Public Comment

Proposed Amendments

2003

Proposed Amendments to the Sentencing Guidelines

December 20, 2002

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found in the November 27, 2002 Federal Register (67 Fed. Reg. 70999) and the December 18, 2002 Federal Register (67 Fed. Reg. 77532).

INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES PUBLISHED IN THE FEDERAL REGISTER ON NOVEMBER 27, 2002 AND DECEMBER 18, 2002

2002 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Corporate Fraud

Synopsis of Proposed Amendment: *This proposed amendment implements the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the "Act"). The Act requires the Commission to promulgate guideline amendments under emergency amendment authority not later than January 25, 2003. In addition to several general directives regarding fraud and obstruction of justice offenses, the Act also sets forth specific directives that require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence.*

First, the proposed amendment sets forth two options for amending §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to address the directive contained in section 1104 of the Act pertaining to fraud offenses involving significantly greater than 50 victims. Option One expands the victims table in §2B1.1(b)(2). Currently, subsection (b)(2) provides a two level enhancement if the offense involved more than 10, but less than 50, victims or was committed through mass-marketing, or a four level enhancement if the offense involved 50 or more victims. Option One provides an additional two levels, for a total of six levels, if the offense involved 250 victims or more. Alternatively, Option Two provides an encouraged upward departure provision if the offense involved substantially more than 50 victims.

Second, the proposed amendment modifies subsection §2B1.1(b)(12)(B) to address directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Subsection (b)(12)(B) currently provides a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The proposed amendment expands the scope of this enhancement to apply to offenses that substantially endanger the solvency or financial security of a publicly traded company. The enhancement does not require the court to determine whether the offense endangered the solvency or financial security of each individual victim. Such a determination likely would unduly complicate the sentencing process. Instead the enhancement is based on a presumption that if the offense conduct endangered the solvency or financial security of a publicly traded company, the offense similarly affected a substantial number of individual victims. The proposed amendment also contains options for extending the scope of the enhancement to include other organizations with a substantial number of employees. This extension might be appropriate because offenses that endanger other large organizations may, like offenses that endanger publicly traded companies, affect the solvency or financial security of a substantial number of victims.

The corresponding application note to the new enhancement sets forth situations in which an offense shall be considered to have endangered the solvency or financial security of a publicly traded company. The note, which is modeled after an analogous note for the financial institutions prong of the enhancement, includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce among the list of situations that would trigger application of the new enhancement.

An issue for comment follows the proposed amendment regarding whether the list of situations should be a non-exhaustive list that the court may consider in determining whether to apply the enhancement.

Third, the proposed amendment addresses the directive contained in section 1104 of the Act pertaining to fraud offenses committed by officers or directors of publicly traded corporations by providing a new two level enhancement at §2B1.1(b)(13). This enhancement would apply if the offense involved a violation of any provision of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. This enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute (e.g., 18 U.S.C. § 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (e.g., 18 U.S.C. § 1341, prohibiting wire fraud), provided that the offense involved a violation of securities law. The corresponding application note provides that in cases in which the new enhancement applies, the current enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Although the directive only specifically addresses officers and directors of publicly traded companies, the proposed amendment provides an option to include registered brokers or dealers because they also are subject to certain requirements under securities law and as such may be considered to hold a heightened position of trust to investors.

Pursuant to the corresponding application note, "securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in section 3(a)(47).

The proposed amendment also includes an issue for comment regarding whether, in addition to the two level enhancement, a minimum offense level should be provided for such offenses committed by officers and directors of publicly traded companies. The issue for comment also requests comment regarding whether the scope of the enhancement should be broadened to apply to an officer or director of other large organizations.

Additional issues for comment are included regarding whether other enhancements, possibly to apply cumulatively, should be added to §2B1.1 in response to the Act, as well as whether further guidance should be provided regarding the calculation of loss in complex white collar offenses.

Fourth, the proposed amendment provides an option for expanding the loss table at §2B1.1(b)(1). Currently, the loss table provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The proposed amendment provides two additional levels to the table; an increase of 28 levels for offenses in which the loss exceeded $200,000,000, and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. This proposed addition to the loss table would address congressional concern expressed in the Act regarding particularly extensive and serious fraud offenses and would more fully effectuate increases in statutory maximum penalties, for example, the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). An issue for comment follows the proposed amendment regarding whether more extensive modifications to the loss table should be made in response to the Act, particularly for offenses involving significantly lower loss amounts.

Fifth, the proposed amendment implements the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. The proposed amendment adds a new two level enhancement to §2J1.2 (Obstruction of Justice) that applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (ii) involved the selection of especially probative or essential evidence to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation. An issue for comment follows the proposed amendment regarding whether the base offense level in §2J1.2 should be increased and whether an enhancement for the use of sophisticated means should be included in §2J1.2. There is an additional issue for comment regarding whether modifications also should be made to the guideline covering perjury offenses, §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) in light

of the proposed amendment to the obstruction of justice guideline, in order to maintain sentencing proportionality between the two types of offenses.

Finally, the proposed amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, is referenced to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act). This offense provides a statutory maximum of 10 years' imprisonment if the defendant certifies the publicly traded company's periodic financial report knowing that the statement does not comply with all requirements of the Securities and Exchange Commission (and 20 years' imprisonment if that certification is done willfully). The proposed amendment also expands the current cross reference in §2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant who is convicted under 18 U.S.C. § 1520 certified the financial report of a publicly traded company in order to facilitate a fraud, the proposed change to the cross reference provision would require the court to apply §2B1.1 instead of §2E5.3. Other new offenses are proposed to be included in Appendix A (Statutory Index) as well as the statutory provisions of the relevant guidelines.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

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

Loss (Apply the Greatest)		Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**
(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**;
(O)	More than $200,000,000	add **28**
(P)	More than $400,000,000	add **30**.

[Option 1 for Substantial Number of Victims:

~~(2) (Apply the greater) If the offense—~~

~~(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or~~

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

(2) (Apply the greatest) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved at least 50, but less than 250, victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.]

* * *

(12) (Apply the greater) If—

* * *

~~(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.~~

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at the time of the offense [(I)] was a publicly traded company[; or (II) had [200][1,000][5,000] or more employees], increase by **4** levels.

* * *

(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was [(i)] an officer or a director of a publicly traded company[; or (ii) a registered broker or dealer], increase by **2** levels.

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1348, 1350, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

Application Notes:

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

* * *

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

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

~~10. *Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.*~~

10. *Application of Subsection (b)(12)(B).*—

(A) *Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B)(i).—For purposes of subsection (b)(12)(B)(i), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution, if, as a consequence of the offense, the institution (i) became insolvent; (ii) substantially reduced benefits to pensioners or insureds; (iii) was unable on demand to refund fully any deposit, payment, or investment; (iv) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (v) was placed in substantial jeopardy of any of subdivisions (i) through (iv) of this note.*

(B) *Enhancement for Endangering the Solvency or Financial Security of a Publicly Held Company [or An Organization with more than [200][1000][5000] Employees] under Subsection (b)(12)(B)(ii).*—

(i) *Definitions.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).*

(ii) *Application.—An offense shall be considered to have substantially endangered the solvency or financial security of an organization that was a publicly traded company[or that had more than [200][1000][5000] employees] if, as a consequence of the offense, the organization (I) became insolvent; (II) filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11 of the United States Code); (III) suffered a substantial reduction in the value of [its equity securities][a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l)] or the value of its employee retirement accounts; (IV) substantially reduced its workforce; (V) substantially reduced its*

employee pension benefits; (VI) was so depleted of its assets as to be forced to merge with another company in order to continue active operations; or (VII) was placed in substantial endangerment of any of subdivisions (I) through (VI) of this note. ["Equity securities" has the meaning given that term in section 3 of Securities Exchange Act of 1934 (15 U.S.C. § 78c).]

11. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of this subsection:

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

"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in section 3(a)(47).

(B) In General.—A conviction under securities law is not required in order for subsection (b)(13) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated securities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.

[Notes 11 through 14 are redesignated as Notes 12 through 15, respectively.]

*~~15~~16. Departure Considerations.— * * **

~~*(v) The offense endangered the solvency or financial security of one or more victims.*~~

[Option 2 for Substantial Number of Victims:

*~~15~~16. Departure Considerations.— * * **

(v) The offense involved substantially more than 50 victims.]

* * *

§2E5.3. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records

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

* * *

~~(2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.~~

(2) If the offense was committed to facilitate or conceal (A) an offense involving theft, fraud, or embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Fraud and Property Destruction), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Perjury or Subornation of Perjury; Bribery of a Witness), as appropriate.

* * *

Statutory Provisions: 18 U.S.C. §§ 1027, 1520; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2J1.2. Obstruction of Justice

* * *

(b) Specific Offense Characteristics

* * *

(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (B) involved the selection of especially probative or essential evidence to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by [**2**] levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1347	2B1.1

18 U.S.C. § 1348	2B1.1	
18 U.S.C. § 1349	2X1.1	
18 U.S.C. § 1350	2B1.1	
		* * *
18 U.S.C. § 1512(c)	2J1.2	
18 U.S.C. § 1512~~(c)~~(d)	2J1.2	
		* * *
18 U.S.C. § 1518	2J1.2	
18 U.S.C. § 1519	2J1.2	
18 U.S.C. § 1520	2E5.3	* * *

Issues for Comment:

1. *The Sarbanes-Oxley Act of 2002 requires the Commission to consider providing an enhancement for officers or directors of publicly traded companies who commit fraud and related offenses. The Act also requires the Commission to ensure that the enhancements relating to obstruction of justice are adequate in cases in which the offense involved an abuse of position of trust or use of a special skill. In response to these directives, the proposed amendment provides an enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) specifically targeting officers and directors who violate securities law, including violations of the rules and regulations issues by the Securities and Exchange Commission. The Commission requests comment regarding whether it also should provide a minimum offense level for this proposed enhancement, and if so, what an appropriate offense level would be. Additionally, should this proposed enhancement apply to cases in which an officer or director of a large, non-public organization violates any provision of security law? Such a case may cause similar harm to the organization, its shareholders, and employees even though the organization is not a publicly traded company and the offense typically would not undermine public confidence in the securities market. The Commission further requests comment regarding whether, as an alternative to the proposed enhancement, it should provide a series of enhancements, possibly to apply cumulatively, to address separate aspects of these directives. Specifically, should the Commission provide enhancements in §2B1.1 that would apply if (A) the defendant used his or her position as officer or director of a publicly traded company in furtherance of a fraud or some other corporate crime; (B) the officer or director of a publicly traded company worked to defeat or compromise internal corporate controls, independent audits, or the oversight by a corporate governing board; or (C) an officer or director derived more than $1,000,000 in personal gain from unlawful activity? If so, should the Commission also provide minimum offense levels for any such enhancements? What would be an appropriate minimum offense level for such enhancements?*

2. *The proposed amendment expands the scope of §2B1.1(b)(12)(B) to apply to offenses that substantially endanger the solvency or financial security of a publicly traded company. This proposed enhancement is in response to directives pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. The proposed corresponding application note sets forth instances of when an offense shall be considered to have endangered the solvency or financial security of a publicly traded company. The note includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce, any one of which would require application of the new enhancement upon a finding of its presence. The Commission requests comment regarding whether the note alternatively should provide that the references are a non-*

exhaustive list that the court may consider in determining whether to apply §2B1.1(b)(12)(B). The Commission also requests comment regarding whether additional factors should be included in the list of instances that could trigger application of the enhancement.

3. *The Commission requests comment regarding whether the loss definition in §2B1.1 should be amended to provide further guidance as to how to calculate loss in complex white collar crime cases. For example, should loss in such cases be based on a change in the market capitalization of a corporation, a change in the value of corporate assets, or some other economic effect?*

4. *The current loss table in §2B1.1 provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The proposed amendment provides two additional increases to the table: an enhancement of 28 levels for offenses in which the loss exceeded $200,000,000, and an enhancement of 30 levels for offenses in which the loss exceeded $400,000,000. This proposed addition to the loss table would address congressional concern expressed in sections 805, 905, and 1104 of the Sarbanes-Oxley Act regarding particularly extensive and serious fraud offenses and would more fully effectuate increases in statutory maximum penalties, for example, the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). Should the Commission modify the loss table more extensively to provide increased offenses levels at lower loss amounts? Commission data indicate that approximately one-third of fraud offenses involve loss amounts less than $20,000, approximately one-third involve loss amounts between $20,000 and $120,000, and approximately one-third involve loss amounts greater than $120,000. For instance, should the Commission modify the loss table to result in a Zone D offense level (assuming a two level reduction for acceptance of responsibility) for offenses involving more than $50,000? Similarly, should the Commission modify the loss table to restrict Zone A offense levels (which provide sentences of straight probation) to offenses involving loss amounts of $10,000 or less (assuming a two level reduction for acceptance of responsibility)? If any changes are made to the loss table in §2B1.1, should the Commission also make similar changes to the tax loss table in §2T4.1 (Tax Table) in order to maintain the long standing relationship between the two loss tables? In addition, the Commission requests comment regarding whether the base offense level in §2B1.1 should be increased from level 6.*

5. *In response to the directives in the Sarbanes-Oxley Act pertaining to obstruction of justice offenses, the proposed amendment sets forth a new two level enhancement in §2J1.2 (Obstruction of Justice) that applies if the offense (A) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (B) involved the selection of especially probative or essential evidence to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation. The Commission requests comment regarding whether, in addition to this enhancement, it should provide an enhancement that is based on the number of participants recruited to commit the obstruction of justice offense. Additionally, should the Commission provide an enhancement for obstruction of justice offenses committed through the use of sophisticated means, perhaps in lieu of the proposed subdivision (C) prong, and if so, what characteristics would be common to such an offense? Finally, given congressional concern with obstruction of justice offenses, should the Commission increase the base offense level in §2J1.2 from level 12 to level 14?*

6. *Part Three of the proposed amendment addresses the emergency amendment directives in the Sarbanes-Oxley Act pertaining to the Chapter Two guidelines for obstruction of justice offenses. Specifically, the proposed amendment would provide a new enhancement in §2J1.2 addressing the directive relating to the destruction of evidence and offenses that are otherwise extensive in scope, planning, or preparation. Currently, defendants sentenced under §2J1.2 or §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) are sentenced proportionately because these guidelines have the same base offense level and provide substantially parallel enhancements. The Commission*

requests comment regarding whether, in light of the proposed changes to §2J1.2, modifications also should be made to §2J1.3 in order to maintain proportionate sentencing between these two guidelines. For example, should the Commission increase the base offense level in §2J1.3 or increase the magnitude of the enhancement of the current specific offense characteristics? Any such amendment to §2J1.3 would be made when the Commission re-promulgates as a permanent amendment any emergency amendment made to §2J1.2.

2. Campaign Finance

Synopsis of Proposed Amendment: *This proposed amendment responds to the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155 (the "Act"). The most pertinent provision of the Act, for the Commission, is section 314, which gives the Commission emergency authority to promulgate amendments to implement the Act not later than February 3, 2003. Specifically, section 314(a) and (b) state:*

> *"(a) IN GENERAL.—The United States Sentencing Commission shall—*
>
> *(1) promulgate a guideline, or amend an existing guideline under section 994 of title 28, United States Code, in accordance with paragraph (2), for penalties for violations of the Federal Campaign Act of 1971 and related election laws; and*
>
> *(2) submit to Congress an explanation of any guidelines promulgated under paragraph (1) and any legislative or administrative recommendations regarding enforcement of the Federal Campaign Act of 1971 and related election laws.*
>
> *(b) CONSIDERATIONS.—The Commission shall provide guidelines under subsection (a) taking into account the following considerations:*
>
> *(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement action to prevent such violations.*
>
> *(2) Provide a sentencing enhancement for any person convicted of such violation if such violations involves—*
>
> *(A) a contribution, donation, or expenditure from a foreign source;*
>
> *(B) a large number of illegal transactions;*
>
> *(C) a large aggregate amount of illegal contributions, donations, or expenditures;*
>
> *(D) the receipt or disbursement of governmental funds; and*
>
> *(E) an intent to achieve a benefit from the Federal Government.*
>
> *(3) Assure reasonable consistency with other relevant directives and guidelines of the Commission.*
>
> *(4) Account for aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements.*
>
> *(5) Assure the guidelines adequately meet the purposes of sentencing under section 3553(a)(2) of title 18, United States Code.".*

Section 309(d)(1) of the FECA sets forth the Act's criminal penalty provisions as follows:

(1) Violations of the FECA as penalized under section 309(d)(1)(A)

Section 309(d)(1)(A) is the main penalty provision of the FECA (2 U.S.C. §437g(d)(1)(A)). As amended by section 312 of the Act, it states that "[a]ny person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure (i) aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, imprisoned for not more than 1 year, or both.". (Before amendment by the Act, section 309(d)(1)(A) of the FECA provided for a maximum term of imprisonment of one year, or a fine, or both.)

The major violations of the FECA to which section 309(d)(1)(A) applies are:

(A) The Ban on Soft Money

Section 323 of the FECA (2 U.S.C. § 441i) prohibits national political party committees (including senatorial and congressional campaign committees) from accepting soft money from any person (including an individual) after November 6, 2002.

(B) Restrictions on Hard Money Contributions

The FECA limits the amount of hard money that may be contributed to a Federal campaign. The FECA limits the amount of hard money that persons other than multicandidate political committees may contribute as follows:

(i) The contribution to a candidate for Federal office may not exceed $2,000 per election. (The limit used to be $1,000; see section 315(a)(1)(A) of the FECA, as amended by section 307(a)(1) of the Act.)

(ii) The contribution to a national party committee may not exceed $25,000 per calendar year. (The limit used to be $20,000; see section 315(a)(1)(B) of the FECA, as amended by section 307(a)(2) of the Act.)

(iii) The contribution to any other political committee, including a political action committee (PAC), may not exceed $5,000 per calendar year. (No change in the former law; see section 315(a)(1)(C) of the FECA.)

(iv) The contribution to a State or local political party may not exceed $10,000 per calendar year. (The limit used to be $5,000; see section 315(a)(1)(D) of the FECA, as amended by section 102(3) of the Act.)

