasing the offense levels for gamma hydroxybutyric acid (''GHB''), a schedule I depressant, and gamma-butyrolactone (''GBL''), a precursor for GHB. Currently, GHB is sentenced with all other schedule I or II depressants (*i.e.*, 1 unit = 1 gram of marihuana). The proposed amendment provides two options for increasing the penalties for GHB in the Drug Equivalency Tables of Application Note 10 of § 2D1.1. The effect of Option One is that a five year term of imprisonment would be triggered by 3.785 liters (equivalent to one gallon) of GHB. The effect of Option Two is that a five year term of imprisonment would be triggered by 18.925 liters (equivalent to five gallons) of GHB. The proposed amendment provides two corresponding quantity options for increasing the penalties for GBL in § 2D1.11.

Second, the proposed amendment adds to Application Note 5 of § 2D1.1 a reference to controlled substance analogues. The note currently states that ''[a]ny reference to a particular controlled substance in these guideline includes all salts, isomers, and all salts of isomers.'' The proposed amendment modifies the rule specifically to include that any reference to a particular controlled substance also includes any analogue of that controlled substance, unless otherwise provided (*e.g.*, the Drug Quantity Table currently references fentanyl analogue).

Third, the proposed amendment corrects a technical error in the Drug Quantity Table of § 2D1.1 with respect to schedule III substances. The maximum base offense level for schedule III substances is level 20 (see § 2D1.1(c)(10)), but there is no corresponding language in the Drug Quantity Table to indicate that level 20 is the maximum base offense level for these substances. The amendment corrects this error.

Fourth, the proposed amendment updates the statutory references in § 2D1.11(b)(2) and accompanying

commentary to conform to statutory redesignations. Section 2D1.11(b)(2) currently provides a three-level reduction if the defendant was convicted of violating 21 U.S.C. 841(d)(2), (g)(1), or 960(d)(2), unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully. Those statutory references should be 21 U.S.C. 841(c)(2), (f)(1), or 960(d)(2) to conform to statutory redesignations. The proposed amendment also expands application of § 2D1.11(b)(2) to include 21 U.S.C. 960(d)(3) and (d)(4) among the statutes of conviction for which the three-level reduction at subsection (b)(2) is available. Currently, the reduction applies in cases in which the defendant (convicted under 21 U.S.C. 841(c)(2), (f)(1), or 960(d)(2), as properly redesignated) did not have knowledge or actual belief that the listed chemical would be used to manufacture a controlled substance. Section 841(c)(2) of title 21, United States Code, requires a finding of either knowledge or a reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance. Sections 960(d)(3) and (d)(4) of title 21, United States Code, similarly require a finding that a person who imports, exports, or serves as a broker for, a listed chemical knows or has a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. Appendix A (Statutory Index) currently references 21 U.S.C. 960(d)(3) and (d)(4) to § 2D1.11, but neither statute is included for purposes of the reduction. Given that the reduction applies in 21 U.S.C. 841(c)(2) cases in which the defendant had a reasonable cause to believe, but not knowledge or actual belief, that the listed chemical would be used to manufacture a controlled substance, and the mens rea in 21 U.S.C. 841(c)(2) is the same as in 21 U.S.C. 960(d)(3) and (d)(4), the proposed amendment adds 21 U.S.C. 960(d)(3) and (d)(4) to 2D1.11(b)(2).

Fifth, the proposed amendment adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table in § 2D1.11(e). Both substances are List I chemicals used in the production of methamphetamine and, according to the DEA, are direct substitutes for red phosphorus. The Commission amended § 2D1.11(e) last amendment cycle to include red phosphorus but because of **Federal Register** notice issues was unable at that time to include white phosphorus and hypophosphorous acid.

Sixth, the proposed amendment also modifies Appendix A (Statutory Index) by deleting the reference to 21 U.S.C. 957, which is not a substantive criminal offense but rather a registration provision for which violations are prosecuted under 21 U.S.C. 960(a) or (b) (for controlled substances) or section 960(d)(6) (for listed chemicals).

Finally, four issues for comment follow the proposed amendment regarding (1) offenses involving anhydrous ammonia; (2) an enhancement for distribution of controlled substances and other illegal substances over the Internet; (3) drug facilitated sexual assault; and (4) a circuit conflict pertaining to Application Note 12 of § 2D1.1, which was most recently noted in *United States* v. *Smack*, _F.3d _, 2003 WL 22419914 (3rd Cir., October 24, 2003).

Proposed Amendment:

Section 2D1.1(c) is amended in subdivision (10) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following:

''40,000 or more units of Schedule III substances;'';

in subdivision (11) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following:

''At least 20,000 but less than 40,000 units of Schedule III substances;''

in subdivision (12) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following:

''At least 10,000 but less than 20,000 units of Schedule III substances;'';

in subdivision (13) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following:

''At least 5,000 but less than 10,000 units of Schedule III substances;'';

in subdivision (14) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following:

''At least 2,500 but less than 5,000 units of Schedule III substances;'';

in subdivision (15) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following:

''At least 1,000 but less than 2,500 units of Schedule III substances;'';

in subdivision (16) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following:

''At least 250 but less than 1,000 units of Schedule III substances;'';

and in subdivision (17) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following:

''Less than 250 units of Schedule III substances;''.

Section 2D1.1 is amended in the subdivision captioned ''*Notes to the Drug Quantity Table'' in Note (F) in the first sentence by inserting ''(except gamma-hydroxybutyric acid)'' after ''Depressants''; and in the second sentence by inserting ''(except gamma-hydroxybutyric acid)'' after ''substance''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 5 by striking ''and'' after ''includes all salts, isomers,''; and by inserting '', and, except as otherwise provided, any analogue of that controlled substance'' after ''all salts of isomers''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables by striking the subdivision captioned ''Schedule I or II Depressants'' in its entirety and inserting the following new subdivisions:

''Schedule I or II Depressants (Except Gamma-Hydroxybutyric Acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-Hydroxybutyric Acid

[Option One: 1 liter of gamma-hydroxybutyric acid = 26,420 gm of marihuana]

[Option Two: 1 liter of gamma-hydroxybutyric acid = 5,284 gm of marihuana]''.

Section 2D1.11(b)(2) is amended by striking ''21 U.S.C. §§ 841(d)(2), (g)(1), or 960(d)(2),'' and inserting ''21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), (d)(3), or (d)(4),''.

Section 2D1.11(e) is amended in subdivision (1) by striking ''10,000 KG or more of Gamma-butyrolactone;'' and inserting ''[757][3785] L or more of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (2) by striking ''At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;'' and inserting ''At least [227.1][1135.5] L but less than [757][3785] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (3) by striking ''At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;'' and inserting ''At least [75.7][378.5] L but less than [227.1][1135.5] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or

Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (4) by striking ''At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;'' and inserting ''At least [53][265] L but less than [75.7][378.5] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (5) by striking ''At least 400 KG but less than 700 KG of Gamma-butyrolactone;'' and inserting ''At least [30.3][151.4] L but less than [53][265] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (6) by striking ''At least 100 KG but less than 400 KG of Gamma-butyrolactone;'' and inserting ''At least [7.6][37.9] L but less than [30.3][151.4] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (7) by striking ''At least 80 KG but less than 100 KG of Gamma-butyrolactone;'' and inserting ''At least [6.1][30.3] L but less than [7.6][37.9] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (8) by striking ''At least 60 KG but less than 80 KG of Gamma-butyrolactone;'' and inserting ''At least [4.5][22.7] L but less than [6.1][30.3] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

in subdivision (9) by striking ''At least 40 KG but less than 60 KG of Gamma-butyrolactone;'' and inserting ''At least [3][15.1] L but less than [4.5][22.7] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus''; and

in subdivision (10) by striking ''Less than 40 KG of Gamma-butyrolactone;'' and inserting ''Less than [3][15.1] L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus''.

The Commentary to § 2D1.11 captioned ''Statutory Provisions'' is amended by inserting '', (3), (4)'' after ''(d)(1), (2)''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 5 by striking ''21 U.S.C. 841(d)(2), (g)(1), and 960(d)(2)'' and inserting ''21 U.S.C. 841(c)(2), (f)(1), and 960(d)(2), (d)(3), and (d)(4)''; and by striking ''Where'' and inserting ''In a case in which''.

