Public Comment

Proposed Amendments

MARCH 1990

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments and additions to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of hearing.

SUMMARY: The Commission is considering (1) making permanent certain amendments that were promulgated in October 1989 as temporary, emergency amendments and (2) promulgating additional permanent amendments and additions to the sentencing guidelines, policy statements, and commentary. The proposed new amendments, or a synopsis of issues to be addressed, are set forth below. The Commission may report regular amendments to the Congress on or before May 1, 1990. Comment is sought on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary.

DATES: Public comment should be received by the Commission no later than March 30, 1990, in order for it to be considered by the Commission in the promulgation of regular amendments due to the Congress by May 1, 1990. The Commission has scheduled a public hearing for March 15, 1990, in the Ceremonial Courtroom of the United States Courthouse in Washington, D.C. on these amendments.

ADDRESS: Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, DC 20004, Attn: Communications Director.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director, Telephone: (202) 662-8800.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the U.S. Government. The Commission is empowered by 28 U.S.C. § 994(a) to promulgate sentencing guidelines and policy statements for Federal sentencing courts. The statute further directs the Commission to periodically review and revise guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress no later than the first day of May each year. See 28 U.S.C. § 994(o), (p).

Ordinarily, the Administrative Procedure Act rulemaking requirements are inapplicable to judicial agencies; however, 28 U.S.C. § 994(x) makes the Administrative Procedure Act rulemaking provisions of 5 U.S.C. § 553 applicable to the promulgation of sentencing guidelines by the Commission.

In October 1989, the Commission promulgated temporary, emergency sentencing guidelines relating to (1) the possession of cocaine base ("crack"); and (2) the statutory authority of judges to deny or terminate certain Federal benefits. See 54 FR 44032 (October 31, 1989). The Commission proposes to promulgate these temporary, emergency guidelines as permanent guidelines and to report these amendments and revisions to the Congress by May 1, 1990.

In addition, the Commission is considering a number of other amendments and additions to the sentencing guidelines, policy statement and commentary. Proposed amendments are presented sequentially by the Chapter and Part of the Guidelines Manual to which they pertain. Each amendment is followed by a statement explaining the reason for the amendment.

The proposed amendments are presented in three formats. First, the majority of the amendments are proposed as specific changes in a guideline, policy statement, or commentary. Second, for some amendments the Commission has published alternative means of addressing an issue. Commentators are encouraged to state their preference among listed alternatives or to suggest a new alternative. Third, the Commission has highlighted certain issues and invites suggestions for specific amendment language. To help focus comment, one or more proposals are presented as examples for some of the issues.

Section 1B1.10 of the United States Sentencing Commission Guidelines Manual sets forth the Commission's policy statement regarding retroactivity of amended guideline ranges. Comment is requested regarding whether any of the proposed amendments should be retroactive under this policy statement.

While the amendments below are specifically proposed for public comment and possible submission to the Congress by May 1, 1990, the Commission emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment.

Authority. 28 U.S.C. § 994(a), (o), (p), (x); sec. 21(a) of the Sentencing Act of 1987 (Pub. L. 100-182).

William W. Wilkins, Jr.
Chairman

Chapter One, Part A (Introduction)

1. Proposed Amendment: Chapter One, Part A, is amended by deleting subparts 2-5 in their entirety and inserting in lieu thereof:

"2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence that was automatically reduced in most cases by "good time" credits. In addition, the parole commission was permitted to determine how much of the remainder of any prison sentence an offender actually would serve. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence adjudged by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently). Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories, the greater the complexity and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it would have been tempting to retreat to the simple, broad-category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view urged the Commission to choose between them and accord one primacy over the other. Such a choice would have been profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. As a practical matter, in most sentencing decisions the application of either philosophy may prove consistent with the same result.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized the more important of these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the pre-guidelines sentencing system was, in a sense, a real offense system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines transmitted to Congress in April 1987, the Commission moved closer to a "charge offense" system. The system is not, however, pure because it contains a number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken through alternative base offense levels, specific offense characteristics, cross-references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea

negotiation practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of §5K2.12 (Coercion and Duress), list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery, assault, or arson), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct), recommends a downward departure of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance

for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the agreement process on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, argued that guidelines which fail to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines may bring. Still other commentators made both arguments.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed.R.Crim.P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea bargaining practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence 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 . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."