The FECA limits the amount of hard money that multicandidate political committees other than individuals may contribute as follows:

(i) The contribution to a candidate for Federal office may not exceed $5,000 per election. (See section 315(a)(2)(A) of the FECA.)

(ii) The contribution to a national party committee may not exceed $15,000 per calendar year. (See section 315(a)(2)(B) of the FECA.)

(iii) The contribution to any other political committee, including a political action committee (PAC), may not exceed $5,000 per calendar year. (No change in the former law; see section 315(a)(2)(C) of the FECA.)

(iv) The contribution to a State or local political party may not exceed $5,000 per calendar year. (See section 315(a)(2)(C) of the FECA.)

(C) The Ban on Contributions and Donations by Foreign Nationals

Section 319 of the FECA (2 U.S.C. § 441e) makes it "unlawful for (1) a foreign national, directly or indirectly, to make (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign

national.".

"Foreign national" is broadly defined to mean (1) a foreign principal, as defined in the Foreign Agent Registration Act of 1938 (22 U.S.C. § 611(b)) or (2) an individual who is not a citizen or national of the United States or who is not lawfully admitted for permanent residence.

(D) Restrictions on Electioneering Communications

Section 304(f) of the FECA, as added by section 201 of the Act, requires any person who makes a disbursement for the direct costs of producing and airing electioneering communications exceeding $10,000 in a calendar year to file a disclosure statement to the Federal Election Commission.

Section 316 of the FECA (2 U.S.C. § 441b) makes it unlawful for any national bank, any corporation organized by authority of any Federal law, or any labor union to make a contribution or expenditure in connection with any federal election to any federal political office, or a disbursement, using non-PAC money, for an "electioneering communication".

An electioneering communication is any broadcast, cable, or satellite communication which (A) refers to a clearly identified candidate for Federal office; (B) is made within 60 days before a general election or 30 days before a primary election. The Communication must be targeted to the pertinent electorate. (See 2 U.S.C. § 434(f)(3)(c).)

(2) Violations of Section 316(b)

Section 309(d)(1)(B) of the FECA states that "[i]n the case of a knowing and willful violation of section 316(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 316(b)(3) may incorporate a violation of section 317(b), 320, or 321".

Section 316(b)(3) of the FECA (2 U.S.C. § 441b(b)(3)) makes it unlawful for a national bank, any corporation organized by authority of any law of Congress, or any labor union (A) to use a political fund to make a political contribution or expenditure from money or anything of value that was secured by physical force, job discrimination, financial reprisals (or the threat thereof), or from dues, fees, or other money required as a condition of membership in the labor organization or as a condition of employment; (B) who solicits an employee for contribution to a political fund to fail to inform the employee of the purposes of the fund at the time of the solicitation; and (B) who solicits an employee for contribution to a political fund to fail to inform the employee of his right to refuse to contribute without reprisal.

The sections which may incorporate violations of section 316(b)(3) of the FECA are section 317(b), which prohibits government contractors from making contributions of currency in excess of $100 for any candidate for Federal office, section 320 which prohibits a person from making a contribution in the name of another or accepting a contribution so made, and section 321, which prohibits any person from making contributions of currency in excess of $100 for any candidate for Federal office.

(3) Fraudulent Misrepresentations Under Section 322

Section 309(d)(1)(C) of the FECA states that "[i]n the case of a knowing and willful violation of section 322, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved."

Section 322(a) of the FECA (2 U.S.C. 441h) states that "[n]o person who is a candidate for Federal office or an employee or agent of such a candidate shall (1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1)."

Section 322(b) states that "[n]o person shall (1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1)."

(4) Conduit Contributions under Section 320

Section 309(d)(1)(D) of the FECA states that "[a]ny person who knowingly and willfully commits a violation of section 320 involving an amount aggregating more than $10,000 during a calendar year shall be (i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more); (ii) fined not less than 300 percent of the amount of the violation and not more than the greater of (I) $50,000; or (II) 1,000 percent of the amount involved in the violation; or (iii) both imprisoned under clause (i) and fined under clause (ii)."

Section 320 of the FECA (2 U.S.C. § 441f) states that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person."

In addition to changes made to the FECA, section 302 of the Act amended section 607 of title 18, United States Code, to make it "unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person." The penalty is a fine of not more than $5,000, not more than 3 years or imprisonment, or both.

In order to implement the directive in the Act, this proposed amendment expands the scope of Chapter Two, Part C (Offenses Involving Public Officials) by providing within that Part a new guideline for offenses under the FECA and related offenses. A new guideline, rather than amendment of an existing guideline, seems most appropriate to implement the directive. Currently there exists no guideline which already incorporates the elements of the FECA and related offenses, although the fraud guideline in particular (§2B1.1) and the public corruption guidelines to a lesser degree (Chapter Two, Part C) provide some overlap in the elements of the offense and aggravating conduct. In addition, the enhancements required to be added by the directive in the Act would fit nicely into a guideline devoted solely to campaign finance offenses but could prove unwieldy if added to the fraud or public corruption guidelines, which cover so many other non-campaign finance offenses.

The proposed amendment provides for a base offense level of level [6-10]. The statutorily authorized maximum term of imprisonment for the conduct covered by the proposed guideline was raised by the Act from one year for all such offenses to two years for some offenses and five years for others. The base offense level is set at level [6-10] in recognition of the relative similarity of these offenses to fraud offenses covered by §2B1.1 and public corruption offenses covered by Chapter Two, Part C. A base offense level of level [6-10]

both insures proportionality with relatively similar offenses and permits various sentencing enhancements directed to be added by the Act to operate well.

The proposed amendment also creates a number of specific offense characteristics in response to the directive in section 314(b) of the Act. First, the directive requires the Commission to provide an enhancement if the offense involved a large aggregate amount of illegal contributions, donations, or expenditures and to provide an enhancement for a large number of illegal transactions. These two directives are fundamentally interrelated because the amount of the illegal contributions necessarily tends to increase as the number of illegal transactions increases. Because of the interrelatedness of these two directives, one option is to address these two considerations by providing a specific offense characteristic, at subsection (b)(1), that uses the fraud loss table in §2B1.1 to incrementally increase the offense level according to the dollar amount of the illegal transactions. This approach would foster proportionality with related guidelines, notably the fraud guideline and the public corruption guidelines (which also reference the fraud loss table), and would provide incremental, rather than a flat, punishment according to the dollar amount involved in the offense.

The proposed amendment provides commentary to explain that "illegal transactions" include only those amounts that exceed the amount a person may legitimately contribute, solicit, or expend. The proposed amendment also provides references in the definition to the FECA's definitions of "contribution" and "expenditure".

Another option, provided in the proposed amendment, is to provide enhancements for both the number of illegal transactions and the dollar amount of the transactions. A separate enhancement for the number of illegal transactions takes into account the aspect of sophistication and planning attendant to multiple violations.

Second, the proposed amendment provides an enhancement if the offense involved a contribution, donation, or expenditure from a foreign source. In implementing this enhancement, the proposed amendment adopts the expansive definition of "foreign national" provided in section 319 of the FECA, and provides for a greater enhancement if the defendant knew that the source of the funds was a foreign government.

Third, the proposed amendment provides an enhancement if the offense involved a donation, contribution, or expenditure of governmental funds. The proposed amendment defines "governmental funds" to mean any Federal, State, or local funds. It is anticipated that this enhancement will apply in situations such as using governmental funds awarded in a contract to make a donation or contribution. The FECA itself addresses this type of situation but in very few places. For example, section 317 of the FECA, 2 U.S.C. § 441c, prohibits any person who enters into a contract with the United States for the rendition of services, the provision of materials, supplies, or equipment, or the selling of any land or property to the United States, if the payment from the United States is to be made in whole or in part from funds appropriated from Congress and before completion of or negotiation for the contract, to make or solicit a contribution of money or anything of value to a political party, committee, or candidate for public office or to any person for a political purpose. (This provision does not prohibit, however, the establishment of a segregated account to be used for political purposes.) The concern behind this provision of the FECA, therefore, is to prevent the use of federal funds for political purposes. The same concern pertains to State and local funds as well.

Fourth, the proposed amendment provides a number of options for responding to the directive to provide an enhancement for cases involving an intent to achieve a benefit from the Federal government. One option is to incorporate this factor into the base offense level. Examination of available Commission data reveals that this factor is present in the majority of illegal campaign finance cases and thus lies within the heartland of these cases. Another option presented in the proposed amendment defines this factor as the intent to influence a Federal public official to perform an official act in return for the contribution, donation,

or expenditure. A third option is also presented that limits the intent to achieve a Federal benefit to the intent to achieve a financial benefit.

The amendment also proposes to add an enhancement if the contribution, donation, or expenditure was obtained through intimidation, threat of harm, including pecuniary harm, or coercion.

The proposed amendment also amends the guideline on fines for individual defendants, §5E1.2, to set forth the fine provisions unique to FECA and to provide two upward departure provisions related to certain FECA fines. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission pursuant to section 309 of the FECA may be a potentially legitimate factor for the court to consider in evaluating where to sentence an offender within the presumptive fine guideline range. An issue for comment is provided regarding whether, in the alternative, a downward adjustment should apply in cases involving conciliation agreements, or alternatively, whether the Commission should discourage downward departures in such cases.

The proposed amendment provides commentary that counts under this proposed guideline are groupable under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Finally, the Statutory Index is amended to incorporate these offenses.

Proposed Amendment:

PART C - OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS

~~*Introductory Commentary*~~

~~*The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice.*~~

* * *

§2C1.8. **Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property**

(a) Base Offense Level: [6][7][8][9][10]

(b) Specific Offense Characteristics

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

(2) (Apply the greater) If the offense involved a contribution, donation, or expenditure, or an express or implied promise to make a contribution,

donation, or expenditure—

(A) by a foreign national, increase by [**2**][**4**] levels; or

(B) by a foreign government, and the defendant knew that the source of the contribution, donation, or expenditure was a foreign government, increase by [**4**][**8**] levels.

(3) If the offense involved a contribution, donation, or expenditure of governmental funds, increase by [**2**][**4**] levels.

(4) If the offense involved an intent [Option One: to influence a Federal public official to perform an official act][Option Two: to obtain a financial Federal benefit] in return for the contribution, donation, or expenditure, increase by [**2**][**4**] levels.

[(5) If the offense involved more than five illegal transactions in a 12-month period, increase as follows:

Number of Illegal Transactions		Increase in Level
(A)	6-15	add [**1**]
(B)	16-30	add [**2**]
(C)	31 or more	add [**3**].]

(6) If the offense involved a donation or contribution obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by [**2**][**4**] levels.

(c) Cross Reference

(1) If the offense involved the fraudulent misrepresentation of authority to speak or otherwise act for a candidate, political party, or employee or agent thereof for the purpose of soliciting a donation or contribution, apply §2B1.1 (Theft, Fraud, and Property Destruction), if the resulting offense level is greater than the offense level determined under this guideline.

Commentary

Statutory Provisions: 2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. § 607. For additional provision(s), see Statutory Index (Appendix A).

Application Notes:

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

"Foreign government" means the government of a foreign country, regardless of whether the United States formally has recognized that country.

"Foreign national" has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441e(b)).

"Governmental funds" means money, assets, or property of a Federal, State, or local government [, including a governmental branch, subdivision, department, agency, or other component.]

"Illegal transaction" means (A) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, solicitation, or expenditure that may be made under the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; and (B) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms "contribution" and "expenditure" have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 431(8) and (9)), respectively.

[2. Application of Abuse of Position of Trust Adjustment.—If the defendant is an elected official, a candidate for elected office, or acting on behalf of, or employed by, an elected official or candidate for elected office, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.]

3. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts).

4. Departure Provisions.—In a case in which the value of the illegal transactions does not adequately reflect the seriousness of the offense, an upward departure may be warranted. For example, a relatively small contribution in violation of the Federal Election Campaign Act of 1971 may be made in exchange for favorable consideration in the award of a substantial Federal government contract. Depending on the facts of such a case, an upward departure may be warranted.

In a case in which 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.

Background: This guideline covers violations of the Federal Election Campaign Act of 1971 and related federal election laws, such as 18 U.S.C. § 607.

§3D1.2. Groups of Closely Related Counts

* * *

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7, 2C1.8

* * *

§5E1.2. Fines for Individual Defendants

* * *

Commentary

Application Notes:

* * *

4. * * *

[*If the count of conviction involves a violation of the Federal Election Campaign Act under 2 U.S.C. § 437g(d)(1)(A), an upward departure to the maximum fine permitted under 18 U.S.C. § 3571 may be warranted. If the count of conviction involves a violation of the Federal Election Campaign Act under 2 U.S.C. § 441f punishable under 2 U.S.C. § 437g(d)(1)(D), an upward departure to the maximum fine permitted under that subsection may be warranted.*]

5. ***Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to $50,000 per day for violations of the Water Pollution Control Act; ~~and~~ 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act***: *and 2 U.S.C. § 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. § 441f, a fine up to the greater of $50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.*

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission may be an appropriate factor in determining at what point within the applicable fine guideline range to sentence the defendant.

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* * *

2 U.S.C. § 437g(d)(1)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8
7 U.S.C. § 6	2B1.1

* * *

18 U.S.C. § 597	2H2.1
18 U.S.C. § 607	2C1.8

* * *

Issues for Comment: *There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. For such cases, the proposed amendment provides that such an agreement may be an appropriate factor in determining the amount of fine that might be imposed. The Commission requests comment regarding whether the existence of such a conciliation agreement between the defendant and Federal Election Commission should be the basis for a downward adjustment under the proposed guideline (and if so, what should the extent of the adjustment be), or, alternatively, should the Commission discourage downward departures in cases involving conciliation agreements so as to limit the effect such an agreement might have on the criminal penalties imposed?*

The Commission also requests comment regarding whether, in contrast to proposed Application Note 2, application of the abuse of position of trust adjustment in §3B1.3 should be precluded for cases under the proposed guideline.

3. Terrorism

Synopsis of Proposed Amendment: *This proposed amendment is a continuation of the Commission's work over the past two years to ensure that the guidelines provide appropriate guideline penalties for offenses involving terrorism. Specifically, this proposed amendment responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub.L. 107–56; the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. 107–88; and the Terrorist Bombings Convention Implementation Act of 2002, Pub.L. 107–97.*

I. REMAINING USA PATRIOT ACT AMENDMENTS

The following amendments build on the Commission's response during the last amendment cycle to the USA PATRIOT ACT.

A. Terrorism Enhancement in Money Laundering Guideline

This amendment provides two options for treatment of the current 6-level terrorism enhancement in the money laundering guideline, §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). Option One eliminates the terrorism enhancement. Elimination of the enhancement is appropriate because it prevents "double-counting" with the terrorism adjustment in §3A1.4 (Terrorism). Specifically, the money laundering terrorism enhancement applies if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism. The terrorism adjustment at §3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5). Therefore, if the money laundering terrorism enhancement applied, the terrorism adjustment at §3A1.4 also would apply based on the same conduct.

In the event the Commission determines that the money laundering terrorism adjustment should not be eliminated, Option Two provides a definition of terrorism in the money laundering guideline that mirrors the definition in §3A1.4.

Proposed Amendment:

[Option 1:

§2S1.1. <u>Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity</u>

* * *

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security~~, terrorism~~, or the sexual exploitation of a minor, increase by **6** levels.**]**

* * *

[Option 2:

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Terrorism" means a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5).]

B. Reference of 18 U.S.C. § 1960 to Money Laundering Guideline

This amendment provides two options for the treatment of certain offenses under 18 U.S.C. § 1960. These offenses prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. § 1960(b)(1)(C). That provision defines an unlicensed money transmitting business as "a money transmitting business which affects interstate or foreign commerce in any manner or degree and otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity." The statutory maximum term of imprisonment is 5 years.

Option One changes the Statutory Index reference for these offenses from §2S1.3 (Structuring Transactions to Evade Reporting Requirements) to the main money laundering guideline, §2S1.1. This change is appropriate for this offense because its essence is money laundering rather than structuring to evade reporting requirements.

In contrast, other offenses under 18 U.S.C. § 1960 would remain in the structuring guideline under Option One because they are essentially structuring offenses. Specifically, they prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. § 1960(b)(1)(A) and (B). Those provisions define an unlicensed money transmitting business as "a money transmitting business which affects interstate or foreign commerce in any manner or degree and (A) is operated without an appropriate money transmitting license. . . .; or (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section."

Option Two maintains the initial Statutory Index reference for 18 U.S.C. § 1960(b)(1)(C) offenses in the structuring guideline but provides a cross reference to the main money laundering guideline for conduct that falls under 18 U.S.C. § 1960(b)(1)(C).

An issue for comment requests comment regarding whether the proposed cross reference should be broadened so that any structuring offense that involves the intent to promote unlawful activity, knowledge or belief that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds would be cross referenced to main money laundering guideline, leaving the structuring guideline to cover purely regulatory offenses.

Proposed Amendment (Part IB):

[Option One:

§2S1.1. **Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957, 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(C)). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2S1.3. **Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports**

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324, 5326. For additional statutory provision(s), see Appendix A (Statutory Index).

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* * *

18 U.S.C. § 1960 2S1.1, 2S1.3]

* * *

[Option Two:

§2S1.3. **Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts**

* * *

(c) Cross References

* * *

(2) If the offense involved (A) a money transmitting business; and (B) the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity, apply §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

Commentary

* * *

4. Cross Reference in Subsection (c)(2).—For purposes of subsection (c)(2), "money transmitting business" means a money transmitting business that affects interstate or foreign commerce. "Money transmitting" includes transferring funds on behalf of the public by any means, including transfers within the United States or to foreign locations by wire, check, draft, facsimile, or courier.]