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

''21 U.S.C. 957 2D1.1''.

Issues for Comment:

1. A concern has been expressed to the Commission regarding offenses involving anhydrous ammonia. Anhydrous ammonia is a volatile chemical generally used in farming but that can also be used in the manufacture of methamphetamine. Section 864 of title 21, United States Code, prohibits stealing anhydrous ammonia or transporting stolen anhydrous ammonia across state lines. The statutory maximum term of imprisonment for an anhydrous ammonia offense is four years, except if the offense involved the intent to manufacture methamphetamine in which case the statutory maximum term of imprisonment is ten years. (A section 864 offense committed subsequent to a specified drug trafficking conviction carries a maximum term of imprisonment of eight years, unless the offense involved the intent to manufacture methamphetamine in which case the maximum term of imprisonment is 20 years.) Appendix A (Statutory Index) references 21 U.S.C. 864 to § 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy). The Commission requests comment regarding whether it should provide a specific offense characteristic in § 2D1.12 specifically to cover anhydrous ammonia offenses. For example, the Commission could provide an enhancement that would apply if the offense involved anhydrous ammonia, or alternatively if the defendant was convicted under 21 U.S.C. 864. If such an enhancement should be provided, what would be an appropriate offense level increase? For example, should the Commission provide an offense level increase of eight or ten levels for convictions under 21 U.S.C. 864?

2. The Commission requests comment regarding whether it should amend the drug guidelines in Chapter Two, Part D, particularly, §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.12 to provide a specific offense characteristic for defendants who unlawfully distribute controlled substances, precursors, listed chemicals, and other illegal substances and items used in the manufacture of controlled substances or listed chemicals over the Internet. There is a concern with the unlawful distribution over the Internet because of the ability to reach a broader market than possible through ''traditional'' drug trafficking methods. If the Commission provides such a specific offense characteristic, what would be an appropriate offense level increase?

3. The Commission requests comment regarding whether it should amend § 2D1.1 to account more adequately for offenses that involve drug facilitated sexual assault, specifically in a case in which the victim of the sexual assault knowingly and voluntarily ingested the drug. Currently, the cross reference in § 2D1.1(d)(2) applies if the defendant was convicted under 21 U.S.C. 841(b)(7) and the victim of the sexual assault did not knowingly ingest the drug. However, if the victim of the sexual assault knowingly and voluntarily ingested the drug, neither 21 U.S.C. 841(b)(7) nor the cross reference applies. The Commission requests comment regarding whether the scope of the cross reference should be expanded to include a case in which the victim of a sexual assault knowingly and voluntarily ingested the drug, even if the defendant is not convicted under 21 U.S.C. 841(b)(7). Alternatively, would the heightened base offense levels in § 2D1.1(a)(1) and (2) apply in such a case and, if so, would they account adequately for drug facilitated sexual assaults of this nature? If not, should the heightened base offenses levels be modified or should the Commission provide a specific offense characteristic to account more adequately for drug facilitated sexual assaults?

4. The Commission has become aware of a circuit split regarding the interpretation of the last sentence in Application Note 12 of § 2D1.1. The relevant language of the note states that ''[i]f, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.'' A conflict has arisen over whether this language is limited to a defendant who is the seller in a sting operation. See *United States* v. *Smack,* _F.3d _, 2003 WL 22419914 (3rd Cir., October 24, 2003) (opining that the language in Note 12 is ambiguous);

United States v. *Williams*, 109 F.3d 502, 511–12 (8th Cir. 1997) (same). Some circuits have concluded that the last sentence of the note is intended to apply only to sellers. See *United States* v. *Gomez*, 103 F.3d 249, 252–53 (2d Cir. 1997) (concluding that the last sentence of Note 12 applies only to sellers); *United States* v. *Perez de Dios*, 237 F.3d 1192 (10th Cir. 2001) (same); *United States* v. *Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (same). Others have concluded that the language also applies to buyers in reverse sting operations. See *United States* v. *Minore,* 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); *United States* v. *Estrada,* 256 F.3d 466, 476 (7th Cir. 2001) (same).

In light of the conflicting interpretations, the Commission requests comment regarding whether it should clarify the interpretation of the last sentence of § 2D1.1, Application Note 12. Specifically, should a buyer in a reverse sting operation be permitted to have excluded from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to purchase, or was not reasonably capable of purchasing? Should the last sentence in Application Note 12 be limited to sellers?

Proposed Amendment 6: Repeal of ''Mitigating Role Cap''

Synopsis of Proposed Amendment: This amendment proposes to repeal the current ''mitigating role cap'' at § 2D1.1(a)(3) and replace it with an alternative approach. The proposed replacement would provide a gradually increasing mitigating role reduction based on drug quantity base offense levels under §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possession a Listed Chemical; Attempt or Conspiracy), beginning at level [30]. In general, the reduction both is more gradual and less generous than the current approach. Under the current ''mitigating role cap'' approach, a defendant who qualifies for a minor role adjustment and whose drug quantity would otherwise result in a base offense level of level 34 will only receive a base offense level of level 30 under § 2D1.1(a)(3). This effectively is a four-level reduction. This defendant also receives the two-level adjustment under § 3B1.2 for minor role in the offense, resulting in an offense level of 28 (assuming no other adjustments). Thus, the net reduction for this defendant under the current mitigating role cap approach is six levels. Under the proposed alternative, however, the net reduction would only be [three] [four-] levels (two-level reduction for minor role in the offense and additional [one-][two-] level reduction for having a base offense level of level 34 under § 2D1.1). This alternative approach also maintains the current distinctions among mitigating role defendants under § 3B1.2 (*i.e.*, minor, minimal, or in-between), rather than capping the drug quantity base offense level at level 30 for all qualifying defendants. Effectively, this approach ''compresses'' the effect of increasing drug quantity above level 30, rather than capping it at that level.

Proposed Amendment:

Section 2D1.1(a)(3) is amended by striking '', except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30''.

Section 3B1.2 is amended to read as follows:

''§ 3B1.2. Mitigating Role

(a) Based on the defendant's role in the offense, decrease the offense level as follows:

(1) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(2) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between subsections (a)(1) and (a)(2), decrease by 3 levels.

(b) If a downward adjustment under subsection (a) is applied and the defendant's Chapter Two offense level was determined pursuant to §§ 2D1.1 or 2D1.11, apply an additional reduction according to the following:

Base offense level from § 2D1.1 or § 2D1.11	Additional reduction
(1) level [30]	[1] level
(2) level [32–34]	[1][2] levels
(3) level [36–38]	[1][2][3] levels.''.

Issue for Comment:

The proposed amendment provides an alternative method to the mitigating role cap in § 2D1.1 for minimizing offense level severity for a certain category of drug defendants. Under this alternative approach, should the additional reduction for mitigating role defendants begin at a lower or higher base offense level? Should the reduction be scaled differently in relation to the drug quantity base offense level? Should certain offenses and/or offenders be disqualified from receiving the additional mitigating role reduction (*e.g.*, defendants convicted under 21 U.S.C. 849, 859, 860, or 861; defendants who used or threatened violence; defendants who possessed or used a weapon; defendants who involved a minor in the offense; or defendants who have a prior felony drug trafficking conviction)? Alternatively, should the Commission simply repeal the current mitigating role cap without providing any alternative method? Are there any other approaches that the Commission should consider, and if so, what are they?

Proposed Amendment 7: Homicide

Synopsis of Proposed Amendment: This amendment proposes a number of changes to the homicide and assault guidelines to address longstanding proportionality concerns and to implement the directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act (the ''Act''), Public Law 107–273.

First, this amendment proposes a number of changes to the homicide guidelines. Generally, the amendment proposes increases in the base offense levels in the guidelines for second degree murder, voluntary manslaughter, and involuntary manslaughter to address proportionality issues among the homicide guidelines and between the homicide guidelines and other offense guidelines in Chapter Two, such as kidnapping and the production of child pornography.