The Commission's solution to this problem has been to write guidelines that classify many offenses for which probation previously was frequently given as serious and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment -- sentences that neither "just deserts" nor "crime control" theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) When the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received

more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct and those who provide substantial assistance to the government in the investigation or prosecution of others.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), requires the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimate at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each row in the table prescribes ranges that overlap with the ranges in the preceding and succeeding rows. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably lesser importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that are the basis for a significant number of prosecutions. It has

sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practices as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment about their seriousness and they will be addressed as the Commission refines the guidelines over time.".

Reason for Amendment: This amendment updates this part to reflect the implementation of guideline sentencing on November 1, 1987, and makes various clarifying and editorial changes to enhance the usefulness of this part both as a historical overview and as an introduction to the structure and operation of the guidelines.

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Chapter One, Part B (General Application Principles)

2. Proposed Amendment: Section 1B1.8(a) is amended by inserting "as part of that cooperation agreement" immediately following "unlawful activities of others, and", and by deleting "so" immediately before "provided", and by inserting "pursuant to the agreement" immediately following "provided".

Section 1B1.8(b) is amended by renumbering subdivisions (2) and (3) as (3) and (4) respectively, and by inserting the following as subdivision (2):

"(2) in determining the defendant's criminal history under Chapter Four, Part A (Criminal History) or §4B1.1 (Career Offender);".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 2 by deleting "The Commission does not intend this guideline to interfere with determining" and inserting in lieu thereof "Subsection (b)(2) provides that this guideline shall not be applied to restrict the use of information in determining".

Section 1B1.8(b)(3) is amended by inserting "by the defendant" immediately before the period at the end of the sentence.

Reason for Amendment: This amendment expressly provides that the use of information concerning the defendant's criminal history cannot be restricted under this guideline section. Application Note 2 in the Commentary of the current guideline states that the Commission does not intend this to happen, but inclusion in the guideline itself is

desirable to expressly require this result and eliminate any room for argument or misinterpretation. In addition, this amendment makes several clarifying changes.

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Chapter One, Part B (General Application Principles), Chapter Three, Part D (Multiple Counts)

3. Proposed Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the last sentence and inserting in lieu thereof:

> "'Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,' as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted on multiple counts. Application of this provision does not require that the defendant, in fact, have been convicted on multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine sold (45 grams) is to be used to determine the offense level even if the defendant is convicted on a single count charging only one of the sales. If the defendant is convicted on multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) will provide that the counts are grouped together. Chapter Three, Part D (Multiple Counts), which applies to convictions on multiple counts, does not limit the scope of §1B1.3(a)(2) because, as discussed above, application of subsection (a)(2) does not require that the defendant actually have been convicted on multiple counts.".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following additional example by renumbering example (4) as (5) and inserting the following as example (4):

> "(4) The defendant is convicted on two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under this subsection to avoid double counting.".

Reason for Amendment: This amendment clarifies the intended scope of §1B1.3(a)(2) in conjunction with the multiple count guidelines to ensure that the latter are not read to limit the former only to conduct of which the defendant was convicted, as apparently occurred in United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989). Petition for rehearing by the Government, as recommended by the Commission, is pending in that case. While the Commission believes that the current language of the respective guidelines and commentary is clear on the issues that apparently caused confusion for the Restrepo panel, further comment is invited on the above proposal in order to elicit suggestions for improving the clarity of the existing language.

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Chapter Two, Part A (Offenses Against The Person)

4. Proposed Amendment: Section 2A2.1 is amended in the title by deleting "Conspiracy or Solicitation to Commit Murder;"; and by deleting subsections (a) and (b) in their entirety, and inserting the following in lieu thereof:

"(a) Base Offense Level:

(1) 28, if the object of the offense would have constituted first degree murder; or

(2) 22, otherwise.

(b) Specific Offense Characteristics

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

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373,"; by deleting "1117,"; and by deleting "(d)," immediately following "1751(c)".

The Commentary to §2A2.1 captioned "Application Notes" is amended in Note 1 by deleting: "'more than minimal planning,' 'firearm,' 'dangerous weapon,' 'brandished,' 'otherwise used,'", by inserting the following additional note:

"2. 'First degree murder,' as used in subsection (a)(1), means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.",

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to §2A2.1 captioned "Background" is amended by deleting the second and third paragraphs, and by inserting the following sentence at the end of the first paragraph:

"An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault).".

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 3 by inserting as the first sentence: "This guideline also covers attempted manslaughter and assault with intent to commit manslaughter.".