Issue for Comment: *The proposed amendment provides two options for the treatment of offenses under 18 U.S.C. § 1960(b)(1)(C). Option One provides for a Statutory Index reference for these offenses to the main money laundering guideline, §2S1.1, rather than the structuring guideline, §2S1.3, because such an offense is essentially a money laundering offense. Option Two references this offense to §2S1.3 in the first instance but provides a cross reference for this offense from §2S1.3 to §2S1.1.*

The Commission requests comment regarding whether the proposed cross reference to §2S1.1 in Option Two should be expanded to cover any offense initially referenced to §2S1.3 in the Statutory Index that involved the intent to promote unlawful activity, knowledge or belief that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds. Such an approach effectively would limit the application of §2S1.3 to regulatory offenses (such as the failure to file transaction reports or structuring transactions to evade reporting requirements) unaccompanied by aggravated, real offense money laundering conduct. To effectuate such cross reference, §2S1.3 would likely need to be amended as follows: First, the base offense level of 8 in subsection (a)(1) would be maintained for offenses under 31 U.S.C. §§ 5318 and 5318A, but the alternative base offense level in subsection (a)(2) would be amended to level 6 without any increase from the loss table in §2B1.1. An alternative base offense level of level 6 for a regulatory offense unaccompanied by aggravated conduct is proportionate to other regulatory offenses under the guidelines. Second, the aggravated conduct described in §2S1.3(b)(1) and the aggravated conduct the absence of which is described in §2S1.3(b)(3) would form the basis for the new cross reference. Accordingly, the cross reference to the main money laundering guideline would apply if: (1) the defendant knew or believed that the funds were the proceeds of unlawful activity or were intended to promote unlawful activity; [(2) the offense involved bulk cash smuggling;] or (3) the defendant acted with reckless disregard for the illegal source of the funds. The major possible effects of cross referencing offenses involving real offense money laundering conduct to the money laundering guideline are application of the six-level enhancement in §2S1.1(b)(1) if the defendant knew or believed that the funds were the proceeds of or were intended to promote certain specified crimes, and application of the enhancement in §2S1.1(b)(3) for sophisticated laundering.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

Currently in §2X3.1 (Accessory After the Fact) there exists an offense level "cap" of level 20 for offenses in which the conduct is limited to harboring a fugitive (and an offense level "cap" of level 30 for all other offenses sentenced under the accessory guideline). This proposed amendment makes the lower offense level "cap" of level 20 inapplicable to offenses involving the harboring of terrorists because of the relative seriousness of those offenses.

Last year, the Commission promulgated an amendment that referenced 18 U.S.C. §§ 2339 and 2339A to §§2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). The offense at 18 U.S.C. § 2339 prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit one of several enumerated offenses. The maximum term of imprisonment is 10 years. The offense at 18 U.S.C. § 2339A prohibits the provision of material support or resources to terrorists, knowing or intending that they will be used in the preparation for, or in carrying out, specified crimes (i.e., those designated as predicate offenses for "federal crimes of terrorism") or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation. The maximum term of imprisonment is 15 years. In contrast, a violation of the general harboring statute, 18 U.S.C. § 1071, has a maximum term of imprisonment of 5 years.

For consistency and proportionality, the proposed amendment not only makes the "cap" of level 20 inapplicable to harboring a person who is convicted under 18 U.S.C. § 2339 or § 2339A but also to the conduct of harboring an individual who commits a terrorism offense, i.e., one of the offenses listed in 18 U.S.C. § 2339 or § 2339A or an offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5).

Proposed Amendment (Part IC):

§2X3.1. **Accessory After the Fact**

~~(a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30. However, in a case in which the conduct is limited to harboring a fugitive, the base offense level under this subsection shall not be more than level 20.~~

(a) Base Offense Level:

(1) **6** levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level **4.**

(3) (A) The base offense level under this guideline shall be not more than level **30**, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall not be more than level **20**.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. § 2339 or § 2339A; or (ii) the conduct involved (I) harboring a person who committed any offense listed in 18 U.S.C. § 2339 or § 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5); or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I). In such a case, the base offense level under this guideline shall be not more than level **30**, as provided in subdivision (A).

* * *

II. AMENDMENTS REQUIRED BY THE PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

The following amendments to the guidelines are proposed in response to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188.

A. BIOLOGICAL AGENTS AND TOXINS

First, the proposed amendment amends the Statutory Index to refer new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, §2M6.1. Specifically, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amends 18 U.S.C. §175b to redesignate the existing offense and create new offenses as follows:

> *(1) The existing offense, redesignated at 18 U.S.C. § 175b(a)(1), prohibits any restricted person (as defined in subsection (b)) from transporting, receiving, or possessing any biological agent or toxin that the Secretary of Health and Human Services has listed under regulations as a "select agent". The maximum term of imprisonment is 10 years. During the last amendment cycle, the Commission referred this offense to §2M6.1 and provided an alternative base offense level of level 22.*
>
> *(2) Two new offenses, at 18 U.S.C. § 175b(b)(1) and (2), prohibit a person from transferring a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, to any person the transferor knows or has reason to believe is not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.*
>
> *(3) Two new offenses, at 18 U.S.C. § 175b(c)(1) and (2), prohibit any person from knowingly possessing a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, if that person has not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.*
>
> *Like the existing offense at 18 U.S.C. § 175b(a)(1), reference of the new offenses to §2M6.1 is appropriate. (An amendment to the statutory index is not necessary because there already exists a reference to §2M6.1 for section 175b offenses.)*

Second, the proposed amendment provides for a base offense level of level 22 for the new offenses involving transfer to, or possession of, select biological agents by unregistered persons. This proposed base offense level is the same as the existing base offense level for offenses involving transfer to, or possession of, select biological agents by restricted persons. The proposed amendment exempts these offenses from application of §2M6.1(b)(1), which provides a two level enhancement for offenses involving select agents, because that factor is incorporated into the proposed base offense levels.

Third, in response to Act, the proposed amendment makes two modifications to the definition of "select biological agent" in §2M6.1. That definition exists in the guideline for purposes of the two level enhancement in §2M6.1(b)(1) for offenses that involved such an agent. First, in response to section 212 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, the amendment proposes to expand the definition of "select biological agent" to include biological agents and toxins the Secretary of Agriculture has determined pose a severe threat to animal and plant health and products.

Second, section 201 of the Act codified a number of provisions of the Antiterrorism and Effective Death Penalty Act of 1996 in the Public Health Service Act. This codification necessitates a conforming amendment to the definition of "select agent" in Application Note 1 of §2M6.1.

Proposed Amendment (Part IIA)

§2M6.1. **Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

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

(1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;

(2) **28**, if subsections (a)(1), (a)(3), and (a)(4)~~, and (a)(5)~~ do not apply;

(3) **22**, if the defendant is convicted under 18 U.S.C. § 175b; or

(4) **20**, if (A) the defendant is convicted under 18 U.S.C. § 175(b); or (B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.

~~(5) **20**, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry out the threat.~~

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2)~~,~~ or (a)(4)~~, or (a)(5)~~ applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by **2** levels.

(2) If (A) subsection (a)(2), (a)(3), or (a)(4)(A) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by **4** levels; (ii) any victim sustained serious bodily injury, increase by **2** levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by **3** levels.

(3) If (A) subsection (a)(2), (a)(3), or (a)(4)~~, or (a)(5)~~ applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by

4 levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

"Select biological agent" means a biological agent or toxin identified (A) by the Secretary of Health and Human Services on the select agent list established and maintained pursuant to section ~~511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132. See 42 C.F.R. part 72~~.351A of the Public Health Service Act (42 U.S.C. 262a), or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).

2. *Threat Cases.—Subsection ~~(a)(3)~~(a)(4)(B) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct evidencing an intent or ability to carry out the threat. For example, subsection ~~(a)(3)~~(a)(4)(B) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant's part to carry out the threat. In contrast, subsection ~~(a)(3)~~(a)(4)(B) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant's belief that the talcum powder was anthrax.*

Subsection ~~(a)(3)~~(a)(4)(B) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

* * *

B. SAFE DRINKING WATER PROVISIONS

This proposed amendment responds to amendments to the Safe Drinking Water Act made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002. Section 1432(a) of the Safe Drinking Water Act (42 U.S.C. § 300i-1(a)) prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from 5 years' imprisonment to 20 years' imprisonment. This offense is the only offense referenced to §2Q1.4 (Tampering or Attempted Tampering with Public Water System). Section 1432(b) of such Act (42 U.S.C. § 300i-1(b)) prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from 3 years' imprisonment to 10 years' imprisonment. This offense is the only offense referenced to §2Q1.5 (Threatened Tampering with Public Water System). For purposes of both offenses, "tamper" means "to introduce a contaminant into a public water system with the intention of harming persons" or "to otherwise interfere with the operation of a public water system with the intention of harming persons".

First, the amendment proposes to consolidate the guidelines covering tampering with consumer products, §2N1.1, and tampering with a public water system, §2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, §2N1.2, and threatened tampering with a public water system, §2Q1.5. Consolidation is proposed because of the infrequency of occurrence of these offenses and because these guidelines cover very similar conduct; accordingly, the treatment of these offenses under the same guideline would promote proportionality in punishment. The substantive changes resulting from the proposed consolidation would include (1) increased base offense levels for public water system offenses, as discussed in the following paragraph; (2) application to consumer product cases of an existing enhancement in the public water system guidelines if the offense involved substantial disruption of governmental functions or substantial expenditure of funds to respond to the offense; (3) elimination of the existing enhancement in the public water system guideline for ongoing, continuous, or repetitive release of a contaminant into the water supply (elimination is proposed because of definitional difficulties); (4) replacement of the existing enhancement in the public water system guideline if the purpose of the offense was to influence government action or to extort money with an application note inviting an upward departure if a terrorist motive was present and a cross reference to the extortion guideline if the offense involved extortion; and (5) application to public water system offenses of an existing cross reference in the consumer products guideline to the murder guidelines if death resulted. Conforming changes are made to the Statutory Index.

An issue for comment follows regarding whether the proposed consolidations also should effectuate a consolidation of the tampering guidelines with the threatened tampering guidelines, similar to the manner in which offenses involving threats to use nuclear, biological, or chemical weapons are subsumed within the nuclear, biological and chemical guideline, §2M6.1.

Second, the amendment proposes to increase the base offense level for offenses involving tampering and threatened tampering with a public water system. Under the proposed consolidation, the base offense level for tampering with a public water system would increase from level 18 to level 25, and the six level enhancement for the risk of death or serious bodily injury would be eliminated and replaced with a graduated enhancement for actual bodily injury. Likewise, the base offense level for threatening to tamper with a public water system is proposed to increase from level 10 to level 16. For point of comparison, the existing base offense level for threatening communications under §2A6.1 is level 12 and for threatened use of nuclear, biological, and chemical weapons under §2M6.1 is level 20. These substantial increases in the base offense levels are proposed to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002.

Third, the amendment proposes to provide an application note in the consolidated guideline that an upward departure (as provided in Application Note 4 of the terrorism adjustment in §3A1.4 (Terrorism)) may be warranted if the tampering or threatened tampering was accompanied by a terrorist motive. The amendments to the Safe Drinking Water Act made by the Public Health Security and Bioterrorism Preparedness and Response of 2002 contemplated that terrorism may be the motive behind tampering with the public water supply. Section 1431 of the Safe Drinking Water Act (42 U.S.C. 300i-1) was amended to expand the authority of the Administrator of the Environmental Protection Agency to take emergency action to protect the public health if the Administrator determines that "there is a threatened or potential terrorist attack or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals, which may present an imminent and substantial endangerment" to the public health. Terrorist motives similarly may be present in offenses involving tampering with consumer products.

One other criminal provision was added by the Act, but it may be appropriate not to list this provision in the Statutory Index at this time. Section 401 of the Public Health Security and Bioterrorism

Preparedness and Response of 2002 added section 1433 to the Safe Drinking Water Act. This provision requires local communities to conduct assessments of the vulnerability of their public water systems to terrorist and other intentional acts. Section 1433(a)(6) of the Safe Drinking Water Act (42 U.S.C. § 300i-2(a)(6)) provides that any person who acquires information from this assessment and knowingly or recklessly reveals such information to a person other than to specified persons authorized to receive such information shall be imprisoned for not more than one year and/or fined in accordance with the fines applicable to Class A misdemeanors. This provision does not provide a neat fit within the guidelines. Most of the environmental regulatory guidelines cover the failure to report information or the falsification of information, rather than the reckless disclosure of information. Rather than provide a Statutory Index reference at this point, it may be best to assess over the next few years the frequency of prosecution of this offense and what conduct typically occurs in connection with the offense.

Proposed Amendment (Part IIB):

PART N - OFFENSES INVOLVING PUBLIC WATER SYSTEMS, FOOD, DRUGS, AGRICULTURAL PRODUCTS, AND ODOMETER LAWS

1. TAMPERING WITH CONSUMER PRODUCTS OR PUBLIC WATER SYSTEMS

§2N1.1. **Tampering With Consumer Products or Attempting to Tamper With Consumer Products Involving Risk of Death or Bodily Injury; Tampering or Attempting to Tamper With a Public Water System**

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1365(a), (e); 42 U.S.C. § 300i-1.

Application Notes:

~~*1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims, or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be*~~

~~*warranted.*~~

~~*2. The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).*~~

1. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

2. Departure Provisions.—

(A) Downward Departure Provision.—The base offense level reflects that offenses covered by this guideline typically pose a risk of death or serious bodily injury to one or more victims; or cause, or are intended to cause, bodily injury. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) Upward Departure Provisions.—If the offense posed a substantial risk of death or serious bodily injury to numerous victims, caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. See Application Note 4 of §3A1.4 (Terrorism).

* * *

§2N1.2. Providing False Information or Threatening to Tamper with Consumer Products; Threatening to Tamper With a Public Water System

* * *

(b) Specific Offense Characteristic

(1) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

~~(b)~~(c) Cross Reference

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1365(c), (d); 42 U.S.C. § 300i-1.

Application Note:

1. Upward Departure Provisions.—If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. See Application Note 4 of §3A1.4 (Terrorism).

* * *

~~§2Q1.4. Tampering or Attempted Tampering with Public Water System~~

~~(a) Base Offense Level: 18~~

~~(b) Specific Offense Characteristics~~

~~(1) If a risk of death or serious bodily injury was created, increase by 6 levels.~~

~~(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.~~

~~(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.~~

~~(4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.~~

~~*Commentary*~~

~~*Statutory Provision. 42 U.S.C. § 300i-1.*~~

~~*Application Note:*~~

~~*1. "Serious bodily injury" is defined in the Commentary to §1B1.1 (Application Instructions).*~~

~~§2Q1.5. Threatened Tampering with Public Water System~~

~~(a) Base Offense Level: 10~~

~~(b) Specific Offense Characteristic~~

~~(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.~~

~~(c) Cross Reference~~

~~(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).~~

~~*Commentary*~~

~~*Statutory Provision. 42 U.S.C. § 300i-1.*~~

* * *

APPENDIX A - STATUTORY INDEX

* * *

42 U.S.C. § 300i-1	~~2Q1.4, 2Q1.5~~2N1.1, 2N1.2

* * *

Issue for Comment: *For the reasons stated in the foregoing synopsis, this amendment proposes to consolidate the guidelines covering tampering with consumer products, §2N1.1, and tampering with a public water system, §2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, §2N1.2, and threatened tampering with a public water system, §2Q1.5. The Commission requests comment regarding whether the Commission should effectuate the consolidation of these four guidelines into one guideline covering both tampering and threatened tampering cases. Such an approach would be consistent with the guideline covering nuclear, biological, and chemical weapons and materials, §2M61, which covers both offenses involving such weapons and materials as well as offenses involving the threatened use of such weapons and materials.*

C. ANIMAL ENTERPRISE TERRORISM

This proposed amendment adds an invited upward departure provision in the fraud, theft, and property destruction guideline, §2B1.1, to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. § 43.

Specifically, section 336 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 increased the penalty provisions of 18 U.S.C. § 43, which makes it an offense to travel in interstate or foreign commerce, or to use or cause to be used the mail or any facility in interstate or foreign commerce for the purpose of causing physical disruption to the functioning of an animal enterprise, and to intentionally damage or cause the loss of any property (including animals and records) used by the animal enterprise, or to conspire to do so.

Before amendment by the Act, the penalty structure was (1) not more than one year imprisonment for causing economic damage exceeding $10,000; (2) not more than 10 years' imprisonment for causing serious bodily injury in the course of such an offense; and (3) life or any term of years of imprisonment if death resulted. As a result of the Act, the penalty structure now is (1) not more than 6 months imprisonment for causing economic damage not exceeding $10,000 (18 U.S.C. § 43(b)(1)); (2) not more than 3 years' imprisonment for causing economic damage exceeding $10,000 (18 U.S.C. § 43(b)(2)); (3) not more than 20 years' imprisonment for causing serious bodily injury in the course of such an offense (18 U.S.C. § 43(b)(3)); and (4) life or any term of years of imprisonment if death resulted (18 U.S.C. § 43(b)(4)).

This offense currently is referenced only to §2B1.1. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. § 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the proposed amendment adds an invited upward departure provision in Application Note 15(A)(ii) of §2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. § 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Proposed Amendment (Part IIC):

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

* * *

Commentary

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Application Notes:

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15. Departure Considerations.—

* * *

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.

III. AMENDMENTS REQUIRED BY THE TERRORIST BOMBINGS CONVENTION IMPLEMENTATION ACT OF 2002

The proposed amendment amends the Statutory Index (and the Statutory Provisions of the pertinent Chapter Two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. 107–197, and provides conforming amendments within a number of Chapter Two guidelines to more fully incorporate the new offenses into the offense guidelines.

First, section 102 of the Act created a new offense at 18 U.S.C. § 2332f, which provides in subsection (a) that "whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (A) with the intent to cause death or serious bodily injury, or (B) with the intent to

cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss" and in subsection (b) that "whoever attempts or conspires to commit [such] an offense" shall be punished as provided under 18 U.S.C. § 2332a(a). Section 2332a offenses currently are referenced to §§2K1.4 (the arson and property damage by use of explosives guideline) and 2M6.1 (the guideline covering nuclear, biological, and chemical weapons). The proposed amendment refers this new offense to those guidelines as well. In addition, the proposed amendment amends the alternative base offense levels in the arson guideline §2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. § 2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and "places of public use".