The amendment also proposes to add a special instruction in the involuntary manslaughter guideline (§ 2A1.4), providing that if the offense involved involuntary manslaughter of more than one victim, Chapter Three, Part D (Multiple Counts) should be applied as if the involuntary manslaughter of each victim had been contained in a separate count of conviction. The purpose of the instruction is to ensure incremental punishment for multiple victims. An issue for comment follows regarding whether such an instruction should be added to each of the other homicide guidelines.

The amendment also proposes to eliminate and/or revise existing outdated commentary in some of the homicide guidelines.

Second, this amendment proposes a number of changes to the assault guidelines and the Chapter Three adjustment relating to official victims to address section 11008(e) of the Act. That section directs the Commission as follows:

''(1) IN GENERAL.—Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and the policy statements of the commission, if appropriate, to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18, United States Code.

(2) FACTORS FOR CONSIDERATION.—In carrying out this section, the United States Sentencing Commission shall consider, with respect to each offense described in paragraph (1)—

(A) any expression of congressional intent regarding the appropriate penalties for the offense;

(B) the range of conduct covered by the offense;

(C) the existing sentences for the offense;

(D) the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;

(E) the extent to which the Federal sentencing guideline sentences for the offense have been constrained by statutory maximum penalties;

(F) the extent to which the Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(G) the relationship of the Federal sentencing guidelines for the offense to the Federal sentencing guidelines for other offenses of comparable seriousness; and

(H) any other factors that the Commission considers to be appropriate.''.

Section 111 of title 18, United States Code, makes it unlawful to forcibly assault, resist, oppose, impede, intimidate, or interfere with (A) any person designated in section 1114 of title 18 (*i.e.*, any officer or employee of the United States, including any member of the uniformed services in the performance of that person's official duties, or any person assisting that person in the performance of those official duties); or (B) any person who formerly served as a person designated in section 1114 on account of that person's performance of official duties during the term of service.

The Act increased the statutory maximum term of imprisonment for offenses under 18 U.S.C. 111 from three years to eight years; and for the use of a dangerous weapon or inflicting bodily injury in the commission of an offense under 18 U.S.C. 111, from ten to 20 years.

Section 115 of title 18, United States Code, makes it unlawful to (A) assault, kidnap, or murder, attempt or conspire to kidnap or murder, or threaten to assault, kidnap, or murder, a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114; or (B) threaten to assault, kidnap, or murder a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114; in order to impede, intimidate, or interfere with the performance of the official's official duties.

Section 115 of title 18, United States Code, also makes it unlawful to assault, kidnap, or murder, attempt or conspire to kidnap or murder, or threaten to assault, kidnap, or murder, a former United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114, or a member of the former official's immediate family, in retaliation for the performance of the official's duties during the official's term of service.

The Act increased the maximum terms of imprisonment for threatened assaults under 18 U.S.C. 115 from three to six years, and for all other threats under 18 U.S.C. 115, from five to ten years.

In addition, the Act also increased the maximum term of imprisonment under 18 U.S.C. 876 from five years to ten years for mailing a communication to a United States judge, a Federal law enforcement officer, or an official covered by 18 U.S.C. 1114 containing a threat to kidnap or injure any person (the penalty remained five years for mailing such a communication to any other person).

The Act also increased the maximum term of imprisonment under 18 U.S.C. 876 from two years to ten years for mailing, with the intent to extort anything of value, a communication to a United States judge, a Federal law enforcement officer, or an official covered by 18 U.S.C. 1114 containing a threat to injure another's property or reputation or a threat to accuse another of a crime (the penalty remained two years for mailing such a communication to any other person). The other statutory maximum terms of imprisonment for offenses under 18 U.S.C. 876 were not changed by the Act. Mailing threatening communications containing a ransom demand for the release of a kidnapped person or containing a threat to kidnap with the intent to extort something of value remain punishable by up to 20 years' imprisonment.

The amendment proposes a number of changes to the assault guidelines and the Chapter Three adjustment relating to official victims to implement the directive and the changes in statutory maximum penalties. These proposed modifications to the offense levels in some of the assault guidelines complement the proposed amendments to the homicide guidelines, which are intended to address longstanding proportionality concerns. Issues for comment follow regarding whether the base offense level in the assault guideline should be reduced by [two] levels, whether the aggravated assault guideline should contain an enhancement for the involvement of a dangerous weapon, whether the assault guidelines should be consolidated, and whether the Chapter Three adjustment for official victims should provide a tiered approach, such that a [six]-level adjustment would apply if the victim was a government officer or employee (or family member thereof) and the offense was motivated by such status, and a three-level adjustment would apply if the victim was a law enforcement officer or prison employee and was assaulted in a certain manner.

Proposed Amendment:

The Commentary to § 2A1.1 captioned ''Application Notes'' is amended by striking Notes 1 and 2 in their entirety and inserting the following:

''1. Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (*e.g.*, a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (*e.g.*, murder in aid of racketeering).

2. Imposition of Life Sentence.—

(A) In General.—An offense level of 43 (*i.e.*, the base offense level under this guideline) results in a guideline sentence of life imprisonment in all criminal history categories. In cases in which a statutory mandatory minimum sentence is life imprisonment, the defendant shall be sentenced to life imprisonment, even if the defendant

received a reduction for acceptance of responsibility under § 3E1.1 (Acceptance of Responsibility).

(B) Offenses Involving Premeditated Killing.—In the absence of capital punishment, life imprisonment is the appropriate sentence in the case of premeditated killing. A downward departure would not be appropriate in such a case.

(C) Unintentional or Unknowing Killing.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the offense level specified in § 2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. 3553(e).

3. Applicability of Guideline When Death Sentence Not Imposed.—If the defendant is sentenced pursuant to 18 U.S.C. 3591 *et seq.* or 21 U.S.C. 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.''.

Section 2A1.2(a) is amended by striking ''33'' and inserting ''[37][38]''.

The Commentary to § 2A1.2 is amended by striking the Background commentary in its entirety and inserting the following:

''Application Note:

1. Upward Departure Provision.—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. See § 5K2.8 (Extreme Conduct).''.

Section 2A1.3(a) is amended by striking ''25'' and inserting ''[26]–[30]''.

The Commentary to § 2A1.3 is amended by striking the Background commentary in its entirety.

Section 2A1.4(a) is amended in subdivision (1) by striking ''conduct was criminally negligent'' and inserting ''offense involved negligent conduct''; and by striking subdivision (2) in its entirety and inserting the following:

''(2) Apply the greater:

(A) 18, if the offense involved reckless conduct; or

(B) [20]–[26], if the offense involved the reckless operation of a means of transportation.''.

Section 2A1.4 is amended by adding at the end the following:

''(b) Special Instruction

(1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.''.

The Commentary to § 2A1.4 captioned ''Application Notes'' is amended in the heading by striking ''Notes'' and inserting ''Note''; by striking Notes 1 and 2 in their entirety and inserting the following:

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

'Criminally negligent' means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

'Means of transportation' includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. 'Mass transportation' has the meaning given that term in 18 U.S.C. 1993(c)(5).

'Reckless' means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. 'Reckless' includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.''.

Section 2A1.5(a) is amended by striking ''28'' and inserting ''[32]–[37]''.

Section 2A2.1(a) is amended in subdivision (1) by striking ''28'' and inserting ''[32]–[37]''; and in subdivision (2) by striking ''22'' and inserting ''[26][28][30]''.

The Commentary to § 2A2.1 captioned ''Application Notes'' is amended by striking Notes 1 and 2 in their entirety and inserting the following:

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

'First degree murder,' means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. 1111.

'Serious bodily injury' and 'permanent or life-threatening bodily injury' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).'';

by redesignating Note 3 as Note 2; and in Note 2, as redesignated by this amendment, by inserting ''Upward Departure Provision.—'' before ''If the offense''.