The Commentary to §2A2.2 captioned "Background" is amended in the first sentence by deleting "where there is no intent to kill".

Chapter Two, Part A, Subpart 1, is amended by inserting the following additional guideline:

"§2A1.5. Conspiracy or Solicitation to Commit Murder

(a) Base Offense Level: 28

(b) Specific Offense Characteristics

(1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

(c) Cross Reference

(1) If the conduct resulted in the death of a victim, apply §2A1.1 (First Degree Murder).

(2) If the conduct constituted attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 373, 1117, 1751(d).".

The title to §2A2.1 is amended by deleting "Conspiracy or Solicitation to Commit Murder;".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373"; by deleting "1117"; and by deleting "(d)," immediately following "1751(c),".

Conforming Amendment: Section 2E1.4(a)(1) is amended by deleting "23" and inserting in lieu thereof "32".

The Commentary to §2E1.4(a)(1) captioned "Application Notes" is amended by deleting Note 2, and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: This amendment restructures this guideline, and increases the offense level for attempted murder and assault with intent to commit murder where the intended offense, if successful, would have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline is proposed (§2A1.5) to cover conspiracy or solicitation to commit murder. Cross references are provided in the proposed §2A1.5 where the offense actually resulted in the death of a victim or constituted attempted murder or assault with intent to murder. Finally, §2E1.4 is amended to conform to the offense level in the proposed §2A1.5.

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Chapter Two, Part B (Offenses Involving Property)

5. Proposed Amendment: Section 2B1.1 is amended by renumbering subsection (b)(5) as (b)(4), and by renumbering the current subsection (b)(4) as (b)(5).

Section 2B1 2 is amended by renumbering subsection (b)(4) as (b)(3), and by renumbering the current subsection (b)(3) as (b)(4).

Section 2B1.3 is amended by renumbering subsection (b)(3) as (b)(2), and by renumbering the current subsection (b)(2) as (b)(3).

Reason for Amendment: In cases involving the theft or destruction of U.S. mail, the theft guideline (§2B1.1), stolen property guideline (§2B1.2), property destruction guideline (§2B1.3), and forgery guideline (§2B5.2) produce identical results if the amount involved more than $1,000, or if the offense did not involve more than minimal planning. However, because of the ordering of the specific offense characteristics, there is a 1 or 2-level difference between §§2B1.1, 2B1.2 and §2B1.3 on one hand, and §2B5.2 on the other in cases of stolen or destroyed mail where there is more than minimal planning and a loss of $1,000 or less. In these cases, §§2B1.1, 2B1.2 and 2B1.3 produce a result that is 1 or 2-levels lower than §2B5.2. This result appears anomalous. This amendment conforms the offense level in §§2B1.1, 2B1.2, and 2B1.3, to that of §2B5.2 in such cases.

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6. Proposed Amendment: The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by beginning a new paragraph with the fifth sentence.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 in the fifth sentence by deleting "loss" and inserting in lieu thereof "offense level", and by inserting immediately before the period at the end of the sentence "; see Application Note 4 of the Commentary to §2X1.1".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by deleting the sixth and seventh sentences, and by inserting the following at the end of the first paragraph:

> "Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended in the process of taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.".

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

> "3. Where the exact loss is not readily ascertainable, the court, for the purposes of subsection (b)(1), need only make a reasonable estimate of the range of loss, given the available information. This estimate may, for example, be based upon the approximate number of victims and the average loss to each victim, or on factors such as the scope and duration of the offense.".

Reason for Amendment: This amendment revises Application Note 2 of the Commentary to §2B1.1 to provide a more precise reference to the pertinent portion of §2X1.1 that applies in cases of partially completed conduct. In addition, the amendment reorders the material in this note, and divides it into separate paragraphs for greater clarity. This amendment also clarifies Application Note 3 of the Commentary to §2B1.1.

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7. Proposed Amendment: Section 2B1.3 is amended in the title by deleting "(Other than by Arson or Explosives)"; and by inserting the following:

"(c) Cross Reference

(1) If the conduct involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives) if the resulting offense level is greater than determined above.".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by deleting the last sentence.

Conforming Amendment: Section 2H3.3(a)(3) is amended by deleting "(Other than by Arson or Explosives)".