Second, section 202 of the Act created a new offense at 18 U.S.C. § 2339C, which provides in subsection (a)(1) that "whoever, in a circumstance described in subsection (c) (i.e., in the United States or outside of the United States by a national of the United States or an entity organized under the laws of the United States), by any means directly or indirectly, unlawfully and willfully provides or collects funds, with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out (A) an act which constitutes an offense, within the scope of certain international treaties, as implemented by the United States, or (B) any other act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act", and in subsection (b) that whoever attempts or conspires to commit such an offense, shall be punished for a maximum term of imprisonment of 20 years.

The proposed amendment refers the new offense at 18 U.S.C. § 2339C(1)(A) to §2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the proposed amendment treats these offenses in the same manner as 18 U.S.C. § 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is proposed to be made in §2X2.1 to conform the definition of the "underlying offense" that is aided and abetted.

The proposed amendment refers the new offense at 18 U.S.C. § 2339C(a)(1)(B) to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to §2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the provision of material support to terrorists, which is appropriately referenced to §2M5.3. The proposed amendment expands §2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Third, 18 U.S.C. § 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were (A) provided in violation of 18 U.S.C. §2339B, or (B) provided or collected in violation of 18 U.S.C. §2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. § 2339C(c) is 10 years.

The proposed amendment references offenses under 18 U.S.C. § 2339C(c)(2)(A) to §2X3.1 (Accessory After the Fact), since the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. § 2339B. An amendment is proposed to be made in §2X3.1 to conform the definition of the "underlying

offense" to which the defendant is an accessory.

The proposed amendment references offenses under 18 U.S.C. § 2339C(c)(2)(B) to §§2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. § 2339C(a)(1), the offense should be sentenced under §2X3.1. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. § 2339C(a)(2), the offense should be sentenced under §2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is proposed to be added to the Statutory Provisions of §§2M5.3 and 2X3.1.

Proposed Amendment (Part III):

§2K1.4. Arson; Property Damage by Use of Explosives

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

(1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~or~~ a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;

~~(2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an aircraft, a mass transportation vehicle, or a ferry; or~~

(2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992, 1993(a)(1), (a)(2), (a)(3), (b), 2275, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

* * *

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose

* * *

Commentary

Statutory Provision: 18 U.S.C. § 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)).

* * *

§2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2339, 2339A, 2339C(a)(1)(A).

Application Note:

1. Definition.—For purposes of this guideline, "underlying offense" means the offense the defendant is convicted of aiding or abetting, or in the case of a violation of 18 U.S.C. § 2339A or 2339C(a)(1)(A), "underlying offense" means the offense the defendant is convicted of having materially supported or provided or collected funds for prior to or during its commission.

* * *

§2X3.1. Accessory After the Fact

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A)).

Application Notes:

1. *Definition.—For purposes of this guideline, "underlying offense" means the offense as to which the defendant is convicted of being an accessory, or in the case of a violation of 18 U.S.C. § 2339A, "underlying offense" means the offense the defendant is convicted of having materially supported after its commission (i.e., in connection with the concealment of or an escape from that offense), or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), "underlying offense" means the violation of 18 U.S.C. § 2339B with respect to which the material support, resources, or funds were concealed or disguised. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct).*

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2332d	2M5.1
18 U.S.C. § 2332f	2K1.4, 2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1
18 U.S.C. § 2339A	2X2.1, 2X3.1
18 U.S.C. § 2339B	2M5.3
18 U.S.C. § 2339C(a)(1)(A)	2X2.1
18 U.S.C. § 2339C(a)(1)(B)	2M5.3
18 U.S.C. § 2339C(c)(2)(A)	2X3.1
18 U.S.C. § 2339C(c)(2)(B)	2M5.3, 2X3.1
18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1

* * *

IV. MISCELLANEOUS AMENDMENTS

The proposed amendment amends §2K1.3 to add an additional base offense level of 18 for certain offenses committed under 18 U.S.C. § 842(p)(2). Section 842(p)(2) criminalizes knowingly or intentionally facilitating Federal crimes of violence by teaching or demonstrating the making or use of an explosive, destructive device, or weapon of mass destruction. It also criminalizes the distribution "by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive, device, or weapon of mass destruction" with the intent or knowing that the teaching, demonstration, or information will be used for or in furtherance of, an activity that constitutes a Federal crime of violence. The statutory maximum term of imprisonment is 20 years.

The statute is referenced in the Statutory Index to §§2K1.3 (covering prohibited transactions involving explosive materials) and 2M6.1 (covering weapons of mass destruction). The applicable base offense levels at §2M6.1 are levels 42 and 28. The applicable offense level at §2K1.3 currently is base

offense level 12. Section 2K1.3 has alternative base offense levels predicated upon recidivism. An alternative base offense level of 24 applies to a defendant with two prior felony convictions of a crime of violence or a controlled substance offense, and an alternative base offense level of 20 applies to a defendant with one prior felony conviction of a crime of violence or a controlled substance offense. The base offense level of 12 appears to be disproportionately low compared with other 20 year offenses, and compared with the treatment of 18 U.S.C. § 842(p)(2) offenses under §2M6.1. This is especially true in light of the definition of "destructive device", defined at 18 U.S.C. § 921(a)(4) to include "(A) any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses . . . ."

The proposed amendment also makes the enhancement at §2K1.3(b)(3) and the cross reference at §2K1.3(c)(1) applicable to 18 U.S.C. § 842(p)(2) offenses. Currently, in cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18, and, if the resulting offense level is greater, the cross reference at subsection (c)(1) references such cases either to §2X1.1 (Attempt, Solicitation, or Conspiracy), or to the most analogous homicide guideline if death resulted. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. § 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

Finally, the proposed amendment makes minor technical changes to the Statutory Provisions of §2M6.1.

Proposed Amendment (Part IV):

§2K1.3. <u>Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials</u>

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

* * *

(3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);

~~(3)~~(4) * * *

~~(4)~~(5) * * *

(b) Specific Offense Characteristics

* * *

(3) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with another felony offense; or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(c) Cross Reference

(1) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with the commission or attempted commission of another offense, or possessed or transferred any explosive material with knowledge or intent that it would be used or possessed in connection with another offense, apply --

* * *

Commentary

* * *

Application Notes:

* * *

3. *For purposes of subsection (a)~~(3)~~(4), "prohibited person" means any person described in 18 U.S.C. § 842(i).*

* * *

9. *For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).*

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)~~(3)~~(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

* * *

§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 842(p)(2)(only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

4. Immigration

Synopsis of Amendment: *This proposed amendment addresses various application issues that have come to the Commission's attention through Helpline calls, training sessions, and case law. First, two options are provided to address felony drug trafficking offenses that receive a sentence other than imprisonment. Currently, there is some confusion regarding whether such offenses should receive a 16-, 12-, or 8-level enhancement. Under the current guideline (as well as both proposed options), drug trafficking offenses for which the term of imprisonment imposed was more than 13 months receive a 16-level enhancement. Under Option One, all other felony drug trafficking offenses will receive a 12-level enhancement. Under Option Two, felony drug trafficking offenses that receive a term of imprisonment of less than 13 months will receive a 12-level enhancement, and felony drug trafficking offenses that receive a sentence other than imprisonment (e.g., probation or a fine) will receive an 8-level enhancement.*

This amendment also makes the following commentary changes: adds definitions of "alien smuggling", "child pornography", and "human trafficking" offenses; adds commentary to clarify how revocations of probation, parole, or supervised release should be treated for purposes of determining the term of imprisonment imposed; adds language prohibiting the use of juvenile adjudications under this guideline; and amends the definition of "aggravated felony" to exclude offenses of simple possession of a controlled substance.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed was a term of imprisonment that exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by **16** levels;

[Option One:

~~(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels;~~

(B) a conviction for a felony drug trafficking offense other than a felony drug trafficking offense covered under subdivision (A), increase by **12** levels;**]**

[Option Two:

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was a term of imprisonment of 13 months or less, increase by **12** levels;**]**

* * *

Commentary

* * *

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

* * *

~~*(iv) If all or any part of a sentence of imprisonment was probated, suspended, deferred, or stayed, "sentence imposed" refers only to the portion that was not probated, suspended, deferred, or stayed.*~~

(iv) "Term of imprisonment".—

(I) Definition.—"Term of imprisonment" means the sentence of incarceration originally imposed.

(II) Probated, Suspended, Deferred, or Stayed Sentences.—If all or any part of a term of imprisonment was probated, suspended, deferred, or stayed, "sentence imposed" refers only to the portion that was not probated, suspended, deferred, or stayed. A sentence in which all of a term of imprisonment was suspended and a term of probation was imposed is not a term of imprisonment for purposes of this guideline. [Option Two: *Accordingly, for purposes of subsections (b)(1)(A) and (B), the sentence imposed for a felony drug trafficking offense must be a sentence of incarceration. Any felony drug trafficking sentence other than a sentence of incarceration (e.g., probation or a fine) shall be counted under subsection (b)(1)(C).*]

(III) Revocations of Probation or Parole.—For purposes of determining the term of imprisonment in a case involving a revocation of probation, parole, or supervised release add the term of imprisonment given upon revocation to any term of imprisonment originally imposed.

(v) Subsection (b)(1) does not apply to a conviction for an offense committed prior to age of eighteen years unless it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

~~*(B) Definitions.—For purposes of subsection (b)(1):*~~

~~*(i) "Committed for profit" means committed for payment or expectation of payment.*~~

~~*(ii) "Crime of violence"—*~~

~~*(I) means an offense under federal, state, or local law that has as an element the use,*~~

~~*attempted use, or threatened use of physical force against the person of another, and*~~

~~*(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.*~~

~~*(iii) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*~~

~~*(iv) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*~~

~~*(v) "Firearms offense" means any of the following.*~~

~~*(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*~~

~~*(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*~~

~~*(III) A violation of 18 U.S.C. § 844(h).*~~

~~*(IV) A violation of 18 U.S.C. § 924(c).*~~

~~*(V) A violation of 18 U.S.C. § 929(a).*~~

~~*(vi) "Terrorism offense" means any offense involving, or intending to promote, a "federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*~~

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Alien smuggling offense committed for profit" means (I) an offense described in section 1324(a) of title 8, United States Code, that was committed for profit, regardless of whether the indictment charged that the offense was committed for profit; or (II) an offense under state law consisting of conduct that would have been an offense under 8 U.S.C. § 1324(a) that was committed for profit, regardless of whether the indictment charged that the offense was committed for profit, if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Committed for profit" means the offense was committed for payment or expectation of payment.

(ii) "Child pornography offense" means (I) an offense described in section 2251, 2251A, 2252[, or 2260] of title 18, United States Code; or (II) an offense under state law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) *"Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*

(iv) *"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*

(v) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

(vi) *"Firearms offense" means any of the following:*

(I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*

(II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*

(III) *A violation of 18 U.S.C. § 844(h).*

(IV) *A violation of 18 U.S.C. § 924(c).*

(V) *A violation of 18 U.S.C. § 929(a).*

(VI) *An offense under state law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

(vii) *"Human trafficking offense" means (I) any offense described in section 1581, 1582, 1583, 1584, 1585, 1588 [, 1589, 1590, or 1591] of title 18, United States Code; or (II) an offense under state law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

(viii) *"Terrorism offense" means any offense involving, or intending to promote, a "federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*

~~*2. Application of Subsection (b)(1)(C). For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in 8 U.S.C. § 1101(a)(43), without regard to the date of conviction of the aggravated felony.*~~

2. Application of Subsection (b)(1)(C).—

(A) *Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" (i) has the meaning given that term in 8 U.S.C. § 1101(a)(43), without regard to the date of conviction of the*

aggravated felony, and (ii) does not include the offense of possession of a controlled substance without an intent to distribute that controlled substance.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B) [(e.g., a felony drug trafficking offense for which the sentence imposed was a sentence other than imprisonment).]

3. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

* * *

(B) "Three or more convictions" means at least three convictions for offenses that ~~(i) were separated by an intervening arrest, (ii) did not occur on the same occasion, (iii) were not part of a single common scheme or plan, or (iv) were not consolidated for trial or sentencing.~~ are not considered related cases as defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).

* * *

5. §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment)

Synopsis of Proposed Amendment: *This is a three part proposed amendment that addresses a number of issues in §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment). First, the amendment amends §5G1.3(b) to allow the court to adjust the length of the sentence for any prior period of imprisonment that "resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense". Currently, this subsection only applies to undischarged terms of imprisonment for any such prior period of imprisonment. As a conforming amendment, the proposed amendment deletes the downward departure provision in Application Note 7 for prior discharged terms of imprisonment.*

In addition to adding discharged terms of imprisonment to the operation of subsection (b), this amendment proposes two options to clarify the rule for application of subsection (b) to a prior term of imprisonment. There has been litigation regarding what "fully taken into account" means. See United States v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is "fully taken into account" if and only if the Guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding); United States v. Caraballo, 200 F.3d 20, 25 (1st Cir. 1999) (holding that the term "fully" cannot be read as synonymous with the term "relevant conduct" because this would be over-inclusive). Compare United States v. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been "fully taken into account" when the prior offense is part of the same course of conduct, common scheme, or plan). Option One makes clear that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. Option Two makes clear that subsection (b) shall apply in cases in which the conduct of the prior offense is (1) incorporated in the base offense level for the instant offense, (2) covered by a specific offense characteristic in the guideline for the instant offense, or (3) covered by a Chapter Three adjustment applicable to the instant offense. Option Two does not require that the Chapter Two or Three offense level necessarily be increased by the prior offense.

This proposed amendment provides two options to address how this guideline applies in cases in which an instant offense committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. In doing so, this amendment resolves a circuit conflict on the issue. The majority of circuits to consider the issue have held that imposition of consecutive sentence is required by Application Note 6. See, e.g., United States v. Smith, 282 F.3d 1045, 1048 (8th Cir. 2002) (stating that Application Note 6 requires consecutive sentences); United States v. Alexander, 100 F.3d 24, 27 (5th Cir. 1996) (same); United States v. Gondek, 65 F.3d 1, 3 (1st Cir. 1995) (same); United States v. Bernard, 48 F.3d 427, 431-32 (9th Cir. 1995) (same). See also United States v. Campbell, No. 01-5661, 2002 U.S. App. LEXIS 23024 (6th Cir., Nov. 6, 2002) (affirming imposition of consecutive sentence as consistent with guideline commentary); United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (noting a strong presumption in favor of consecutive sentence). Three circuits, however, have disagreed. The second, third, and tenth circuits held that the word "should" in Application Note 6 renders the commentary non-binding. See United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999); United States v. Swan, 275 F.3d 272, 279-83 (3d Cir. 2002); United States v. Tisdale, 248 F.3d 964, 977-79 (10th Cir. 2001). Under Option One A, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. Option One B maintains the current language in Application Note 6 which provides that the sentence for the instant offense should run consecutively to the undischarged term of imprisonment.

Finally, an issue for comment is provided regarding whether the Commission should resolve a circuit split with respect to §5G1.3(c) and whether the sentencing court may grant "credit" for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the

remaining portion of the defendant's preexisting state sentence. Compare Ruggiano v. Reish, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with United States v. Fermin, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit).

Proposed Amendment:

Option One:

§5G1.3. Imposition of a Sentence ~~on a Defendant Subject to an~~in Cases Involving an Undischarged or Discharged Term of Imprisonment

[Option One A: (a) If the instant offense was committed while the defendant was (1) serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of ~~imprisonment;~~ imprisonment; or (2) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.**]**

~~(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.~~

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that (1) is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (2) was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(A) If the term of imprisonment for that other offense is undischarged—

(i) the court [may][shall] adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(ii) the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(B) If the term of imprisonment is discharged, the court [may][shall] adjust the sentence for any period of imprisonment already served.

* * *

[Option One A:

Commentary

* * *

Application Notes:

~~*1. Consecutive sentence - subsection (a) cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*~~

1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release).].

~~*2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example. The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine, 2-level reduction for acceptance of responsibility, final offense level of 12, Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).*~~

2. Subsection (b) Cases.—

(A) In General.— Subsection (b) applies in cases in which (i) all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) such prior offense has resulted in an increase in the Chapter Two or Chapter Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Chapter Three offense level for the instant offense, but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was

a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a "sentence reduction pursuant to §5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons."

(D) Examples.—The following are examples in which subsection (b) applies and an adjustment to the sentence is appropriate:

(i) The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of 16 for sale of 55 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant already has served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

(ii) The defendant is convicted of a federal offense charging the sale of 150 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The state term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24-30 months (Chapter Two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant already has served six months on the discharged state term, a sentence of 18 months on the instant offense achieves this result.

[Option One B would maintain current Application Note 6 of the Commentary to §5G1.3 as follows:

6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).]

~~7. *Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.*~~

Option Two:

§5G1.3. **Imposition of a Sentence ~~on a Defendant Subject to an~~in Cases Involving an Undischarged or Discharged Term of Imprisonment**

[Option TwoA: (a) If the instant offense was committed while the defendant was (1) serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of ~~imprisonment;~~imprisonment; or (2) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.**]**

~~(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.~~

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction, the sentence for the instant offense shall be imposed as follows:

(1) If the term of imprisonment for that other offense is undischarged—

(A) the court [may][shall] adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(B) the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(2) If the term of imprisonment is discharged, the court [may][shall] adjust the sentence for any period of imprisonment already served.

* * *

[Option Two A:

Commentary

* * *

Application Notes:

~~1. *Consecutive sentence - subsection (a) cases.* Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.~~

1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release).]

~~2. *Adjusted concurrent sentence - subsection (b) cases.* When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. *Example.* The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).~~

2. Subsection (b) Cases.—

(A) In General.—Subsection (b) applies in cases in which the conduct comprising all of the prior offense is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction. Such conduct is covered by the Chapter Two guideline or a Chapter Three adjustment if the conduct is (i) incorporated in the base offense level for the instant offense of conviction; (ii) covered by a specific offense characteristic in the guideline for the instant offense of conviction; or (iii) covered by a Chapter Three adjustment applicable to the instant offense of conviction. Cases in which only part of the prior offense is covered are addressed under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the base offense level or the specific offense characteristic in the applicable Chapter Two offense guideline is an enhancement for a prior conviction (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the

defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a "sentence reduction pursuant to §5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons."