Section 2A2.2 is amended by striking subdivision (a) in its entirety and inserting the following:

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

(1) 15; or

(2) [27], if the defendant is convicted under 18 U.S.C. 111(b).''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended by striking Note 2 in its entirety; by redesignating Note 3 as Note 2; and by adding at the end the following:

''3. Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

4. Application of Official Victim Adjustment.—The base offense level in subsection (a)(2) incorporates the fact (A) that the victim was a government official performing official duties; or (B) that the victim formerly was a government official and the assault occurred on account of the victim's performance of official duties during the time of the victim's official service. Accordingly, if subsection (a)(2) applies, do not apply § 3A1.2 (Official Victim).''.

Section 2A2.3 is amended in subdivision (a)(1) by striking ''6'' and inserting ''[9]''; and by striking ''conduct'' and inserting ''offense''; and in subdivision (a)(2) by striking ''3'' and inserting ''[6]''.

Section 2A2.3(b)(1) is amended by striking ''If'' and inserting ''(Apply the greater) If (A) the victim sustained bodily injury, increase by 2 levels; or (B)''.

The Commentary to § 2A2.3 captioned ''Application Notes'' is amended by striking ''Notes'' and inserting ''Note''; and by striking Notes 1, 2, and 3 in their entirety and inserting the following:

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

'Bodily injury', 'dangerous weapon', and 'firearm' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

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

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

Section 2A2.4(a) is amended by striking ''6'' and inserting ''[12]''.

Section 2A2.4(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; in subdivision (1) by striking ''conduct'' and inserting ''offense''; and by adding at the end the following:

''(2) If the victim sustained bodily injury, increase by 2 levels.''.

The Commentary to § 2A2.4 captioned ''Application Notes'' is amended by striking Notes 1 and 2 in their entirety and inserting the following:

''1. Definitions.—For purposes of this guideline, 'bodily injury', 'dangerous weapon', and 'firearm' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

2. Application of Certain Chapter Three Adjustments.—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply § 3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under § 2A2.2 (Aggravated Assault) and the base offense level under § 2A2.2(a)(2) does not apply. Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply § 3C1.2 (Reckless Endangerment During Flight).''.

The Commentary to 2A2.4 captioned ''Application Notes'' is amended in Note 3 by inserting ''Upward Departure Provision.—'' before ''The base''.

Section 3A1.2 is amended to read as follows:

''§ 3A1.2. Official Victim

Increase by [6] levels if—

(1) (A) the victim was (i) a government officer or employee; (ii) a former government officer or employee; or (iii) a member of the immediate family of a person described in subdivision (i) or (ii); and (B) the offense of conviction was motivated by such status; or

(2) in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(A) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(B) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility.''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 2 in the second sentence by striking ''subdivision (a)'' and inserting ''this adjustment''; in the third sentence by striking ''guideline'' and inserting ''guidelines''; and by striking ''is'' and inserting ''are (A) subsection (a)(2) of § 2A2.2 (Aggravated Assault); and (B)''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 3 by striking ''Subsection (a)'' and inserting ''Subdivision (1)''; and by striking ''subsection (a)'' and inserting ''subdivision (1)''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 4 by striking ''Subsection (b)'' each place it appears and inserting ''Subdivision (2)''; and by striking ''subsection (b)'' each place it appears and inserting ''subdivision (2)''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended by striking Note 5 in its entirety and inserting the following:

''5. Upward Departure Provision.—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.''.

Issues for Comment:

1. Instead of the proposed alternative base offense level in § 2A2.2 (Aggravated Assault) in the case of a conviction under 18 U.S.C. 111(b) and the proposed three-level increase in the Chapter Three adjustment for official victims in § 3A1.2 (Official Victims), should the Commission provide an enhancement in the assault guidelines for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in 18 U.S.C. 111 or 115? If so, what would be an appropriate increase for such enhancement?

Are there additional, related enhancements that the Commission should provide in the assault guidelines, particularly given the directive to consider providing sentences at or near the statutory maximum for the most egregious cases? Would such an enhancement be appropriate for other Chapter Two guidelines that cover these offenses, such as the guidelines covering attempted murder (§ 2A2.1), kidnapping (§ 2A4.1), and threatening communications (§ 2A6.1)?

Should the Commission consider providing a tiered approach in the Chapter Three adjustment for official victims (§ 3A1.2) such that a [six]-level adjustment would apply if the victim was a government officer or employee (or family member thereof) and the offense was motivated by such status, and a three-level adjustment would apply if the victim was a law enforcement officer or prison employee and was assaulted in a certain manner?

2. Do the current base offense levels in each of the assault and threatening communications guidelines provide adequate punishment for the covered conduct? If not, what would be appropriate base offense levels for §§ 2A2.2, 2A2.3, 2A2.4, and 2A6.1? For example, should the base offense level for offenses involving obstructing or impeding officers under § 2A2.4 be level 15, the same as for aggravated assault, and contain the same enhancements as the aggravated assault guideline, so that an assault of an official unaccompanied by serious bodily injury would nevertheless be severely punished?

3. Should the Commission consider more comprehensive amendments to the assault guidelines as part of, or in addition to, its response to the directives? For example, should the Commission consolidate any or all of the assault guidelines?

In addition to the two-level enhancement for bodily injury proposed in §§ 2A2.3(b)(1) and 2A2.4(b)(2), are there other aggravating or mitigating circumstances that should be incorporated into those guidelines?

Should the base offense level in the aggravated assault guideline generally be decreased by two levels? Should it be decreased by two levels in cases in which none of the specific offense characteristics apply (*i.e.,* in cases in

which there are no aggravating circumstances)?

Are there any other application issues pertaining to the assault guidelines that the Commission should address?

4. Should the base offense level in § 2A1.4 for involuntary manslaughter be increased, and if so, to what extent? Should additional specific offense characteristics be added for involuntary manslaughter offenses, including: (A) A four-level increase if death occurred while the defendant was driving intoxicated or under the influence of alcohol or drugs, or if alcohol and/or drugs otherwise were involved in the offense; (B) a two-level increase if the actions of the defendant resulted in multiple homicides; and (C) a two-level increase if the offense involved the use of a dangerous weapon?

The amendment proposes to add a special instruction in the involuntary manslaughter guideline to treat offenses involving multiple persons as if the conduct with respect to each person had been contained in a separate count of conviction. Should the Commission add this special instruction to each of the homicide guidelines?

5. Should specific offense characteristics be added in § 2A1.3 for voluntary manslaughter, including (A) a two-level increase for use of a weapon; and (B) a four-level increase for use of a firearm?

Proposed Amendment 8: Miscellaneous Amendments

Synopsis of Proposed Amendment: This proposed amendment makes changes to various sentencing guidelines as follows:

(A) Clarifies that the application of § 2B1.1(b)(7)(C) in the fraud/theft guideline, regarding a violation of a prior judicial order, is defendant based. Current Application Note 6(C) states that ''[s]ubsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning * * *''. The note, however, seemingly conflicts with the language of the enhancement itself, at § 2B1.1(b)(7)(C), which uses a relevant conduct construct (*i.e.*, ''if the offense involved''). Given that the underlying principle of the enhancement is to provide increased punishment for an individual who demonstrates aggravated criminal intent by knowingly ignoring a prior warning not to engage in particular conduct, see USSG § 2B1.1, comment. n. 6(C), the proposed amendment restructures § 2B1.1(b)(7) to clarify that application of the prior judicial order enhancement is defendant based. The proposed amendment also makes necessary technical and conforming amendments to the commentary.

(B) Expands the special multiple victim rule in the fraud/theft guideline, § 2B1.1, Application Note 4(B)(ii), for offenses involving stolen U.S. mail to include mail collection and delivery units that serve multiple postal customers (*e.g.*, apartment bank boxes). The special rule is that any offense that involves stolen mail from a Postal Service mail box, cart, or satchel shall be considered to have involved 50 or more victims. The Commission has been informed, however, that the rule as currently written does not apply in cases in which mail is stolen from privately owned mail boxes such as those found in apartment complexes or other multiple dwelling communities. The proposed amendment uses language suggested by the Postal Service to include privately owned mail boxes within the special rule.