Reason for Amendment: This amendment inserts a cross reference providing that offense conduct constituting arson or property destruction by explosives is to be treated under §2K1.4 (Arson, Property Destruction by Explosives) if the resulting offense level obtained under that section is greater. Because arson, or property damage by use of explosives, is an aggravated form of property destruction, just as armed robbery is an aggravated form of robbery, the use of the same "relevant conduct" standard to determine the offense level is appropriate.

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8. Proposed Amendment: Section 2B3.1(b)(5) is amended by deleting "obtaining", and by deleting "the object of the offense" and inserting in lieu thereof "taken".

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 5, and by renumbering Notes 6, 7, and 8 as 5, 6, and 7 respectively.

The Commentary to §2B3.1 captioned "Background" is amended by deleting the second paragraph in its entirety.

Section 2B2.1(b)(3) is amended by deleting "obtaining", and by deleting "an object of the offense" and inserting in lieu thereof "taken".

The Commentary to §2B2.1 captioned "Application Notes" is amended by deleting Note 2, and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B2.2(b)(3) is amended by deleting "obtaining", and by deleting "an object of the offense", and by inserting in lieu thereof "taken".

The Commentary to §2B2.2 captioned "Application Notes" is amended by deleting Note 2, and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Reason for Amendment: This amendment provides that the specific offense characteristic related to the taking of a firearm or controlled substance applies whenever such item is taken. Attempts or conspiracies to take such an item would be covered under §2X1.1.

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9. Proposed Amendment: Section 2B3.1(b)(1) is amended by deleting "robbery or attempted robbery".

Reason for Amendment: This amendment deletes unnecessary and potentially confusing language. Application of §2X1.1 requires the same result not only in the case of an attempt, but also in the case of conspiracy or solicitation.

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10. Proposed Amendment: Option 1: Section 2B3.1 is amended by inserting the following additional subsection:

"(c) Special Instruction:

(1) If the defendant, as part of the same course of conduct or common scheme or plan as the offense of conviction, committed one or more additional robberies, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such robbery.".

The Commentary to §2B3.1 captioned "Application Notes" is amended by inserting the following additional Note:

"9. Separate robberies are not grouped together under §3D1.2(a-d). The special instruction at §2B3.1(c) provides that where the defendant committed an additional robbery or robberies as part of the same course of conduct or common scheme or plan as the offense of conviction, the offense level will be determined as if the defendant had been convicted on a separate count for each such robbery (whether or not the defendant was actually convicted of each such robbery). The restriction in this provision to robbery offenses that are part of the same course of conduct or common scheme or plan as the offense of conviction coincides with the restriction on the scope of relevant conduct under subsection (a)(2) of §1B1.3 (Relevant Conduct).".

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Option 2: Section 2B3.1(b) is amended by inserting the following additional subsection:

"(7) If the defendant committed one or more additional robberies, increase by 2 levels. Do not apply this adjustment, however, if the defendant is convicted of more than one robbery.".

The Commentary to §2B3.1 is amended by inserting the following additional Note:

"9. When the defendant is convicted of more than one robbery, the multiple count rules of Chapter Three, Part D (Multiple Counts) will apply in lieu of specific offense characteristic (b)(7).".

Reason for Amendment: This amendment addresses a concern that the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guidelines practice. This may occur when the prosecutor accepts a plea to only one count of robbery where the defendant in fact has committed several robberies, because the additional robberies would not be taken into account by the guidelines. Under past

practice, the court was unconstrained in considering such circumstances (within the maximum sentenced authorized by statute for the count or counts of which the defendant was convicted). Where additional robberies were found to have been committed by the defendant, the Parole Commission guidelines expressly considered such conduct. Because such cases are serious and not infrequent, the proposed amendment would expressly provide for the inclusion of such conduct in the guidelines. As with pre-guideline practice, the sentence imposed under each option could not exceed the maximum authorized by statute for the count or counts of which the defendant was actually convicted.

Under Option 1, the case would be treated as if the defendant had been convicted of each robbery provided that the court determined both that the defendant committed the additional robbery or robberies, and that such robbery or robberies were part of the same course of conduct or common scheme or plan of the offense of conviction. The limitation to 'same course of conduct or common scheme or plan as the offense of conviction' coincides with that in §1B1.3(a)(2).

Under Option 2, a 2-level increase would be provided if the defendant committed an additional robbery, whether or not part of the same course of conduct or common scheme or plan as the offense of conviction. This adjustment would not apply, however, where the defendant was actually convicted of more than one robbery; in that case, the rules of Chapter Three, Part D (Multiple Counts) would apply instead.