(D) Examples.—The following are examples in which subsection (b) applies and an adjustment to the sentence is appropriate:

(i) The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2 level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant already has served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

(ii) The defendant is convicted of a federal offense charging the sale of 150 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The state term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24-30 months (Chapter Two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant already has served six months on the discharged state term, a sentence of 18 months on the instant offense achieves this result.

[Option Two B would maintain current Application Note 6 of the Commentary to §5G1.3 as follows:

6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).]

~~*7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.*~~

Issue for Comment: *The Commission requests comment on whether it should resolve a circuit split with respect to §5G1.3(c) and whether the sentencing court may grant "credit" for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the remaining portion of the defendant's preexisting state sentence. Compare Ruggiano v. Reish, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with United States v. Fermin, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). If so, how should this apparent conflict be resolved?*

6. Miscellaneous Amendments

Synopsis of Proposed Amendment: *This proposed amendment makes technical and conforming changes to various guideline provisions. The proposed amendment accomplishes the following:*

(1) *Amends §1B1.1 (Application Instructions) to (A) provide an instruction that makes clear that the application instructions are to be applied in the order presented in the guideline; (B) amend Application Note 4 to make clear that, absent an instruction to the contrary, multiple specific offense characteristics (or a Chapter Two specific offense characteristic and a Chapter Three adjustment) that are triggered by the same conduct are to be applied cumulatively; and (C) provide an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.*

(2) *Restructures the definitions of "prohibited sexual conduct" in §§2A3.1 (Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of "means" and "includes".*

(3) *Amends the definition of "child pornography" in §§2A3.1 and 4B1.5, and the definition of "visual depiction" in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct), in light of Ashcroft v. The Free Speech Coalition, et al., 122 S.Ct. 1389 (2002).*

(4) *(A) Amends §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) by: (i) providing a maximum base offense level of 30 if the defendant receives an adjustment under §3B1.2 (Mitigating Role) and providing a two level reduction if the defendant meets the criteria of subdivisions (1) through (5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to conform this guideline to §2D1.1 (Drug Trafficking), which was amended last amendment cycle; (ii) adding red phosphorus to the Chemical Quantity Table in response to a recent classification of red phosphorus as a List I chemical; and (B) provides an issue for comment regarding the penalties for oxycodone generally and a brand named pill containing oxycodone known as Oxycontin.*

(5) *Amends the departure provision in Application Note 6 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) to conform to Application Note 12 of §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).*

(6) *Amends subsection (b)(5) of §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) to include receipt and distribution in the enhancement for use of a computer. Currently the enhancement only applies to offenses in which a computer was used for the transmission of child pornography.*

(7) *Responds to new legislation and makes other technical amendments as follows:*

(a) *Amends Appendix A (Statutory Index) and §2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security*

and Rural Investment Act of 2002 (the "Act"), Pub. L. 107–171. The first new offense provides a statutory maximum of one year for violating the Animal Health Protection Act (Subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or article for distribution or sale. The Act also provides a statutory maximum of 10 years for a subsequent violation of either offense.

(b) *Amends Appendix A (Statutory Index) and §2B1.1 in response to a new offense (19 U.S.C. § 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment assistance to qualifying agricultural commodity producers.*

(c) *Amends Appendix A (Statutory Index) and §§2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or an incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The proposed amendment references 40 U.S.C. § 5104(e)(1) to §2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment penalty of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of not more than one year. The proposed amendment references 40 U.S.C. § 14309(a) and (b) to §2C1.3.*

(d) *Amends Appendix A (Statutory Index) and §2H2.1 (Obstructing an Election or Registration) to provide a guideline reference for offenses under 18 U.S.C. § 1015(f). Currently, 18 U.S.C. § 1015 generally is referenced to §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use). However, 18 U.S.C. 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. The proposed amendment references 18 U.S.C. § 1015(f) to §2H2.1 (Obstructing an Election or Registration).*

Proposed Amendment:

(1) Provides an Instruction in §1B1.1 (Application Instructions) That Makes Clear That the Application Instructions Are to Be Applied in the Order Presented in the Guideline; Amends

Application Note 4 to Make Clear That Multiple Specific Offense Characteristics (or a Chapter Two Specific Offense Characteristic and a Chapter Three Adjustment) Which Are Triggered by the Same Conduct Are to Be Applied Cumulatively; Provides New Application Note Regarding Use of Short Titles in Guidelines

§1B1.1. **Application Instructions.**—Except as specifically directed, the provisions of this manual are to be applied in the following order:

* * *

Commentary

Application Notes:

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~~*4. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative, only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used, the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.*~~

4. *(A)* *Specific Offense Characteristics.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.*

(B) *Adjustments from Different Guideline Sections.—Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). In some cases, such adjustments (e.g., a Chapter Two specific offense characteristic and a Chapter Three [or Chapter Four] adjustment) may be triggered by the same conduct, but are meant to take into account different aspects of that conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim enhancement under §3A1.2, even though both enhancements are triggered by the shooting of the officer. Section 2B3.1(b)(3) accounts for the injury to the police officer, while §3A1.2(a) accounts for the official status of the victim.*

* * *

(7) *Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny,*

Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Fraud, and Property Destruction).

* * *

(2) Restructures the Definitions of "Prohibited Sexual Conduct" in §2A3.1 (Criminal Sexual Abuse) and §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

* * *

Commentary

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Application Notes:

1. For purposes of this guideline—

* * *

~~*"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.*~~ *"Prohibited sexual conduct" means any sexual activity for which a person can be charged with a criminal offense. "Prohibited sexual conduct" includes the production of child pornography, but 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).*

* * *

§4B1.5. Repeat and Dangerous Sex Offender Against Minors

* * *

Commentary

Application Notes:

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) ~~means~~ any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) ~~includes~~ the production of child pornography; or (iii) ~~includes~~ trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography~~; and (iv)~~. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

* * *

(3) Amends the Definition of "Child Pornography" in §§2A3.1 and 4B1.5 and the Definition of "Visual Depiction" in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct),

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

* * *

Commentary

* * *

Application Notes:

1. For purposes of this guideline—

* * *

"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).~~ "Child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—

(A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

* * *

§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

* * *

Commentary

* * *

Application Notes:

1. For purposes of this guideline—

* * *

~~"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).~~

"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) or any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—

(A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

* * *

§4B1.5. Repeat and Dangerous Sex Offender Against Minors

* * *

Commentary

Application Notes:

* * *

3. Application of Subsection (a).—

(A) Definitions.—For purposes of subsection (a):

* * *

~~*(ii) "Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).*~~

(ii) "Sex offense conviction" means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor, and does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" (i) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in ~~18 U.S.C. § 2256(8)~~ Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

* * *

(4) (A) Amends §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) to (1) Provide a Maximum Base Offense Level of 30 if the Defendant Receives an Adjustment under §3B1.2 (Mitigating Role) and a Two Level Reduction if Defendant Meets Criteria of §5C1.2 (1)-(5); and (2) Adds Red Phosphorus to the Chemical Quantity Table

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

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level shall be not more than level **30**.

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

(e) CHEMICAL QUANTITY TABLE* (All Other Precursor Chemicals)

Listed Chemicals and Quantity	Base Offense Level

* * *

(1)	List I Chemicals 890 G or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 200 G or more of Ergonovine; 400 G or more of Ergotamine; 20 KG or more of Ethylamine; 2.2 KG or more of Hydriodic Acid; 320 KG or more of Isosafrole; 200 G or more of Methylamine; 500 KG or more of N-Methylephedrine; 500 KG or more of N-Methylpseudoephedrine; 625 G or more of Nitroethane; 10 KG or more of Norpseudoephedrine; 20 KG or more of Phenylacetic Acid; 10 KG or more of Piperidine;	**Level 30**

320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
10,000 KG or more of Gamma-butyrolactone;
714 G or more of Red Phosphorus.

(2) List I Chemicals **Level 28**

At least 267 G but less than 890 G of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 660 G but less than 2.2 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isosafrole;
At least 60 G but less than 200 G of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 187.5 G but less than 625 G of Nitroethane;
At least 3 KG but less than 10 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus;

* * *

(3) List I Chemicals **Level 26**

At least 89 G but less than 267 G of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 220 G but less than 660 G of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 20 G but less than 60 G of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 62.5 G but less than 187.5 G of Nitroethane;
At least 1 KG but less than 3 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;

At least 71 G but less than 214 G of Red Phosphorus;

(4) List I Chemicals **Level 24**

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus;

* * *

(5) List I Chemicals **Level 22**

At least 35.6 G but less than 62.3 G of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 88 G but less than 154 G of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 8 G but less than 14 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 25 G but less than 43.8 G of Nitroethane;
At least 400 G but less than 700 G of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 400 KG but less than 700 KG of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus;

* * *

(6) List I Chemicals **Level 20**

At least 8.9 G but less than 35.6 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 22 G but less than 88 G of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 2 G but less than 8 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 6.3 G but less than 25 G of Nitroethane;
At least 100 G but less than 400 of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 100 KG but less than 400 KG of Gamma-butyrolactone;
At least 7 G but less than 29 G of Red Phosphorus;

* * *

(7) List I Chemicals **Level 18**

At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 1.6 G but less than 2 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 5 G but less than 6.3 G of Nitroethane;
At least 80 G but less than 100 G of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 80 KG but less than 100 KG of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus;

* * *

(8) List I Chemicals **Level 16**

3.6 KG or more of Anthranilic Acid;
At least 5.3 G but less than 7.1 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 13.2 G but less than 17.6 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 1.2 G but less than 1.6 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 3.8 G but less than 5 G of Nitroethane;
At least 60 G but less than 80 G of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 60 KG but less than 80 KG of Gamma-butyrolactone;
At least 4 G but less than 6 G of Red Phosphorus;

* * *

(9) List I Chemicals **Level 14**

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 3.6 G but less than 5.3 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 8.8 G but less than 13.2 G of Hydriodic Acid;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 800 MG but less than 1.2 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 2.5 G but less than 3.8 G of Nitroethane;
At least 40 G but less than 60 G of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 40 KG but less than 60 KG of Gamma-butyrolactone;
At least 3 G but less than 4 G of Red Phosphorus;

* * *

(10) List I Chemicals **Level 12**

Less than 2.7 KG of Anthranilic Acid;
Less than 3.6 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 8.8 G of Hydriodic Acid;
Less than 1.44 KG of Isosafrole;
Less than 800 MG of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 2.5 G of Nitroethane;
Less than 40 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
Less than 40 KG of Gamma-butyrolactone;
Less than 3 G of Red Phosphorus

* * *

Commentary

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Application Notes:

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7. Applicability of Subsection (b)(4).—The applicability of subsection (b)(4) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(4) applies.

* * *

(4)(B) Issue for Comment on Oxycodone

Issue for Comment: *The Commission requests comment regarding the penalties for oxycodone generally and a brand named prescription drug containing oxycodone known as Oxycontin. Currently, the Drug Equivalency Tables in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) provide a marihuana equivalency of 500 grams for one gram of a mixture of substance containing oxycodone. Recently, however, drug enforcement has reported an increase in trafficking of the prescription drug Oxycontin, which contains higher than historical amounts of oxycodone but weighs substantially less than other prescription drugs containing oxycodone. Consequently, a defendant convicted of trafficking in certain prescription drugs containing smaller amounts of oxycodone relative to the total weight of the pill may receive a higher sentence than a defendant convicted of trafficking in larger amounts of Oxycontin.*

How should the Commission address the weight differential and the resulting sentencing disparity? Should the equivalency for oxycodone be reevaluated? Should the Commission amend the Drug Equivalency Tables in §2D1.1 to provide a separate marihuana equivalency for Oxycontin, notwithstanding that the guidelines do not otherwise provide specific penalties for brand name drugs? If so, what should that marihuana equivalency be?

Alternatively, should the Commission sentence oxycodone defendants based on the purity of the prescription drug involved (an approach currently used in sentencing methamphetamine and amphetamine defendants)? This approach may require amending the Drug Quantity Tables in §2D1.1 to provide separate penalties for oxycodone (actual) and oxycodone (mixture). Oxycontin additionally has a time release element that can be eliminated simply by crushing or breaking the pill, increasing the immediate effect for the user. Should the Commission provide an enhancement for trafficking in pills that have a time release element?

* * *

(5) Conforms Departure Provision in Application Note 6 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)

§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

* * *

Commentary

* * *

Application Notes:

* * *

~~*6. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:*~~

~~*(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.*~~

~~*(B) The offense involved more than 10 victims.*~~

6. Upward Departure Provisions.—An upward departure may be warranted if the offense involved more than 10 victims.

* * *

(6) Amends §2G2.2(b)(5) to Include Receipt and Distribution in the Enhancement for Use of a Computer

§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**

(b) Specific Offense Characteristics

* * *

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

* * *

(7) Amendments to Appendix A (Statutory Index) and Statutory Provisions

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

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2C1.3. **Conflict of Interest; Payment or Receipt of Unauthorized Compensation**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 1909; 40 U.S.C. § 14309(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2H2.1. **Obstructing an Election or Registration**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597, 1015(f); 42 U.S.C. §§ 1973i, 1973j(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(q), 930; 40 U.S.C. § 5104(e)(1).

* * *

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg, 6810, 7734, 8313; 21 U.S.C. §§ 115, 117, 122, 134-134e, 151-158, 331, 333(a)(1), (a)(2), (b), 458-461, 463, 466, 610, 611, 614, 617, 619, 620, 642-644, 676; 42 U.S.C. § 262. For additional statutory provision(s), see Appendix A (Statutory Index).

APPENDIX A - STATUTORY INDEX

* * *

7 U.S.C. § 7734	2N2.1
7 U.S.C. § 8313	2N2.1
	* * *
18 U.S.C. § 1015(a)-(e)	2B1.1, 2J1.3, 2L2.1, 2L2.2
18 U.S.C. § 1015(f)	2H2.1
	* * *
19 U.S.C. § 2316	2B1.1
19 U.S.C. § 2401f	2B1.1
	* * *
38 U.S.C. § 3502	2B1.1
40 U.S.C. § 5104(e)(1)	2K2.5
40 U.S.C. §14309(a), (b)	2C1.3
	* * *

7. Involuntary Manslaughter

Synopsis of Proposed Amendment: *This proposed amendment is a continuation of the Commission's work over the past several years to ensure that the guidelines provide appropriate guideline penalties for offenses involving involuntary manslaughter. In 1994, Congress increased the statutory maximum penalty for involuntary manslaughter offenses from three years' to six years' imprisonment after receiving a Commission report analyzing federal criminal penalties and recommending that the statutory maximum penalty for involuntary manslaughter be increased to six years. Studies have shown that the heartland of involuntary manslaughter offenses involves vehicular homicide and that these offenses are punished more severely by many of the States. The Commission further examined both voluntary and involuntary manslaughter offenses in 1997, and in 1998 sent a report and letter to Congress recommending that the statutory maximum penalty for voluntary manslaughter offenses be increased to permit the Commission to make changes that would maintain proportionality based on offense severity. Although no action has been taken on that recommendation, the Commission has received recommendations from Congress and the Department of Justice that it proceed to amend the guidelines for involuntary manslaughter to increase the base offense levels. Accordingly, this proposed amendment increases the base offense levels for involuntary manslaughter by [2][4][6] levels. An issue for comment follows that generally seeks the public's input regarding the appropriate offense levels for involuntary manslaughter offenses, including (with a view toward proportionate sentencing) the appropriate offense levels for involuntary manslaughter offenses compared to offense levels for aggravated assault.*

Proposed Amendment:

§2A1.4. **Involuntary Manslaughter**

(a) Base Offense Level:

(1) ~~10~~[12][14][16], if the conduct was criminally negligent; or

(2) ~~14~~[16][18][20], if the conduct was reckless.

* * *

Issue for Comment: *The Commission requests comment generally on the appropriate offense levels for offenses involving involuntary manslaughter. In addition, the Commission requests comment regarding the appropriate and proportionate offense levels for involuntary manslaughter compared to offense levels for aggravated assault under §2A2.2 (Aggravated Assault). Currently, the base offense level for aggravated assault is level 15, and the guideline contains several enhancements, such as enhancements for bodily injury. As a consequence, the guideline penalties for aggravated assault currently are more serious than those for involuntary manslaughter.*

8. Cybersecurity

Issue for Comment: *Section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107–296, directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code, to ensure that the sentencing guidelines and policy statements reflect the serious nature of such offenses, the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.*

The directive also includes a number of factors for the Commission to consider, including the potential and actual loss resulting from the offense, the level of sophistication and planning involved in the offense, whether the offense was committed for purposes of commercial advantage or private financial benefit, whether the defendant acted with malicious intent to cause harm in committing the offense, the extent to which the offense violated the privacy rights of individuals harmed, whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, whether the violation was intended to, or had the effect of, significantly interfering with or disrupting critical infrastructure, and whether the violation was intended to, or had the effect of, creating a threat to public health or safety, or injury to any person.

The Commission requests comment regarding how it should respond to this directive.

9. Offenses Involving Body Armor and Assault Against a Federal Judge

Issues for Comment:

1. *Section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273, directs the Sentencing Commission to review and amend the sentencing guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in 18 U.S.C. § 16) or drug trafficking crime (as defined in 18 U.S.C. § 924(c) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act further states that it is the sense of Congress that any such enhancement should be at least two levels. The Commission requests comment regarding how it should respond to this directive. For example, should the Commission provide a Chapter Three adjustment for the use of body armor in any crime of violence or drug trafficking crime? Alternatively, should the Commission provide a specific offense characteristic in all relevant Chapter Two guidelines (e.g., §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) that would apply if the defendant used body armor in the course of the offense?*

   What would be an appropriate increase for the use of body armor if the Commission provides a Chapter Three adjustment or a specific offense characteristic in the relevant Chapter Two guidelines?