(C) Modifies § 2B1.1(b)(9), which provides a two-level enhancement and a minimum offense level of level 12, in response to the SAFE ID Act (section 607 of the PROTECT Act, Pub. L. 108–21). That Act created a new offense at 18 U.S.C. § 1028(a)(8) prohibiting the trafficking of authentication features (*e.g.*, a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified), and amended 18 U.S.C. 1028 to prohibit the transfer or possession of authentication features. The proposed amendment makes § 2B1.1(b)(9) applicable to offenses involving authentication features.

(D) Addresses a new offense provided at 18 U.S.C. 25 (Use of minors in crimes of violence), which was created by section 601 of the PROTECT Act. Section 25 of title 18, United States Code, prohibits any person who is 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. The penalties for committing the offense are, for the first conviction, ''subject to twice the maximum term of imprisonment * * * that would otherwise be authorized for the offense'', and for each subsequent conviction, ''subject to 3 times the maximum term of imprisonment * * * that would otherwise be authorized for the offense.''

The guidelines currently address the use of a minor to commit an offense in § 3B1.4 (Using a Minor To Commit a Crime). That guideline provides a two-level adjustment and applies to any offense in which a defendant used or attempted to use a minor to commit the offense or assist in avoiding detection of, or apprehension for, the offense. Given that the PROTECT Act created a new substantive offense for the use of a minor in crimes of violence, the proposed amendment creates a new guideline for 18 U.S.C. § 25 offenses rather than build on § 3B1.4. The proposed guideline at § 2X6.1 (Use of a Minor to Commit a Crime of Violence) directs the court to increase by [2][4][6] levels the offense level from the guideline applicable to the offense of which the defendant is convicted of using a minor. A base offense level of [2], however, would be consistent with the offense level increase currently provided by § 3B1.4. An issue for comment follows the amendment regarding whether, if the Commission were to adopt an offense level increase of [4]or [6], the Commission also should amend § 3B1.4 to provide consistent penalties.

The proposed amendment also (i) provides application notes addressing the interaction of the new guideline with § 3B1.4 and the grouping of multiple counts; and (ii) amends Appendix A (Statutory Index) to reference the new offense.

(E) Corrects typographical error in Application Note 4 of § 3C1.1 (Obstruction or Impeding the Administration of Justice).

(F) Conforms the definition of ''crime of violence'' in § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to the definition provided in § 2L1.2 (Unlawfully Entering or Remaining in the United States), effective November 1, 2003, by including specific reference to statutory rape and sexual abuse of a minor.

The proposed amendment also adds to the definition of ''crime of violence'' possession of a sawed-off shotgun and other firearms of the type described in 26 U.S.C. 5845(a). Congress determined that such firearms are inherently dangerous and, when possessed unlawfully, serve only violent purposes. Accordingly, Congress passed The National Firearms Act, Public Law 90–618, which in part requires such firearms to be registered with National Firearms Registration and Transfer Record. See 26 U.S.C. 5861(d). Notwithstanding that Application Note 1 of § 4B1.2 excludes from the definition of ''crime of violence'' the offense of unlawful possession of a firearm by a felon, several circuit courts have held that possession of a sawed-off shotgun is a ''crime a violence'' because under § 4B1.2(a)(2) the offense ''otherwise involves conduct that presents a serious potential risk of physical injury to another''. *See, e.g., United States* v.

Serna, 309 F.3d 859, 864 (5th Cir. 2002) (unlawful possession of a sawed-off shotgun constitutes conduct that, by its nature, poses a serous potential risk of injury to another and is therefore a crime of violence under § 4B1.2(a)); *United States* v. *Johnson,* 246 F.3d 330 (4th Cir. 2001) (possession of a sawed-off shotgun always creates a serious risk of physical injury to another person and therefore is a crime of violence for career offender purposes); *United States* v. *Brazeau,* 237 F.3d 842, 845 (7th Cir. 2001) (sawed-off shotguns are inherently dangerous and the possession of such a firearm is a crime of violence); *see also United States* v. *Fortes*, 141 F.3d 1 (1st Cir. 1998) (possession of a sawed-off shotgun is a ''violent felony'' for purposes of 18 U.S.C. § 924(e) (the Armed Career Criminal Act)). An important distinguishing factor for these courts' holdings is that ''most weapons do not have to be registered—only those weapons that Congress found to be inherently dangerous'' must be registered. *Brazeau* at 845. ''If the weapon is not so labeled, mere possession by a felon is not a crime of violence.'' *Id.* Indeed, at the time the Commission amended § 4B1.2 to exclude the offense of felon in possession from the definition of ''crime of violence'', it was only concerned with felons possessing ordinary handguns and rifles and did not address more serious firearms.

The proposed amendment addresses the issue by adopting a categorical rule that possession of a firearm described in 26 U.S.C. 5845(a) is a crime of violence. (Besides sawed-off shotguns, section 5845(a) includes silencers, machine guns, and destructive devices). This part of the proposed amendment addresses the case in which the court has to determine whether a prior offense (state or federal) for possessing a sawed-off shot gun (or other section 5845(a) weapon) qualifies as a crime of violence, as for example, in determining the appropriate base offense level in § 2K2.1. The proposed amendment also modifies the rule that excludes felon in possession offenses from the definition of ''crime of violence'' to except from that rule possession of firearms that are of the type described in 26 U.S.C. 5845(a).

(G) Generally updates Chapter Six (Sentencing Procedures and Plea Agreements), and in particular, incorporates amendments made to Rules 11 and 32 of the Federal Rules of Criminal Procedure, effective December 1, 2002. Those amendments made some substantive changes but mostly reorganized Rules 11 and 32 as part of a general restyling of the Federal Rules of Criminal Procedure to make the rules more easily understood and to make style and terminology consistent throughout the rules. This proposed amendment reflects relevant substantive amendments and stylistic changes (including redesignations).

While much of the proposed amendment of Chapter Six is stylistic and conforming, the more significant aspects of the proposal can be summarized as follows:

- Amends § 6A1.2 (Disclosure of Presentence Report; Issues in Dispute) to set out the specific procedural requirements governing the disclosure of the presentence report and any issues in dispute as required by Rule 32. Currently, § 6A1.2 provides that the court should adopt procedures for the timely disclosure of the presentence report, the resolution of disputed issues prior to the sentencing hearing, and the identification of any unresolved issues. Rule 32 was amended in 1997 to provide particular procedural deadlines and requirements for the disclosure of the presentence report and issues in dispute and, in December 2002, those deadlines and requirements were reorganized to read more easily. This proposed amendment reflects those changes.
- Moves Application Note 1 of § 6A1.2, regarding a requirement that the court provide notice of departure, to its own policy statement. The Commission added the application note in 1997 in light of *Burns* v. *United States,* 501 U.S. 129, 138–39 (1991), in which the Court held that, before a sentencing court may depart upward on a ground not previously identified in the presentence report, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a departure. The Court also stated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departed either upward or downward. Proposed policy statement § 6A1.4 (Notice of Possible Departure) reflects the substantive amendment that added subsection (h) to Rule 32 specifically to incorporate the *Burns* holding.
- Deletes outdated commentary regarding pre-guidelines procedures.
- Fully incorporates into § 6B1.3 the procedure set forth in Rule 11(c)(5) that the court must follow when the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C).

Please note that the PROTECT Act amendments, effective October 27, 2003, updated the references to Rule 11 in § 6B1.2.

(H) Makes conforming amendments to various guideline provisions and commentary in light of PROTECT Act departure amendments promulgated at the October meeting.

(I) Corrects error in the examples provided in Application Note 3(B)(iii) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(J) Provides an issue for comment regarding an apparent double-counting issue in cases in which (i) the defendant is convicted of 18 U.S.C. 922(g) (felon in possession), (ii) is an armed career criminal under § 4B1.4, and (iii) is convicted of an 18 U.S.C. 924(c) (use of a firearm during a drug trafficking offense or crime of violence).

Proposed Amendment:

(A) Clarifying Application of § 2B1.1(b)(7)(C)

Section 2B1.1(b)(7) is amended by inserting ''(A)'' before ''the offense''; by striking ''involved (A)'' and inserting ''involved (i)''; by striking ''(B)'' and inserting ''(ii)''; by striking ''(C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D)'' and inserting ''(iii)''; and by striking the comma after ''education'' and inserting ''; or (B) the defendant violated a prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 6 in subdivision (B) by inserting ''(i)'' after ''Subsection (b)(7)(A)'' each place it appears; by striking subdivision (C) in its entirety; and by redesignating subdivision (D) as subdivision (C).

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 6 in subdivision (C), as redesignated by this amendment; by striking ''subsection (b)(7)(D)'' and inserting ''subsection (b)(7)(A)(iii)''; and by inserting after subdivision (C), as redesignated by this amendment, the following:

''(D) Offenses Committed in Contravention of Prior Judicial Order.—Subsection (b)(7)(B) provides an enhancement if the defendant commits an offense in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is

established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (*e.g.*, a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 6 in subdivision (E)(i) by inserting ''(i)'' after ''(b)(7)(A)'' each place it appears; and in subdivision (E)(ii) by striking ''(b)(7)(B) and (C)'' and inserting ''(b)(7)(A)(ii) and (B)''; and by striking ''(b)(7)(B) or (C)'' and inserting ''(b)(7)(A)(ii) or (B)''.

(B) Expanding Special Rule for Theft of Mail To Include Privately Owned Boxes

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 4 by striking subdivision (B)(ii) in its entirety and inserting:

''(ii)Special Rule.—A case described in subdivision (B)(i) of this note that involved a relay box, a collection box, a delivery vehicle, a satchel, a cart, a housing unit cluster box, an apartment box, or any other thing used or designed for use in the conveyance of [Option 1: a large volume of] United States mail [Option 2: to multiple addresses], whether such thing is privately owned or owned by the United States Postal Service, shall be considered to have involved 50 or more victims.''.

(C) SAFE ID Act

Section 2B1.1(b)(9) is amended by inserting ''(i)'' before ''device-making''; by inserting ''; or (ii) authentication feature'' after ''equipment''; by inserting ''(i)'' before ''unauthorized access''; and by inserting ''; (ii) or authentication feature'' after ''access device''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 8(A) by inserting before the paragraph that begins '''Counterfeit access device''' the following paragraph:

'' 'Authentication feature' has the meaning given that term in 18 U.S.C. § 1028(d)(1).''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 8(A) in the paragraph that begins '' 'Means of identification' '' by striking ''(4)'' and inserting ''(7)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 8(B) by inserting ''Authentication Features and'' before ''Identification Documents''; and by inserting ''authentication features'' after ''involving''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the eleventh paragraph by inserting ''(i)'' after ''(A)''; and by inserting ''(i)'' after ''(B)''.

(D) Use of Minor To Commit Crimes of Violence (PROTECT Act)

Chapter Two, Part X is amended by adding at the end the following new subpart:

''6. OFFENSES INVOLVING USE OF A MINOR IN A CRIME OF VIOLENCE

§ 2X6.1 Use of a Minor in a Crime of Violence

(a) Base Offense Level: [2][4][6] plus the offense level from the guideline applicable to the underlying offense.

Commentary

Statutory Provision: 18 U.S.C. 25.

Application Notes:

1. Definitions.—For purposes of this guideline, 'underlying offense' means the offense of which the defendant is convicted of using a minor. Apply the base offense level plus any applicable specific offense characteristic that were known, or reasonably should have been known, by the defendant. See Application Note 10 of the Commentary to § 1B1.3 (Relevant Conduct).

2. Non-applicability of § 3B1.4.—The base offense level in subsection (a) incorporates the use of a minor in the offense; accordingly, do not apply the adjustment in § 3B1.4 (Using a Minor to Commit a Crime).

3. Grouping of Multiple Counts.—In a case in which the defendant is convicted under 18 U.S.C. 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely Related Counts).''.

Appendix A is amended by inserting after the line referenced to 18 U.S.C. 4 the following new line:

''18 U.S.C. 25 2X6.1''.

Issue for Comment: The proposed new guideline for 18 U.S.C. 25 offenses directs the court to increase by [two][four][six] levels the offense level from the guideline applicable to the offense of which the defendant is convicted of using a minor. The statutory penalties for the new offense are as follows: For the first conviction, the defendant is ''subject to twice the maximum term of imprisonment * * * that would otherwise be authorized for the offense'', and for each subsequent conviction, the defendant is ''subject to 3 times the maximum term of imprisonment * * * that would otherwise be authorized for the offense''. A base offense level of [2] (plus the offense level from the guideline applicable to the underlying offense), however, would be consistent with the offense level increase currently provided by § 3B1.4 (Using a Minor to Commit a Crime). Notwithstanding the current increase in § 3B1.4, should the Commission provide a base offense level increase of [four] or [six] levels for proposed § 2X6.1? If so, should the Commission also amend § 3B1.4 to provide a greater offense level adjustment in order to maintain consistent penalties between § 3B1.4 and the proposed new guideline? Should the Commission amend § 3B1.4 to conform the definition of ''used or attempt to use'' (''includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting'') to the definition of ''uses'' in 18 U.S.C. 25(a)(3) (defined as ''employs, hires, persuades, induces, entices, or coerces'')? Finally, are there any specific offense characteristics that the Commission should consider providing in the new guideline?

(E) Correcting Typographical Error in § 3C1.1

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 5(b) by striking ''3(g)'' and inserting ''4(g)''.

(F) ''Crime of Violence'' Definition in § 4B1.2

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins '' 'Crime of violence' includes'' by inserting ''statutory rape, sexual abuse of a minor,'' after ''forcible sex offenses,''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins '' 'Crime of violence' does not'' by striking ''. Where'' and inserting '', unless the possession was of a firearm of a type described in 26 U.S.C. 5845(a). If ''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting before the paragraph that begins ''Unlawfully possessing a prohibited flask'' the following paragraph:

''Unlawfully possessing a firearm that is of a type described in 26 U.S.C. 5845(a) (*e.g.*, a sawed-off shotgun, silencer, or machine gun) is a 'crime of violence'.''.

(G) Chapter Six Update

Section 6A1.1 is amended by striking ''A probation officer'' and all that follows through ''presentence report.'' and inserting the following:

''(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless—

(1) 18 U.S.C. 3593(c) or another statute requires otherwise; or

(2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report.''.

The Commentary to § 6A1.1 is amended by striking the second sentence in its entirety; in the third sentence by striking ''Rule 32(b)(1)'' and inserting ''Rule 32(c)(1)(A)''; and by striking '', but only after explaining, on the record, why sufficient information is already available'' and inserting ''in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to meaningfully exercise its statutory sentencing authority and explains its finding on the record''.

Section 6A1.2 is amended by striking ''Courts should adopt'' and all that follows through ''Fed. R. Crim. P.'' and inserting the following:

''(a) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Rule 32(e)(2), Fed. R. Crim. P.

(b) Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.

(c) At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. Rule 32(g), Fed. R. Crim. P.''.

The Commentary to § 6A1.2 is amended by striking ''Application Note:'' and all that follows through ''(1991).''.

The Commentary to § 6A1.2 captioned ''Background'' is amended by striking ''32(b)(6)(B)'' and inserting ''32(f)''.

Section 6A1.3(b) is amended by striking ''32(c)(1)'' and inserting ''32(i)''.

The Commentary to § 6A1.3 is amended by striking the first paragraph in its entirety; in the third paragraph by striking ''117 S. Ct. 633, 635'' and inserting ''519 U.S. 148, 154''; and by striking ''117 S. Ct. at 637'' and inserting ''519 U.S. at 157''.

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

''§ 6A1.4 Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns* v. *United States,* 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.''.

Chapter Six, Part B is amended in the ''Introductory Commentary'' by striking ''Rule 11(e)(1)'' and inserting ''Rule 11(c)''; by striking ''These policy statements are a first step toward implementing 28 U.S.C. 994(a)(2)(E).''; by striking ''shall'' and inserting ''will continue to''; [by striking ''and ultimately develop standards'' and all that follows through ''the Commission's work.'']; in the last paragraph by striking ''The present policy statements move in the desired direction in two ways. First, the'' and inserting ''These''; [by striking ''This is a reaffirmation of pre-guidelines practice.] Second, the policy statements'' and inserting ''The policy statements also''; by inserting ''continue to'' after ''Explanations will''; [and by striking ''and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process''.]