2. *Section 11008 of the Act directs the Commission to review and amend, if appropriate, the guidelines or policy statements to provide an appropriate enhancement 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. The directive also contains a number of factors for the Commission to consider, including the range of conduct covered by the offenses, the existing sentence for the offense, the extent to which the guidelines for these offenses have been constrained by statutory maximum penalties, and the adequacy of the guidelines to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense. The Act also increases the statutory maximum terms of imprisonment for the following offenses: for threatened assaults under 18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), from three years to six years; for all other threats made in violation of 18 U.S.C. § 115, from five years to ten years; for a violation of 18 U.S.C. § 111 (Assaulting, resisting, or impeding certain officers or employees), 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.*

   Appendix A (Statutory Index) references 18 U.S.C. § 111 to §§2A2.2 (Aggravated Assault) and 2A2.4 (Obstructing or Impeding Officers). These guidelines have base offense levels of 15 and 6, respectively. Section 115 of title 18, United States Code, is referenced to, among other guidelines, §§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2, and 2A2.3 (Minor Assault). The base offense level for §2A2.1 is level 28 (if the object of the offense would have constituted first degree murder) or level 22. The base offense level for §2A2.3 is level 6 (if the conduct involved physical contact, or if a dangerous weapon was possessed or its use was threatened) or level 3.

   Given the directive, the factors to consider, and the increases in the statutory maximum penalties, the Commission requests comment regarding the following:

(A) *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?*

(B) *Do the current base offense levels in each of the assault guidelines provide adequate punishment for the covered conduct? If not, what would be appropriate base offense levels for §§2A2.2, 2A2.3, and 2A2.4?*

(C) *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 §§2A2.3 and 2A2.4? Should the Commission amend §2A2.3(b)(1) to provide a two level enhancement for bodily injury? Some commentators have argued that such an amendment would bring the minor and aggravated assault guidelines more in line with one another because there may be cases in which an assault that does not qualify as an aggravated assault under §2A2.2 nevertheless involves bodily injury. Are there any other application issues pertaining to the assault guidelines that the Commission should address?*

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MEMORANDUM

TO: Chair Murphy
Commissioners

FROM: Karen Hickey

RE: Public Comment

DATE: February 24, 2002

Attached are late-arriving letters of public comment from the Practitioners' Advisory Group and from The Honorable George P. Kazen. These letters are hole-punched for insertion into the February 18, 2003 Public Comment notebook.

PRACTITIONERS' ADVISORY GROUP
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February 24, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Amendments Published for Comment on November 22, 2002

Dear Judge Murphy:

We are writing to provide the Commission with the Practitioners' Advisory Group's comments on the amendments published for comment on November 22, 2002.

1. **Terrorism Enhancement in Money Laundering Guideline**

The P.A.G. supports Option One of this proposed amendment. Having been heavily involved in the drafting of the revised money laundering guideline, we do not believe there was any consideration given in the course of that possibility of a cumulative "double counting" adjustment for terrorism beyond that set forth in the money laundering guideline. Given the more recent Chapter 3 adjustment, deletion of this adjustment within the 2S1.1 guideline is appropriate.

2. **Reference of 18 U.S.C. § 1960 to Money Laundering Guideline**

The P.A.G. does not support either of the two options with respect to this proposed amendment because they will potentially dissolve the significant statutory differences between Sections 1956 and 1957, on the one hand, and § 1960 on the other. It is important to note that considerable thought and effort went into the drafting of the new guidelines for Sections 1956 and 1957. Section 1956 carries

a statutory maximum penalty of 20 years, while § 1957 carries a statutory maximum of ten years. In contrast, § 1960 covers a statutory maximum of only five years. It has been well documented that § 1957 is an extraordinary broad statute which encompasses a variety of conduct. The most significant limitation on the application of § 1957 is the requirement that the monetary transaction in question have a value of greater than $10,000. This dollar value threshold was of critical importance in the enactment of the legislation and to prevent its application in an overbroad fashion. Section 1960 does not contain this limitation. In other words, it applies to any transaction involving the proceeds of a criminal offense regardless of amount, circumstance, or intent. By applying the guideline applicable to § 1957 offenses to § 1960 offenses, the effect will be to eliminate the $10,000 threshold which has been so important eliminating the overbreath of § 1957.

The use of § 2S1.1 in § 1960(b)(1)(C) offenses will also collapse the distinction between § 1956 and § 1960. Section 1956 requires proof that the defendant conducted the transaction "with the intent to promote the carrying on of specified unlawful activity." Section 1960, in contrast, requires only a knowledge on the part of the defendant that the funds are intended to be used *by someone else* to promote or support unlawful activity. This is a significant difference in mental state which will be erased by the use of § 2S1.1 for § 1960(b)(1)(C) offenses. In short, the P.A.G. believes that in light of the significant effort expended in the drafting of § 2S1.1 and its application to Sections 1956 and 1957, that guideline should not be applied to § 1960 offenses. Section 1960 has a significantly lower statutory maximum, and significantly less restrictive elements.

3. **Enhancement in Accessory After the Fact Guideline for Harboring Terrorists.**

The P.A.G. does not oppose the elimination of the offense level "cap" of level 20 where the conduct involves harboring a person who the defendant knows or has reasonable grounds to believe has committed any offense listed in 18 U.S.C. § 2339 or § 2339(a), or has committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. § 2332(b)(g)(5). The P.A.G. is concerned, however, that the proposed language in the amendment to § 2X3.1(a)(3)(C) appears to be broad enough to apply to those who harbor persons who have committed such offenses without either knowledge or reason to believe that the nature of the offense committed by the fugitive was one of terrorism. Although crimes of terrorism are obviously very serious, there appears to be no reason to apply the higher base offense level where the defendant has neither knowledge or reason to believe that the fugitive being harbored has committed such an offense.

4. **The Amendments Regarding Biological Agents and Toxins**

The P.A.G. has no comment on the proposed amendments regarding biological agents and toxins, and believes the proposed amendments regarding the safe drinking water provisions are appropriate, with the limited proviso that a base offense level of 22 rather than 25 should be utilized. The proposed seven-level increase from 18 to 25 will more than double the current sentencing levels. While the P.A.G. recognizes that the existing guidelines for these offenses may need modification, such a drastic change to existing sentencing policy should rarely, if ever, occur at one time. The P.A.G. believes that a four-level upward adjustment to the guideline reflects a more measured approach which could then receive further study and analysis in application. The P.A.G. also believes that the current distinction between actual tampering and mere threatened tampering should remain. Actual tampering with a water supply or a consumer product in any instance reflects a very different mental state than a threat to do so. Accordingly, the current distinction between the two should be recognized through the use of separate guidelines.

The P.A.G. supports the proposed upward departure regarding animal enterprise terrorism.

5. **Amendments Required by the Terrorists Bombing Convention Implementation Act of 2002**

The P.A.G. believes it would be overbroad to amend § 2K1.4(a)(1) to expand the use of the higher base offense level for offenses involving the attempted destruction of "a place of public use." The current distinction in the guideline between offense level 24 and 20 reflects the significantly greater culpability of those who attempt to destroy dwellings, airports, aircraft, mass transportation facilities, and mass transportation vehicles. The proposed amendment would apply this higher base offense level to attempts to destroy or cause property damage to any "place of public use" as defined in 18 U.S.C. § 2332f(e)(6). This definition includes any "location" that is "accessible" to "members of the public, whether continuously, periodically, or occasionally." This would appear to encompass any location that is not private. The P.A.G. believes this to be detrimental to the proportionality previously achieved in the guideline through the differentiation of those with higher culpable states who seek to destroy implements of mass transportation compared to those who seek to destroy remote locations on public land which are technically open to members of the public although used only occasionally. The P.A.G. would recommend the deletion of "place of public use" from the base offense level 24 portion of the guideline.

6. **Immigration**

The P.A.G. supports Option Two of the amendment to § 2L1.2(b)(1) inasmuch as that option recognizes the distinction between prior offenses which resulted in a term of imprisonment and those which did not. In light of the volume of state offenses which do not result in periods of incarceration, the P.A.G. believes this distinction is important and should be preserved in the guidelines.

7. **Proposed Amendments to § 5G1.3**

With regard to the series of proposals regarding § 5G1.3, the P.A.G. recommends that the Commission select for passage those amendments which provide the sentencing judge with maximum discretion. Such discretion is necessary in this area because of the often complex and case-specific issues that arise where a defendant is facing (or has faced) imprisonment on a related charge in another jurisdiction. The sentencing judge is in the best position to determine whether, or to what extent, the defendant should receive credit for the prior sentence. With this over-arching principle in mind, the P.A.G. recommends the following.

At the outset, the P.A.G. recommends amending § 5G1.3 to cover cases in which the defendant is facing an undischarged terms of imprisonment or has already completed his or her term of imprisonment. There is no principled basis to credit or not to credit a defendant for a prior sentence based on the fortuity of whether the defendant has completed the prior sentence at the time of sentencing. With regard to amending § 5G1.3(b), the P.A.G. supports Option Two because it provides maximum discretion to the sentencing judge in determining whether, or to what extent, to credit the prior sentence.

With regard to application note 6, the P.A.G. supports Option One (B), which again, provides maximum discretion to the sentencing judge to determine whether or not the sentence for the instant offense should run consecutively or concurrently or partially concurrently with the prior offense on which supervision is being revoked. We submit that Option One (A), which would require that the sentence for the instant offense shall be imposed to run consecutively, essentially adopts a mandatory minimum sentencing scheme which is at odds with the purpose of the guidelines and with this Commission's long-held position on mandatory minimum sentencing. The requirement of consecutive time also risks at least some double counting because a defendant who has committed other offenses typically has a higher criminal history score. In addition, that defendant will receive a two point upward adjustment, pursuant to § 4A1.1(d), for having committed the new offense while under supervision.

Finally, with regard to the issue for comment, the P.A.G. urges the Commission to resolve the current circuit split and to clarify that a sentencing judge has the authority to grant credit for an

undischarged state sentence even where the federal sentence is imposed concurrently. Bureaucratic quirks in the criminal justice system, particularly involving the interplay between the state and federal prison systems, have served to defeat the recommendations, and even the rulings, of federal sentencing judges regarding concurrent sentences. Unless a federal judge is authorized to grant "credit" for time served in state prison, the imposition of a concurrent sentence in many instances will not achieve the desired result.

The timing of the interplay between a defendant who starts in federal custody and one who does not can lead to incredible disparity in sentences among defendants otherwise similarly situated. This is because the Bureau of Prisons generally gives a defendant no credit for time spent in state custody, whereas state systems typically give full credit for time spent in federal custody.

Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention and any judges who sentence Defendant A retain their full historical power to declare that subsequent sentences may be imposed either concurrently or consecutively to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get sent via a writ into the federal system, where Defendant B might be in pretrial detention in the same cell as Defendant A; yet the Bureau of Prisons will give Defendant B no credit for this time based on the fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ. This situation is not changed even if the federal sentencing judge orders the imposition of a concurrent or partially concurrent sentence. The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. By providing the sentencing judge with the authority to grant "credit" for time served in state prison, the Commission can help overcome this extremely frustrating, illogical and inequitable situation.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners with respect to the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

cc: All Commissioners
Charles Tetzlaff, Esq.
Tim McGrath, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

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January 21, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
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Washington, D. C. 20002-8002

Dear Judge Murphy:

I write in response to a proposed amendment, issued December 20, 2002, to Section 2L1.2 of the Guidelines. Proposed Application Note 2(A) would now exclude from the definition of "aggravated felony" any controlled substance offense "without an intent to distribute that controlled substance."

In my opinion, this proposal would aggravate an already unfortunate disparity created by the previous amendment to that guideline concerning the definition of a "drug trafficking offense."

The Commission apparently wishes to make a distinction between a controlled substance crime of "simple possession," as distinguished from a crime of possession with intent to distribute or manufacture, or the actual distribution or manufacturing of controlled substances. I would have no quarrel with such a distinction if it truly separated cases involving small amounts of narcotics for personal use. Unfortunately, however, that is not the case, at least in Texas.

My research of Texas law indicates that, with respect to marihuana, there are only two offenses. These are found in the Health and Safety Code at §§481.120 and 121. One offense is delivery of marihuana and the other is possession of marihuana. Copies of these statutes are attached for your convenience. As you can see, the possession statute describes offenses ranging from a Class B Misdemeanor up to one punishable by life in prison, depending upon the amount of the marihuana.

The other narcotics with which we typically deal, including cocaine and heroin, are treated in different sections of the same Texas code, also attached. For those substances, there is an offense of manufacturing, delivering or possession with intent to deliver. Section 481.112. There is also, however, the offense of "simple" possession at §481.115. Once again, the latter provision describes offenses ranging from a state jail felony up to life in prison. Thus, under §481.115(f), an offense involving at least 400 grams of the controlled substance is punishable by a minimum sentence of 10 years and a maximum sentence of 99 years or life. Because of the very high sentences allowed under §481.115, my experience is that Texas prosecutors almost never bother to charge under §481.112. Instead, they inevitably use §481.115, since it is much simpler to prove. Similarly, as to marihuana, they invariably use only §481.121.

The result is that after November 1, 2002, when I am sentencing two defendants for illegal reentry under the current §2L1.2, a defendant with a prior federal conviction of possession with intent to distribute 50 pounds of marihuana could receive an upward adjustment of 16 levels under (b)(1)(A), while a defendant with a conviction only of "possession" of 1,000 pounds of marihuana or 100 pounds of cocaine in a Texas state court would receive an adjustment of 8 levels. The proposed new amendment, as I understand it, would now lower the latter defendant's adjustment to 4 levels. This is not an academic issue. I have dealt with similar disparities already, and it is most unfortunate.

I have not tried to determine whether other states have a statutory scheme similar to that of Texas. I do know that I have encountered cases where defendants were convicted in other states and the charging documents only refer to "possession," despite an offense report which clearly described a case of possession with intent to distribute and/or actual distribution. In any event, Texas probably accounts for a very large number of illegal entry prosecutions, and significant numbers of the affected defendants have been convicted of drug offenses in Texas courts, so that the problem I describe is not an insignificant one.

Thank you for your consideration of this matter, and your efforts in this very difficult area of criminal sentencing.

Sincerely yours,

George P. Kazen

GPK/gs

TX PENAL §§ 12.31. Capital Felony

(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the institutional division for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life.
(b) In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

TX PENAL §§ 12.32. First Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.33. Second Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the institutional division for any term of not more than 20 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.34. Third Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.35. State Jail Felony Punishment

(a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.
(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or
(2) the individual has previously been finally convicted of any felony:
(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or
(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

TX HEALTH & S §§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
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(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.120. Offense: Delivery of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;
(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;
(3) a state jail felony if the amount of marihuana delivered is five pounds or less but more than one-fourth ounce;
(4) a felony of the second degree if the amount of marihuana delivered is 50 pounds or less but more than five pounds;
(5) a felony of the first degree if the amount of marihuana delivered is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marihuana delivered is more than 2,000 pounds.

TX HEALTH & S §§ 481.121. Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;
(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

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MEMORANDUM

TO: Chair Murphy
Commissioners

FROM: Karen Hickey

RE: Public Comment

DATE: February 24, 2002

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PRACTITIONERS' ADVISORY GROUP
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February 24, 2003

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The P.A.G. does not support either of the two options with respect to this proposed amendment because they will potentially dissolve the significant statutory differences between Sections 1956 and 1957, on the one hand, and § 1960 on the other. It is important to note that considerable thought and effort went into the drafting of the new guidelines for Sections 1956 and 1957. Section 1956 carries

a statutory maximum penalty of 20 years, while § 1957 carries a statutory maximum of ten years. In contrast, § 1960 covers a statutory maximum of only five years. It has been well documented that § 1957 is an extraordinary broad statute which encompasses a variety of conduct. The most significant limitation on the application of § 1957 is the requirement that the monetary transaction in question have a value of greater than $10,000. This dollar value threshold was of critical importance in the enactment of the legislation and to prevent its application in an overbroad fashion. Section 1960 does not contain this limitation. In other words, it applies to any transaction involving the proceeds of a criminal offense regardless of amount, circumstance, or intent. By applying the guideline applicable to § 1957 offenses to § 1960 offenses, the effect will be to eliminate the $10,000 threshold which has been so important eliminating the overbreath of § 1957.

The use of § 2S1.1 in § 1960(b)(1)(C) offenses will also collapse the distinction between § 1956 and § 1960. Section 1956 requires proof that the defendant conducted the transaction "with the intent to promote the carrying on of specified unlawful activity." Section 1960, in contrast, requires only a knowledge on the part of the defendant that the funds are intended to be used *by someone else* to promote or support unlawful activity. This is a significant difference in mental state which will be erased by the use of § 2S1.1 for § 1960(b)(1)(C) offenses. In short, the P.A.G. believes that in light of the significant effort expended in the drafting of § 2S1.1 and its application to Sections 1956 and 1957, that guideline should not be applied to § 1960 offenses. Section 1960 has a significantly lower statutory maximum, and significantly less restrictive elements.

3. **Enhancement in Accessory After the Fact Guideline for Harboring Terrorists.**

The P.A.G. does not oppose the elimination of the offense level "cap" of level 20 where the conduct involves harboring a person who the defendant knows or has reasonable grounds to believe has committed any offense listed in 18 U.S.C. § 2339 or § 2339(a), or has committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. § 2332(b)(g)(5). The P.A.G. is concerned, however, that the proposed language in the amendment to § 2X3.1(a)(3)(C) appears to be broad enough to apply to those who harbor persons who have committed such offenses without either knowledge or reason to believe that the nature of the offense committed by the fugitive was one of terrorism. Although crimes of terrorism are obviously very serious, there appears to be no reason to apply the higher base offense level where the defendant has neither knowledge or reason to believe that the fugitive being harbored has committed such an offense.

4. **The Amendments Regarding Biological Agents and Toxins**

The P.A.G. has no comment on the proposed amendments regarding biological agents and toxins, and believes the proposed amendments regarding the safe drinking water provisions are appropriate, with the limited proviso that a base offense level of 22 rather than 25 should be utilized. The proposed seven-level increase from 18 to 25 will more than double the current sentencing levels. While the P.A.G. recognizes that the existing guidelines for these offenses may need modification, such a drastic change to existing sentencing policy should rarely, if ever, occur at one time. The P.A.G. believes that a four-level upward adjustment to the guideline reflects a more measured approach which could then receive further study and analysis in application. The P.A.G. also believes that the current distinction between actual tampering and mere threatened tampering should remain. Actual tampering with a water supply or a consumer product in any instance reflects a very different mental state than a threat to do so. Accordingly, the current distinction between the two should be recognized through the use of separate guidelines.