Section 6B1.1 is amended by striking subsections (a), (b), and (c) in their entirety and inserting:

''(a) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.

(c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A).''.

The Commentary to § 6B1.1 is amended in the first paragraph in the first sentence by striking ''11(e)'' and striking the second paragraph and inserting the following:

''Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given that a presentence report normally will be prepared, the court may defer acceptance of the plea agreement until the court has reviewed the presentence report.''.

Section 6B1.3 is amended by striking ''If the plea'' and all that follows through ''Fed. Crim. P.'' and inserting the following:

''If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(a) inform the parties that the court rejects the plea agreement;

(b) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(c) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P.''.

The Commentary to § 6B1.3 is amended by striking ''11(e)(4)''and inserting ''11(c)(5)''.

(H) Conforming PROTECT Act Amendments (Departures)

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in the fifth sentence of Note 5 by striking ''When'' and inserting ''In a case in which creation of risk is''; by striking ''creation of a risk may provide a ground for imposing a sentence above the applicable guideline range'' and inserting ''an upward departure may be warranted''.

The Commentary to § 1B1.4 captioned ''Background'' is amended in the fifth sentence by striking ''sentencing above the guideline range'' and inserting ''an upward departure''.

The Commentary to § 1B1.8 captioned ''Application Notes'' is amended in the third sentence of Note 1 by striking ''increase the defendant's sentence above the applicable guideline range by upward departure'' and inserting ''depart upward''; and in the last sentence by striking ''below the applicable guideline range'' and inserting ''downward''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 7 by striking ''sentence below the applicable guideline range''and inserting ''downward departure''.

The Commentary to § 2R1.1 captioned ''Application Notes'' is amended in Note 7 by striking '', or even above,'' and by inserting '', or an upward departure'' after ''guideline range''.

The Commentary to § 2T1.8 captioned ''Application Note'' is amended in Note 1 by striking ''a sentence above the guidelines'' and inserting ''an upward departure''.

Chapter Two, Part T, Subpart 3 is amended in the ''Introductory Commentary'' by striking ''imposing a sentence above that specified in the guideline in this Subpart'' and inserting ''departing upward''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 4 by striking ''a sentence above the guideline range'' and inserting ''an upward departure''.

Section 5C1.2(a) is amended by striking ''verbatim''.

Section 5H1.1 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''; by striking ''impose a sentence below the applicable guideline range when'' and inserting ''depart downward in a case in which''; and by inserting ''; Gambling Addiction'' after ''Abuse''.

Section 5H1.2 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.3 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.5 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.6 is amended by striking ''Family ties'' and inserting ''In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties''; by inserting after the first paragraph the following:

''In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.'';

and by striking:

''*Note:** Section 401(b)(4) of Public Law 108–21 (the ''Protect Act'') directly amended § 5H1.6 to add the second paragraph, effective April 30, 2003. The Commission incorporated this direct amendment in the *Supplement to the 2002 Guidelines Manual* but inadvertently omitted the second paragraph in the **Federal Register** notice of amendments dated October 21, 2003. The policy statement should be read as containing the second paragraph, pursuant to the direct amendment made by Public Law 108–21.''.

The Commentary to § 5H1.6 is amended by adding at the end the following:

''Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.''.

Section 5H1.11 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.12 is amended by striking ''grounds for imposing a sentence outside the applicable guideline range'' and inserting ''in determining whether a departure is warranted''.

Section 5K2.14 is amended by striking ''increase the sentence above the guideline range'' and inserting ''depart upward''.

Section 5K2.16 is amended by inserting ''downward'' before ''departure''; and by striking ''below the applicable guideline range for that offense''.

Section 5K2.21 is amended by striking ''increase the sentence above the guideline range'' and inserting ''depart upward''.

Section 5K2.22 is amended by striking ''impose a sentence below the applicable guideline range'' each place it place it appears and inserting ''depart downward''; and by striking ''imposing a sentence below the guidelines'' and inserting ''a downward departure''.

Section 5K2.23 is amended by striking ''sentence below the applicable guideline range'' and inserting ''downward departure''.

(I) Correction of Examples in § 5G1.2

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended in Note 3(B)(iii) by striking ''2113(a) (20 year'' and inserting ''113(a)(3) (10 year''; in the second sentence by striking ''400'' and inserting ''460''; by striking ''360–life'' and inserting ''460–485''; and in the third sentence by striking ''40'' and inserting''100''; and by striking ''2113(a)'' and inserting ''113(a)(3)''.

(J) Issue for Comment Regarding ''Double Counting'' Issue in § 4B1.4 (Armed Career Criminal)

Issue for Comment: The Commission requests comment regarding application of the guidelines in cases in which the defendant (1) is convicted under 18 U.S.C. 922(g) (felon in possession); (2) is an armed career criminal under § 4B1.4; and (3) is convicted under 18 U.S.C. 924(c) (use of a firearm during a drug trafficking offense or crime of violence).

Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) provides that in cases in which a defendant is convicted of 18 U.S.C. 924(c) and of the underlying offense, the weapon enhancement in the guideline for the underlying offense is not to be applied. This rule is provided because the mandatory minimum consecutive sentence required by 18 U.S.C. 924(c) is sufficient to account for the possession or use of the weapon in the underlying offense. Section 4B1.4 (Armed Career Criminal) provides for an ''enhanced'' sentence (*i.e.*, an offense level of level 34 pursuant to § 4B1.4(b)(3)(A) and Criminal History Category VI pursuant to § 4B1.4(c)(2)) for cases in which an armed career criminal uses or possesses a firearm in connection with a crime of violence or controlled substance offense. Unlike § 2K2.4, however, § 4B1.4 does not currently contain a rule to provide an exception to application of the ''enhanced'' sentence in cases in which the defendant also is convicted under 18 U.S.C. 924(c) (or a similar offense carrying a ''flat'' mandatory

consecutive penalty *e.g.*, 18 U.S.C. 844(h) or 18 U.S.C. 929(a)). The Commission requests comment regarding whether such a rule should be provided in § 4B1.4.

For example, should the Commission add § 4B1.4 to the list of guidelines to which the special exception in § 2K2.4 applies? Should the Commission also provide an upward departure note to § 4B1.4 for the few cases in which the application of the exception may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), 924(c), or 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level and criminal history category had been applied?

Proposed Amendment 9: MANPADS and Other Destructive Devices

Synopsis of Amendment: This amendment proposes to increase by [5]–[13] additional levels the existing two-level enhancement in § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for cases in which the offense involved destructive devices that are portable rockets, missiles, or devices used for launching portable rockets or missiles, and by increasing the enhancement by up to [7] additional levels if the offense involved any other kind of destructive device. It also proposes to add certain attempts and conspiracies to the list of offenses for which the three-level reduction in § 2X1.1 (Attempt, Solicitation, or Conspiracy) is prohibited.

As defined in 26 U.S.C. 5845(f), a ''destructive device'' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellent, the barrels of which have a bore of more than one-half inch in diameter; or (3) any combination of parts designed or intended for use in converting any device into a destructive device as described above.

In its annual submission to the Commission dated August 1, 2003, the Department of Justice recommended that guideline penalties be increased if the offense involved the use or attempted use of, or conspiracy to use, a kind of destructive device known as the man-portable air defense system (MANPADS) or any similar destructive device. MANPADS are portable rockets and missiles that pose particular risks due to their portability, potential range, accuracy, and destructive power. This amendment addresses that concern by increasing the enhancement in § 2K2.1(b)(3) for involvement of these types of destructive devices from 2 levels to [7]–[15] levels, correspondingly increasing the maximum cumulative offense level in that guideline from level 29 to level [30]–[42], and increasing the enhancement for all other destructive devices from two levels to up to [9] levels. An issue for comment follows regarding whether the increase should pertain to all destructive devices within the meaning of 26 U.S.C. 5845(f) or only to MANPADS and similar weapons, or to some other subcategory of destructive devices, or whether there should be a graduated increase for different kinds of destructive devices.

Similarly, the Department of Justice also urged the Commission to increase guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive device. Those offenses include 18 U.S.C. 32 (destruction of an aircraft or aircraft facilities), 18 U.S.C. 1993 (terrorist attacks and other acts of violence against mass transportation systems), and 18 U.S.C. 2332a (use of certain weapons of mass destruction). In response to this concern, the amendment proposes to amend the special instruction in § 2X1.1(d) to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally, and not just in the context of the use of a MANPADS or similar destructive device. These offenses are comparable in nature to the offenses already listed in § 2X1.1(d). Issues for comment follow regarding the appropriate Statutory Index references for these offenses the definition of ''destructive device.''

Proposed Amendment:

Section 2K2.1(b) is amended by striking subdivision (3) in its entirety and inserting the following:

''(3) If the offense involved—

(A) a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by [7]–[15] levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by [2]–[9] levels.''.

Section 2K2.1(b) is amended in the paragraph beginning ''Provided, that'' by striking ''29'' and inserting ''[30]–[42]''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 11 by striking ''a two-level'' and inserting ''the applicable''.

Section 2X1.1(d) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5):

18 U.S.C. 81;
18 U.S.C. 930(c);
18 U.S.C. 1362;
18 U.S.C. 1363;
18 U.S.C. 1992;
18 U.S.C. 2339A;
18 U.S.C. 2340A;
49 U.S.C. 46504;
49 U.S.C. 46505; and
49 U.S.C. 60123(b).

(B) Any of the following offenses:

18 U.S.C. 32;
18 U.S.C. 1993; and
18 U.S.C. 2332a.''.

Issues for Comment:

1. The Commission requests comment regarding whether the proposed increase in the enhancement in § 2K2.1(b)(3) for involvement of a destructive device should pertain to all destructive devices within the meaning of 26 U.S.C. 5845(f) or only to man-portable air defense systems (MANPADS) and similar destructive devices or to some other subcategory of destructive devices. In addition, what is the appropriate extent of such an increase? Specifically, are there types of destructive devices other than MANPADS and similar destructive devices that should receive a [7]–[15] level enhancement, as is proposed for MANPADS and similar destructive devices? Should the extent of the increase vary according to the kind of destructive device involved? Should the limitation on the cumulative offense level of level 29 in § 2K2.1(b) be amended if the extent of the enhancement in § 2K2.1(b)(3) is increased, and, if so what should the limitation on the cumulative offense level be? Alternatively, should the limitation on the cumulative offense level be eliminated?

2. The Commission also requests comment regarding whether 18 U.S.C. 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. 1993(a), should be referenced in Appendix A (Statutory Index) to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of

Mass Transportation Vehicle or Ferry) rather than, or in addition to, § 2A6.1 (Threatening or Harassing Communications).

Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. 32 should be referenced only to § 2A5.2.

3. The Commission also requests comment regarding whether there should be a cross reference to § 2A5.2 or § 2M6.1 in any guideline to which offenses under 18 U.S.C. 32, 1993, and 2332a are referenced, if the offense involved interference or attempted interference with a flight crew, interference or attempted interference with the dispatch, operation, or maintenance of a mass transportation system (including a ferry), or the use or attempted use of weapons of mass destruction.

4. The Commission seeks comment regarding whether the ''destructive device'' definition at Application Note 4 of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. Practitioners have commented that it is unclear whether certain types of firearms qualify as ''destructive devices''. Should the Commission clarify the definition of ''destructive device''? If so, what issues should be addressed?

Issue for Comment 10: Aberrant Behavior

Issue for Comment: The Commission requests comment regarding whether the departure provision in § 5K2.20 (Aberrant Behavior) should be eliminated (and departures based on characteristics described in § 5K2.20 should be prohibited) and whether those characteristics instead should be incorporated into the computation of criminal history points under § 4A1.1 (Criminal History Category). Specifically, are there circumstances or characteristics, currently forming the basis for a departure under § 5K2.20, that should be treated within § 4A1.1 instead, particularly for first offenders?

Issues for Comment 11: Hazardous Materials

Issue for Comment: In its annual submission to the Commission dated August 1, 2003, the Department of Justice urged the Commission to consider revising the guideline treatment for the illegal transportation of hazardous materials. According to the Department, the sentencing guideline applicable to hazardous materials, § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), is not adequately suited to such offenses because (1) such offenses are different from more typical pollution offenses covered by that guideline and have characteristics that are not addressed by that guideline; and (2) the specific offense characteristics in that guideline are not characteristic of such offenses. As a consequence, the offense levels applicable to hazardous materials offenses often are inadequate given the severity of the offense.

Specifically, the Department stated that § 2Q1.2 originally was intended to cover the release of toxic substances and pesticides in the context of ongoing, continuous, or repetitive releases into the environment and the failure to obtain government permits to handle certain materials. Offenses involving hazardous materials, on the other hand, often involve a one-time, catastrophic occurrence that provide a ''target-rich'' environment for terrorists and that, because of the movement of these materials in commerce, could affect a large population or occur in a setting such as aboard an aircraft where corrective or preventive action is unlikely. Further aggravating the risks inherent in the transportation of hazardous materials is that, unlike other toxins, government permitting is not required.

In light of the Department of Justice's concerns, the Commission requests comment regarding whether existing guidelines should be revised, or whether a new guideline should be created, to address more adequately offenses involving hazardous materials. Specifically:

(1) How should the Commission define key terms regarding offenses involving the transportation of hazardous materials? For example, for purposes of enhanced penalties governing hazardous materials (as opposed to other toxic materials and pesticides) what hazardous materials, and/or what statutory provisions, should be covered? What activities constitute a ''release'' in the context of transportation of hazardous materials?

What is the appropriate definition of ''environment'' in the context of transportation of hazardous materials?

(2) What is an appropriate base offense level for offenses involving the transportation of hazardous materials?

(3) What aggravating and/or mitigating factors particular to such offenses should be incorporated into the guidelines as specific offense characteristics? For example, should the guidelines provide enhancements if the offense involved any of the following:

(A) The transportation of a hazardous material on a passenger-carrying or other aircraft.

(B) The transportation of a hazardous material on any passenger-carrying mode of mass transportation.

(C) The concealment of the hazardous material during its transportation, such as by misrepresentation, deception, or physical concealment.

(D) The release of a hazardous material.

(E) Disruption of, or damage to, critical infrastructure.

(F) The release of a hazardous material resulting in damage to the environment, or to public or private property.

(G) An emergency response and/or the evacuation of a community or part thereof.

(H) Repetition of the offense.

(I) The substantial likelihood of death or serious injury.

(J) Actual serious bodily injury or death.

(K) A substantial expenditure for remediation.

(L) The failure to provide, submit, file, or retain required information about a hazardous material, including the failure to notify for certain hazardous material incidents under 49 CFR 171.1.

(M) Financial gain to the defendant or the financial loss to others, excluding government costs of cleanup.

(N) The transportation of radioactive or explosive material.

(O) A terrorist motive.

(P) A controlled substance manufacturing or trafficking offense.

(Q) The failure to properly train transporters of hazardous materials (see, *e.g.,* 49 U.S.C. 5107).

(R) The procurement of a license through fraudulent means.

What should be the extent of any specific characteristic added to the guidelines for these enhancements, including gradation for seriousness of the specific offense characteristic involved?

(4) If a new guideline were to be promulgated covering only offenses involving the transportation of hazardous materials:

(A) What interaction should the new guideline covering hazardous materials transportation offenses have with the guidelines in Chapter Eight (Sentencing of Organizations)? For example, should a separate compliance program be established for persons involved in the transportation of hazardous materials, or should additional factors be added to the compliance requirements in Chapter Eight?

(B) What cross references, if any, should be included with this guideline?

(C) What impact, if any, should repeat civil penalties or regulatory infractions have on culpability under this proposed guideline?

(D) Under Chapter Three, Part D (Multiple Counts), what would be the appropriate grouping of counts involving the transportation of hazardous materials under this new guideline and counts involving environmental offenses covered under other existing guidelines, particularly § 2Q1.2?

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