The P.A.G. supports the proposed upward departure regarding animal enterprise terrorism.

5. **Amendments Required by the Terrorists Bombing Convention Implementation Act of 2002**

The P.A.G. believes it would be overbroad to amend § 2K1.4(a)(1) to expand the use of the higher base offense level for offenses involving the attempted destruction of "a place of public use." The current distinction in the guideline between offense level 24 and 20 reflects the significantly greater culpability of those who attempt to destroy dwellings, airports, aircraft, mass transportation facilities, and mass transportation vehicles. The proposed amendment would apply this higher base offense level to attempts to destroy or cause property damage to any "place of public use" as defined in 18 U.S.C. § 2332f(e)(6). This definition includes any "location" that is "accessible" to "members of the public, whether continuously, periodically, or occasionally." This would appear to encompass any location that is not private. The P.A.G. believes this to be detrimental to the proportionality previously achieved in the guideline through the differentiation of those with higher culpable states who seek to destroy implements of mass transportation compared to those who seek to destroy remote locations on public land which are technically open to members of the public although used only occasionally. The P.A.G. would recommend the deletion of "place of public use" from the base offense level 24 portion of the guideline.

6. **Immigration**

The P.A.G. supports Option Two of the amendment to § 2L1.2(b)(1) inasmuch as that option recognizes the distinction between prior offenses which resulted in a term of imprisonment and those which did not. In light of the volume of state offenses which do not result in periods of incarceration, the P.A.G. believes this distinction is important and should be preserved in the guidelines.

7. **Proposed Amendments to § 5G1.3**

With regard to the series of proposals regarding § 5G1.3, the P.A.G. recommends that the Commission select for passage those amendments which provide the sentencing judge with maximum discretion. Such discretion is necessary in this area because of the often complex and case-specific issues that arise where a defendant is facing (or has faced) imprisonment on a related charge in another jurisdiction. The sentencing judge is in the best position to determine whether, or to what extent, the defendant should receive credit for the prior sentence. With this over-arching principle in mind, the P.A.G. recommends the following.

At the outset, the P.A.G. recommends amending § 5G1.3 to cover cases in which the defendant is facing an undischarged terms of imprisonment or has already completed his or her term of imprisonment. There is no principled basis to credit or not to credit a defendant for a prior sentence based on the fortuity of whether the defendant has completed the prior sentence at the time of sentencing. With regard to amending § 5G1.3(b), the P.A.G. supports Option Two because it provides maximum discretion to the sentencing judge in determining whether, or to what extent, to credit the prior sentence.

With regard to application note 6, the P.A.G. supports Option One (B), which again, provides maximum discretion to the sentencing judge to determine whether or not the sentence for the instant offense should run consecutively or concurrently or partially concurrently with the prior offense on which supervision is being revoked. We submit that Option One (A), which would require that the sentence for the instant offense shall be imposed to run consecutively, essentially adopts a mandatory minimum sentencing scheme which is at odds with the purpose of the guidelines and with this Commission's long-held position on mandatory minimum sentencing. The requirement of consecutive time also risks at least some double counting because a defendant who has committed other offenses typically has a higher criminal history score. In addition, that defendant will receive a two point upward adjustment, pursuant to § 4A1.1(d), for having committed the new offense while under supervision.

Finally, with regard to the issue for comment, the P.A.G. urges the Commission to resolve the current circuit split and to clarify that a sentencing judge has the authority to grant credit for an

undischarged state sentence even where the federal sentence is imposed concurrently. Bureaucratic quirks in the criminal justice system, particularly involving the interplay between the state and federal prison systems, have served to defeat the recommendations, and even the rulings, of federal sentencing judges regarding concurrent sentences. Unless a federal judge is authorized to grant "credit" for time served in state prison, the imposition of a concurrent sentence in many instances will not achieve the desired result.

The timing of the interplay between a defendant who starts in federal custody and one who does not can lead to incredible disparity in sentences among defendants otherwise similarly situated. This is because the Bureau of Prisons generally gives a defendant no credit for time spent in state custody, whereas state systems typically give full credit for time spent in federal custody.

Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention and any judges who sentence Defendant A retain their full historical power to declare that subsequent sentences may be imposed either concurrently or consecutively to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get sent via a writ into the federal system, where Defendant B might be in pretrial detention in the same cell as Defendant A; yet the Bureau of Prisons will give Defendant B no credit for this time based on the fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ. This situation is not changed even if the federal sentencing judge orders the imposition of a concurrent or partially concurrent sentence. The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. By providing the sentencing judge with the authority to grant "credit" for time served in state prison, the Commission can help overcome this extremely frustrating, illogical and inequitable situation.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners with respect to the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

cc: All Commissioners
Charles Tetzlaff, Esq.
Tim McGrath, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

P.O. BOX 1060
LAREDO, TEXAS 78042
(956) 726-2237
Fax (956) 726-2349

January 21, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D. C. 20002-8002

Dear Judge Murphy:

I write in response to a proposed amendment, issued December 20, 2002, to Section 2L1.2 of the Guidelines. Proposed Application Note 2(A) would now exclude from the definition of "aggravated felony" any controlled substance offense "without an intent to distribute that controlled substance."

In my opinion, this proposal would aggravate an already unfortunate disparity created by the previous amendment to that guideline concerning the definition of a "drug trafficking offense."

The Commission apparently wishes to make a distinction between a controlled substance crime of "simple possession," as distinguished from a crime of possession with intent to distribute or manufacture, or the actual distribution or manufacturing of controlled substances. I would have no quarrel with such a distinction if it truly separated cases involving small amounts of narcotics for personal use. Unfortunately, however, that is not the case, at least in Texas.

My research of Texas law indicates that, with respect to marihuana, there are only two offenses. These are found in the Health and Safety Code at §§481.120 and 121. One offense is delivery of marihuana and the other is possession of marihuana. Copies of these statutes are attached for your convenience. As you can see, the possession statute describes offenses ranging from a Class B Misdemeanor up to one punishable by life in prison, depending upon the amount of the marihuana.

The other narcotics with which we typically deal, including cocaine and heroin, are treated in different sections of the same Texas code, also attached. For those substances, there is an offense of manufacturing, delivering or possession with intent to deliver. Section 481.112. There is also, however, the offense of "simple" possession at §481.115. Once again, the latter provision describes offenses ranging from a state jail felony up to life in prison. Thus, under §481.115(f), an offense involving at least 400 grams of the controlled substance is punishable by a minimum sentence of 10 years and a maximum sentence of 99 years or life. Because of the very high sentences allowed under §481.115, my experience is that Texas prosecutors almost never bother to charge under §481.112. Instead, they inevitably use §481.115, since it is much simpler to prove. Similarly, as to marihuana, they invariably use only §481.121.

The result is that after November 1, 2002, when I am sentencing two defendants for illegal reentry under the current §2L1.2, a defendant with a prior federal conviction of possession with intent to distribute 50 pounds of marihuana could receive an upward adjustment of 16 levels under (b)(1)(A), while a defendant with a conviction only of "possession" of 1,000 pounds of marihuana or 100 pounds of cocaine in a Texas state court would receive an adjustment of 8 levels. The proposed new amendment, as I understand it, would now lower the latter defendant's adjustment to 4 levels. This is not an academic issue. I have dealt with similar disparities already, and it is most unfortunate.

I have not tried to determine whether other states have a statutory scheme similar to that of Texas. I do know that I have encountered cases where defendants were convicted in other states and the charging documents only refer to "possession," despite an offense report which clearly described a case of possession with intent to distribute and/or actual distribution. In any event, Texas probably accounts for a very large number of illegal entry prosecutions, and significant numbers of the affected defendants have been convicted of drug offenses in Texas courts, so that the problem I describe is not an insignificant one.

Thank you for your consideration of this matter, and your efforts in this very difficult area of criminal sentencing.

Sincerely yours,

George P. Kazen

GPK/gs

TX PENAL §§ 12.31. Capital Felony

(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the institutional division for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life.
(b) In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

TX PENAL §§ 12.32. First Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.33. Second Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the institutional division for any term of not more than 20 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.34. Third Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.35. State Jail Felony Punishment

(a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.
(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or
(2) the individual has previously been finally convicted of any felony:
(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or
(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

TX HEALTH & S §§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
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(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.120. Offense: Delivery of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;
(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;
(3) a state jail felony if the amount of marihuana delivered is five pounds or less but more than one-fourth ounce;
(4) a felony of the second degree if the amount of marihuana delivered is 50 pounds or less but more than five pounds;
(5) a felony of the first degree if the amount of marihuana delivered is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marihuana delivered is more than 2,000 pounds.

TX HEALTH & S §§ 481.121. Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;
(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
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WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

MEMORANDUM

TO: Chair Murphy
Commissioners

FROM: Karen Hickey

RE: Public Comment

DATE: February 24, 2002

Attached are late-arriving letters of public comment from the Practitioners' Advisory Group and from The Honorable George P. Kazen. These letters are hole-punched for insertion into the February 18, 2003 Public Comment notebook.

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
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February 24, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Amendments Published for Comment on November 22, 2002

Dear Judge Murphy:

We are writing to provide the Commission with the Practitioners' Advisory Group's comments on the amendments published for comment on November 22, 2002.

1. **Terrorism Enhancement in Money Laundering Guideline**

The P.A.G. supports Option One of this proposed amendment. Having been heavily involved in the drafting of the revised money laundering guideline, we do not believe there was any consideration given in the course of that possibility of a cumulative "double counting" adjustment for terrorism beyond that set forth in the money laundering guideline. Given the more recent Chapter 3 adjustment, deletion of this adjustment within the 2S1.1 guideline is appropriate.

2. **Reference of 18 U.S.C. § 1960 to Money Laundering Guideline**

The P.A.G. does not support either of the two options with respect to this proposed amendment because they will potentially dissolve the significant statutory differences between Sections 1956 and 1957, on the one hand, and § 1960 on the other. It is important to note that considerable thought and effort went into the drafting of the new guidelines for Sections 1956 and 1957. Section 1956 carries

a statutory maximum penalty of 20 years, while § 1957 carries a statutory maximum of ten years. In contrast, § 1960 covers a statutory maximum of only five years. It has been well documented that § 1957 is an extraordinary broad statute which encompasses a variety of conduct. The most significant limitation on the application of § 1957 is the requirement that the monetary transaction in question have a value of greater than $10,000. This dollar value threshold was of critical importance in the enactment of the legislation and to prevent its application in an overbroad fashion. Section 1960 does not contain this limitation. In other words, it applies to any transaction involving the proceeds of a criminal offense regardless of amount, circumstance, or intent. By applying the guideline applicable to § 1957 offenses to § 1960 offenses, the effect will be to eliminate the $10,000 threshold which has been so important eliminating the overbreath of § 1957.

The use of § 2S1.1 in § 1960(b)(1)(C) offenses will also collapse the distinction between § 1956 and § 1960. Section 1956 requires proof that the defendant conducted the transaction "with the intent to promote the carrying on of specified unlawful activity." Section 1960, in contrast, requires only a knowledge on the part of the defendant that the funds are intended to be used *by someone else* to promote or support unlawful activity. This is a significant difference in mental state which will be erased by the use of § 2S1.1 for § 1960(b)(1)(C) offenses. In short, the P.A.G. believes that in light of the significant effort expended in the drafting of § 2S1.1 and its application to Sections 1956 and 1957, that guideline should not be applied to § 1960 offenses. Section 1960 has a significantly lower statutory maximum, and significantly less restrictive elements.

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5. **Amendments Required by the Terrorists Bombing Convention Implementation Act of 2002**

The P.A.G. believes it would be overbroad to amend § 2K1.4(a)(1) to expand the use of the higher base offense level for offenses involving the attempted destruction of "a place of public use." The current distinction in the guideline between offense level 24 and 20 reflects the significantly greater culpability of those who attempt to destroy dwellings, airports, aircraft, mass transportation facilities, and mass transportation vehicles. The proposed amendment would apply this higher base offense level to attempts to destroy or cause property damage to any "place of public use" as defined in 18 U.S.C. § 2332f(e)(6). This definition includes any "location" that is "accessible" to "members of the public, whether continuously, periodically, or occasionally." This would appear to encompass any location that is not private. The P.A.G. believes this to be detrimental to the proportionality previously achieved in the guideline through the differentiation of those with higher culpable states who seek to destroy implements of mass transportation compared to those who seek to destroy remote locations on public land which are technically open to members of the public although used only occasionally. The P.A.G. would recommend the deletion of "place of public use" from the base offense level 24 portion of the guideline.

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At the outset, the P.A.G. recommends amending § 5G1.3 to cover cases in which the defendant is facing an undischarged terms of imprisonment or has already completed his or her term of imprisonment. There is no principled basis to credit or not to credit a defendant for a prior sentence based on the fortuity of whether the defendant has completed the prior sentence at the time of sentencing. With regard to amending § 5G1.3(b), the P.A.G. supports Option Two because it provides maximum discretion to the sentencing judge in determining whether, or to what extent, to credit the prior sentence.

With regard to application note 6, the P.A.G. supports Option One (B), which again, provides maximum discretion to the sentencing judge to determine whether or not the sentence for the instant offense should run consecutively or concurrently or partially concurrently with the prior offense on which supervision is being revoked. We submit that Option One (A), which would require that the sentence for the instant offense shall be imposed to run consecutively, essentially adopts a mandatory minimum sentencing scheme which is at odds with the purpose of the guidelines and with this Commission's long-held position on mandatory minimum sentencing. The requirement of consecutive time also risks at least some double counting because a defendant who has committed other offenses typically has a higher criminal history score. In addition, that defendant will receive a two point upward adjustment, pursuant to § 4A1.1(d), for having committed the new offense while under supervision.

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undischarged state sentence even where the federal sentence is imposed concurrently. Bureaucratic quirks in the criminal justice system, particularly involving the interplay between the state and federal prison systems, have served to defeat the recommendations, and even the rulings, of federal sentencing judges regarding concurrent sentences. Unless a federal judge is authorized to grant "credit" for time served in state prison, the imposition of a concurrent sentence in many instances will not achieve the desired result.

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Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention and any judges who sentence Defendant A retain their full historical power to declare that subsequent sentences may be imposed either concurrently or consecutively to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get sent via a writ into the federal system, where Defendant B might be in pretrial detention in the same cell as Defendant A; yet the Bureau of Prisons will give Defendant B no credit for this time based on the fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ. This situation is not changed even if the federal sentencing judge orders the imposition of a concurrent or partially concurrent sentence. The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. By providing the sentencing judge with the authority to grant "credit" for time served in state prison, the Commission can help overcome this extremely frustrating, illogical and inequitable situation.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners with respect to the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

cc: All Commissioners
Charles Tetzlaff, Esq.
Tim McGrath, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

P.O. BOX 1060
LAREDO, TEXAS 78042
(956) 726-2237
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January 21, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D. C. 20002-8002

Dear Judge Murphy:

I write in response to a proposed amendment, issued December 20, 2002, to Section 2L1.2 of the Guidelines. Proposed Application Note 2(A) would now exclude from the definition of "aggravated felony" any controlled substance offense "without an intent to distribute that controlled substance."

In my opinion, this proposal would aggravate an already unfortunate disparity created by the previous amendment to that guideline concerning the definition of a "drug trafficking offense."

The Commission apparently wishes to make a distinction between a controlled substance crime of "simple possession," as distinguished from a crime of possession with intent to distribute or manufacture, or the actual distribution or manufacturing of controlled substances. I would have no quarrel with such a distinction if it truly separated cases involving small amounts of narcotics for personal use. Unfortunately, however, that is not the case, at least in Texas.

My research of Texas law indicates that, with respect to marihuana, there are only two offenses. These are found in the Health and Safety Code at §§481.120 and 121. One offense is delivery of marihuana and the other is possession of marihuana. Copies of these statutes are attached for your convenience. As you can see, the possession statute describes offenses ranging from a Class B Misdemeanor up to one punishable by life in prison, depending upon the amount of the marihuana.

The other narcotics with which we typically deal, including cocaine and heroin, are treated in different sections of the same Texas code, also attached. For those substances, there is an offense of manufacturing, delivering or possession with intent to deliver. Section 481.112. There is also, however, the offense of "simple" possession at §481.115. Once again, the latter provision describes offenses ranging from a state jail felony up to life in prison. Thus, under §481.115(f), an offense involving at least 400 grams of the controlled substance is punishable by a minimum sentence of 10 years and a maximum sentence of 99 years or life. Because of the very high sentences allowed under §481.115, my experience is that Texas prosecutors almost never bother to charge under §481.112. Instead, they inevitably use §481.115, since it is much simpler to prove. Similarly, as to marihuana, they invariably use only §481.121.

The result is that after November 1, 2002, when I am sentencing two defendants for illegal reentry under the current §2L1.2, a defendant with a prior federal conviction of possession with intent to distribute 50 pounds of marihuana could receive an upward adjustment of 16 levels under (b)(1)(A), while a defendant with a conviction only of "possession" of 1,000 pounds of marihuana or 100 pounds of cocaine in a Texas state court would receive an adjustment of 8 levels. The proposed new amendment, as I understand it, would now lower the latter defendant's adjustment to 4 levels. This is not an academic issue. I have dealt with similar disparities already, and it is most unfortunate.

I have not tried to determine whether other states have a statutory scheme similar to that of Texas. I do know that I have encountered cases where defendants were convicted in other states and the charging documents only refer to "possession," despite an offense report which clearly described a case of possession with intent to distribute and/or actual distribution. In any event, Texas probably accounts for a very large number of illegal entry prosecutions, and significant numbers of the affected defendants have been convicted of drug offenses in Texas courts, so that the problem I describe is not an insignificant one.

Thank you for your consideration of this matter, and your efforts in this very difficult area of criminal sentencing.

Sincerely yours,

George P. Kazen

GPK/gs

TX PENAL §§ 12.31. Capital Felony

(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the institutional division for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life.
(b) In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

TX PENAL §§ 12.32. First Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.33. Second Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the institutional division for any term of not more than 20 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.34. Third Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.35. State Jail Felony Punishment

(a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.
(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or
(2) the individual has previously been finally convicted of any felony:
(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or
(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

TX HEALTH & S §§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.120. Offense: Delivery of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;
(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;
(3) a state jail felony if the amount of marihuana delivered is five pounds or less but more than one-fourth ounce;
(4) a felony of the second degree if the amount of marihuana delivered is 50 pounds or less but more than five pounds;
(5) a felony of the first degree if the amount of marihuana delivered is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marihuana delivered is more than 2,000 pounds.

TX HEALTH & S §§ 481.121. Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;
(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

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PUBLIC COMMENT SUMMARIES

February 18, 2003

Amendment No. 1 – Corporate Fraud

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable William W. Wilkins, Chair
300 East Washington Street, Suite 222
Greenville, SC 29601

Regarding the issue for comment about whether the loss tables for fraud, theft, and property destruction offenses should be separate, the CLC strongly believes that it would be ill-advised to reverse the thorough and careful work that went into the Economic Crime Package by pulling apart the consolidated guideline. The CLC states that the considerations that favored the adoption of the Economic Crime Package are still valid. The CLC notes that one key consideration in consolidating the guideline was to avoid disparate sentencing outcomes for conceptually similar offenses that sometimes were occurring depending on whether sentencing occurred under the theft or the fraud guideline. The CLC states that a consolidated guideline would appear to better ensure consistent sentencing treatment of the various hybrid theft/fraud and new technology offenses, such as identify theft and cellular telephone cloning.

The CLC notes that the Economic Crime Package amendments only are applicable to offenses committed after November 1, 2002, and thus, there is little data available and virtually no appellate case law on the effect that these changes have had on sentencing.

The CLC strongly believes that the Commission should wait until sufficient empirical data and case law guidance are available concerning the Economic Crime Package before considering any major revisions. If the Commission chooses to consider deconsolidation during this amendment cycle, the CLC requests that, at a minimum, the Commission publish specific proposals on how the loss tables would be separated and provide specific examples on how the proposed guidelines would operate.

Frank O. Bowman, III
Professor of Law
Indiana Univ. School of Law - Indianapolis

Professor Bowman believes no case has been made to support across-the-board sentence increases for economic crime offenders at all loss levels. The DOJ has failed to support its proposals with arguments grounded in experience, statistical evidence, penological theory,

reason, or common sense. Because the DOJ has not proffered any substantive arguments in support of its position, Professor Bowman assumes what the DOJ's arguments might be if it were to engage in a debate on the merits and addresses them in turn:

- Response to a crime wave? No, statistics show that the number of economic and property crimes committed in the U.S. declined between 1974 and 2000. While the number of economic crime defendants sentenced in federal court was almost constant between 1994 and 2000, the number of federal economic crime referrals declined, meaning DOJ is digging deeper into the economic crime pool to maintain a constant number of federal defendants.

- A reaction to declining sentences? No, while sentences for drug and violent offenses declined in the 1990s, the sentences for economic crimes increased slightly. Commission statistics also show that the number of economic crime defendants who received prison sentences increased in the 1990s. This trend will continue as the Economic Crime Package amendments take effect.

- Too low as compared to the states? No, it appears that sentences served by federal economic offenders are markedly more severe than those served by state economic crime defendants.

- Too low as compared to other federal crimes? Economic crime sentences are lower than sentences for violent and drug offenses, but a comparison of averages for these offenses is inherently flawed. White collar offenses are not as serious as violent crimes against persons or drug trafficking. Further, the average federal economic crime sentence is relatively low, not because the sentencing structure is unduly lenient, but because the U.S. Attorney's Offices are prosecuting thousands of small cases (15% of defendants took less than $2000) in which little or no prison time would be called for under any rational sentencing scheme. A comparison of the high-loss amount economic crime cases to violent or drug offenses paints a truer picture.

Professor Bowman includes relevant statistics, charts, and tables in his materials to support his conclusions. He also suggests that DOJ answer six questions before the Commission seriously considers its proposals.

In the second of his two letters to the Commission, Professor Bowman addresses the suggestion that the theft and fraud guidelines be un-consolidated. He concludes, "This is a bad idea. Please don't do it."

- Different penalty levels for theft and fraud would create chaos (i.e., generate litigation) to no purpose.

- Theft and fraud cases cannot be separated into two analytically distinct categories, as

Professor Bowman's brief foray into Anglo-American legal history and quick survey of modern American criminal law reveal. Bowman attaches several representative samples of state statutes that have abandoned the traditional distinctions to his letter. He also addresses the troublesome case of embezzlement and concludes that categorization of embezzlement would have to be accomplished on a case-by-case basis. The same is true for many schizophrenic federal economic crimes that may be committed by both fraudulent and non-fraudulent means. The Commission would have to: (1) identify the statutes that can be both fraud and theft and let the parties litigate the issue, (2) identify all statutes as either fraud or theft and risk sacrificing one of its most basic mandates - sentence similarly situated defendants similarly - for administrative convenience, or (3) go through the various statutes and identify which *methods* of committing the offenses should be sentenced under each guideline.

- Separate theft and fraud guidelines are bad policy because these categories have no necessary connection to offense seriousness, defendant blameworthiness, or any other valid sentencing consideration. Bowman illustrates his point with case studies.

- Splitting up the newly consolidated economic crime guideline without compelling justification less than eighteen months after the consolidation will damage the institutional credibility of the Sentencing Commission.

Federal & Community Public Defender (Defenders)
Carmen Hernandez

The Defenders oppose any increase of the loss table at lower loss amounts for the following reasons:

(1) Low-loss-amount offenses were not targeted by the Sarbanes-Oxley Act, and the recently-promulgated emergency amendments more than adequately address the harms identified by Congress in that Act. The Defenders argue that prison sentences are generally inappropriate for low level white collar offenses because (A) such sentences are inconsistent with the parsimony principle and sentencing purposes identified in 18 U.S.C. 3553(a)(2) and (B) 28 U.S.C. 994(j) requires sentences "other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Compliance with the 994(j) mandate is more critical than ever in light of new DOJ/BOP policies restricting use of community confinement centers for low-level, nonviolent offenders.

(2) Loss amounts often overstate the culpability of defendants.

(3) There is no practical, policy, or empirical basis to support raising penalties for low-level offenses, sentences for which were just lowered in 2001.

(4) Increased penalties for low-level offenses will disrupt the lives of low-level offenders and their families but will result in no corresponding benefit to society.

(5) Increased penalties for low-level offenders run afoul of 28 U.S.C. 994(g), which requires the Commission to consider prison capacity in formulating guidelines, and will contribute to a lack of uniformity and fairness in sentencing.

The Defenders suggest, instead, that the emergency amendments be adjusted to comply with the structure of the Guidelines before they are promulgated as permanent amendments. They suggest that three specific adjustments be made: (1) Cap the offense level for white collar offenses at a level below 43 because (A) life sentences for nonviolent offenses are always inappropriate, (B) life sentences should be reserved for offenses whose statutory maximum punishment is mandatory life imprisonment, and (C) offense level 43 for offenses that have a 20-year statutory maximum punishment is inconsistent with the structure of the Guidelines (examples of the inconsistences are provided). (2) The offense level for less culpable defendants should be capped as follows:

> (b) Specific Offense Characteristics
>
> > (14) If the defendant receives an adjustment under 3B1.2 (Mitigating Role), the cumulative adjustments from U.S.S.G. 2B1.1(b) shall not exceed **20** levels.

Finally, (3) cumulative adjustments for like harms should be capped in the manner such adjustments have been capped in 2B3.1(b)(2)&(3).

Eastman Kodak Company
A. Terry VanHouten
Assistant General Counsel
Employment Law and Personnel Relations Legal Staff
343 State Street
Rochester, NY 14650-0218

Eastman Kodak urges the Commission to consider the endorsement of an organizational ombuds functions as an element of the proposed sentencing guidelines. Kodak believes that an ombuds function would be valuable in implementing legislation such as the Sarbanes-Oxley Act. The company states that the goals of the Act are to create a working environment that mandates ethical and legal conduct. To do so, corporations must create a system that ensures confidentiality in order to encourage employees to come forward.

Kodak states that it has a number of resources available to employees who wish to raise issues of concern. [Kodak includes an attachment that outlines the company's formal problem resolution plan]. Kodak maintains that in order to encourage employees to come forward to report unethical

or illegal conduct, there must be a "zero barrier" access point that ensures confidentiality among the various corporate resources. Thus, Kodak believes that an organizational ombuds office would provide this entry point to the reporting system. Kodak suggests that three characteristics of such an office — independence, neutrality, and confidentiality — would ensure that employees have a safe haven to come forward. Kodak believes that the ombuds function would be highly beneficial in identifying impediments to effective governance and thus should be included in the guidelines.

Amendment No. 3 – Terrorism

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

I. Remaining USA Patriot Act Amendments

A. Terrorism Enhancement in Money Laundering Guidelines

The Department of Justice (DOJ) has no objection to the proposed terrorism enhancement in the money laundering guideline. The DOJ believes, however, that an additional amendment to Application Note 2 in §3A1.4 may be warranted to ensure that an offense that involves the laundering of funds that were the proceeds of a federal crime of terrorism offense shall be considered to have involved, or to have been intended to promote, a federal crime of terrorism and thus shall trigger the application of the terrorism adjustment in §3A1.4.

B. Reference of 18 U.S.C. § 1960 to Money Laundering Guideline

The DOJ prefers a combination of both Options 1 and 2 of this proposed amendment. On the one hand, the DOJ believes guideline application will be easier with a direct and appropriate statutory reference to §2S1.1 for offenses under 18 U.S.C. § 1960(b)(1)(C) rather than with indirect guideline application through a different statutory reference followed by cross-reference from the one guideline to the other. On the other hand, as suggested in the issue for comment, the DOJ does not think it appropriate for the Commission to provide a cross-reference to §2S1.1 for any offense referenced to §2S1.3 where the government can prove the offense involved the intent to promote unlawful activity, knowledge or belief that the funds were proceeds of unlawful activity, or a reckless disregard of the illicit source of the funds. Thus, the DOJ suggests that § 1960(b)(1)(C) offenses be referenced to §2S1.1 and that a cross-reference be added to §2S1.3 as suggested above.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

The DOJ supports this proposal. Harboring a fugitive in the terrorism-related contexts specified in the guideline is a very serious offense. Furthermore, DOJ states that under the amendment, the final Chapter Two offense level may still be lower than level 30, (see §2X3.1 – the offense level is 6 levels lower than the offense level for the underlying offense); the amendment merely ensures that Chapter Two offense level will not be artificially capped at level 20.

The DOJ notes a few technical issues with the proposal. First, a parenthetical in the explanatory text introducing the amendment incorrectly states that predicate offenses listed in 18 U.S.C. § 2339A are the same as the offenses listed in 18 U.S.C. § 2332b(g)(5). Second, the maximum

sentence for a § 2339A offense is life imprisonment if death results from the offense, and 15 years otherwise; the explanatory text is therefore imprecise when it lists the maximum punishment as 15 years. Finally, there is a minor issue with the text of the amendment itself. The text would apply the maximum base offense level of 30 to certain obstructive or perjurious conduct. The DOJ believes this language is unnecessary and that its inclusion may cause confusion. Hence, we recommend deleting "; or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I)".

II. Amendments Required by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

A. Biological Agents and Toxins

The DOJ support these amendments. The DOJ agrees that §2M6.1 is the appropriate guideline for these offenses and that level 22 is an appropriate base offense level for these offenses. The DOJ notes that these offenses will play a pivotal role in maintaining the new statutory registration scheme.

B. Safe Drinking Water Provisions

The DOJ agrees that the base offense levels and specific offense characteristics for offenses under 42 U.S.C. § 300i-1(a) and (b) should be amended to account for the substantially increased maximum punishment; however, the DOJ does not believe that this is best accomplished by taking those crimes out of the environmental crimes guidelines and merging them with a guideline covering entirely unrelated offenses. The amendment and issue for comment suggests merging Safe Drinking Water Act offenses with the consumer product tampering crimes because of the rareness of prosecutions of these offenses, a view that the offenses are similar, and the supposed promotion of proportionality if the environmental terrorism and consumer products crimes are in the same guideline. The DOJ does not believe these are sufficient reasons for breaking up the environmental crimes guidelines in Part 2Q.

The DOJ asserts that beyond rarity, there is little similarity between the types of crimes covered by Parts 2Q and 2N, except perhaps for the fact that the means of tampering in either medium could be poison of some nature. (In the case of drinking water tampering, the contaminant – that is, the "poison" – could be a chemical, biological, or radiological agent.) Tampering with a drinking water supply, though, also might be by interfering with a system's operation, for example, by blowing up a water pipeline. Because public drinking water is used by virtually every member of any community, a single act would put at risk an entire community (perhaps 10 million or more people in one of our larger metropolitan areas), not just the users of a particular pain reliever, for example. The DOJ states that this potential broad effect of a Safe Drinking Water Act offense is characteristic of many of the environmental crimes that are covered by Part 2Q.

The DOJ states that proportionality of punishment can be achieved by parallel amendments to Part 2Q and 2N without combining them into guidelines under a Part entitled "Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws". The DOJ states that Safe Drinking Water Act crimes share more with other environmental crimes than they do with food, drug, agricultural product, and odometer violations; thus, the same activity that might be prosecuted as drinking water tampering also could constitute a violation of the Federal Water Pollution Control Act, the Resource Conservation and Recovery Act, and/or the Comprehensive Environmental Response, Compensation and Liability Act, and those crimes might well be charged in the same indictment. The DOJ states that this proposed shifting of Safe Drinking Water Act violations to a part of the guidelines treating consumer products would compromise the organization of Part 2Q with two crimes under one environmental statute separated entirely from all of the other environmental crimes, including at least one other under the same statute. See, 42 U.S.C. § 300h-2(b)(2). The DOJ does not believe that this fragmentation is a sound approach.

In sum, the DOJ does not believe that the tampering/attempt crimes under the Safe Drinking Water Act should be consolidated with unrelated crimes. The guidelines for those crimes should be revised because of amendments to the law, but the Commission's purpose of proportionality in punishment can be achieved by separate guidelines that track one another. The DOJ does, however, believe that consolidating the tampering and attempt crimes is a reasonable proposal.

The DOJ suggests raising the base offense level in §2Q1.4 to 25 (as in 2N1.1); retaining the §2Q1.4(1) specific offense characteristic in order to capture risk, which is key in environmental law, whether or not a person is successful in causing harm; retaining the specific offense characteristics in §2Q1.4(b)(2)-(4); and adding the cross-references and special instruction from 2N1.1(c) and (d).

C. Animal Enterprise Terrorism

The DOJ supports the proposed amendment to Application Note 15 in §2B1.1 – adding an upward departure consideration – to account for enhanced statutory penalties under 18 U.S.C. § 43 (animal enterprise terrorism) for cases involving death or serious bodily injury.

III. Amendments Required by the Terrorist Bombings Convention Implementation Act of 2002

First, 18 U.S.C. § 2332f criminalizes the unlawful delivery, placement, discharge, or detonation of an explosive or other lethal device against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction where that destruction results in major economic loss.

The DOJ fully agrees with the Commission's proposal to reference this offense to §§2K1.4 and

2M6.1 of the guidelines. If the offender uses a biological, chemical, radiological, or nuclear weapon, then §2M6.1 would apply; otherwise, §2K1.4 would apply. The DOJ states that these guidelines will provide the appropriate punishment for this offense, particularly in light of the proposed amendment to §2K1.4, whereby the enhanced base offense level set forth in §2K1.4(a)(1) will be applicable to an offense that involves the destruction or attempted destruction of a public transportation system, a state or government facility, an infrastructure facility, or a place of public use.

Second, the DOJ states that the Commission proposes to reference violations of § 2339C(a)(1)(B) to §2M5.3. (Unlike § 2339C(a)(1)(A) offenses, § 2339C(a)(1)(B) offenses are not tied to a specific federal predicate offense). This would result in a base offense level of 26, a two-level enhancement if the defendant knew that the funds would be used to purchase weapons, and a cross-references to other guidelines if the offense resulted in death, was tantamount to attempted murder, or involved nonconventional weapons of mass destruction. The DOJ believes a two-level enhancement for the provision of funds or other material support or resources with the intent or knowledge that they are to be used to commit a violent act should be added. The DOJ believes the defendant who acts with that knowledge or intent (a category that includes all § 2339C(a)(1)(B) offenders, and some § 2339B offenders) is significantly more culpable than other defendants, and should be punished more severely. The DOJ suggests that this enhancement could be integrated into existing § 2M5.3(b)(1) by the addition of a new subsection (E), such as the following: "(E) funds or other material support or resources with the intent or knowledge that they are to be used to commit or assist in the commission of a violent act".

Third, the Commission proposes to reference violations of § 2339C(c)(2)(A) to §2X3.1 (accessory after the fact), with 18 U.S.C. § 2339B as the underlying offense. For clarity, the DOJ suggests, in proposed Application Note 1 to §2X3.1, striking "material support, resources, or funds" and substituting "material support or resources."

With regard to 18 U.S.C. § 2339C(c)(2)(B), the Commission proposes to treat some of these violations differently from others. Specifically, the Commission proposes (1) to reference offenses under (c)(2)(B) that involve the concealing of funds collected in violation of (a)(1)(A) to §2X3.1 (accessory after the fact), since they can be tied to a specific underlying federal offense; and (2) to reference (c)(2)(B) violations that involve the concealing of funds collected in violation of (a)(1)(B) to §2M5.3. The DOJ supports this approach.

IV. Miscellaneous Amendments

The DOJ supports the Commission's proposals to amend the applicable guidelines for offenses under 18 U.S.C. § 842(p)(2) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction). Regarding the proposed minor amendments to the statutory provisions following §2M6.1, the DOJ suggests deletion of the phrase ", but including any biological agent, toxin, or vector" both times it appears because the DOJ believes this phrase is no longer needed in light of statutory amendments to 18 U.S.C. § 2332a(c)(2)(C).