The Commission seeks comment on both options. In addition, in respect to Option 1, the Commission seeks comment on whether it should adopt a specific definition of same course of conduct or common scheme or plan in respect to robbery offenses and, if so, the appropriate content for this definition.

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11. Proposed Amendment: Section 2B3.2(a) is amended by deleting "18" and inserting in lieu thereof "20".

Extortion carries less penalties than robbery

Section 2B3.2(b)(1) is amended by deleting "$2,500" and inserting in lieu thereof "$10,000".

Reason for Amendment: Prior to the 1989 amendments, robbery and extortion had the same base offense level of 18. In 1989, the Commission raised the offense for robbery to 20, but did not address the extortion guideline. The proposed amendment increases the base offense level for extortion to level 20 to conform it to the robbery base offense level.

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Chapter Two, Part B (Offenses Involving Property) and Part F (Offenses Involving Fraud or Deceit)

12. Proposed Amendment: Section 2B1.1(b) is amended by inserting the following additional specific offense characteristic:

"(7) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24.".

Section 2B4.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

"(2) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24.".

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

"(6) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24.".

Reason for Amendment: This amendment implements the following statutory directive in Section 961(m) of Public Law 101-73: "Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution."

Comment is requested on whether the above formulation is the most appropriate way of implementing this directive or whether graduated minimum offense levels should be based upon the size of the financial institution affected.

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Chapter Two, Part D (Offenses Involving Drugs)

13. Proposed Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by inserting "in the table below" immediately before "to estimate", by deleting "Bufotenine at 1 mg per dose = 100 mg of Bufotenine" and inserting in lieu thereof "Mescaline at 500 mg per dose = 50 gms of mescaline", and by deleting "common controlled substances" and inserting in lieu thereof "certain controlled substances. Do not use this table if a more reliable estimate of the total weight is available from case specific information".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by deleting the following from the table captioned "Typical Weight Per Unit (Dose, Pill, or Capsule) Table":

"Bufotenine	1 mg
Diethyltryptamine	60 mg
Dimethyltryptamine	50 mg",
"Barbiturates	100 mg
Glutethimide (Doriden)	500 mg",

"Thiobarbital 50 mg",

by inserting an asterisk immediately after each of the following:

"LSD (Lysergic acid diethylamide)", "MDA", "PCP", "Psilocin", "Psilocybin", "2,5-Dimethoxy-4-methylamphetamine (STP, DOM)", "Methaqualone", "Amphetamine", "Methamphetamine", "Phenmetrazine (Preludin)",

and by inserting the following at the end:

"*For controlled substances marked with an asterisk, the typical weight per unit shown is the weight of the actual controlled substance, and not necessarily the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.".

Reason for Amendment: This amendment makes clear that the "Typical Weight Per Unit Table" in Note 11 of the Commentary to §2D1.1 is not to be used where a more reliable estimate of the weight of the mixture or substance containing the controlled substance is available from case specific information. This amendment also makes clear that for certain controlled substances this table provides an estimate of the weight of the actual controlled substance, not necessarily the weight of the mixture or substance containing the controlled substance, and therefore use of this table in such cases will provide a very conservative estimate. Finally, this amendment deletes listings for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases, more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer).

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14. §2D1.1 - Drug Quantity and Drug Equivalency Tables. Where there are different controlled substances, Application Note 10 of the Commentary to §2D1.1 provides a method for combining the quantities of the different controlled substances in order to apply the Drug Quantity Table at §2D1.1(c) to produce a single offense level. This is accomplished by transforming each controlled substance to an "equivalent" amount of heroin or marihuana. Note, however, that for certain controlled substances (Schedule I and II Depressants, and Schedule III, IV, and V controlled substances), the maximum offense levels provided in the Drug Quantity Table at §2D1.1(c) are capped at less than level 43, in recognition of the lower statutory sentences authorized for offenses involving these substances in comparison, for example, to heroin or cocaine (e.g., the maximum offense level is 20 for a Schedule I or II depressant or a Schedule III substance, 12 for a Schedule IV substance, and 8 for a Schedule V substance). The Commission has become aware that in certain types of cases, the instructions in Application Note 10 of the Commentary in respect to certain combinations involving Schedule I or II depressants, or Schedule III, IV, and V substances, appear to override the capped offense levels provided for such substances in the Drug Quantity Table at guideline 2D1.1(c).

Illustrations of these two types of cases follow:

(1) Under §2D1.1(c)(12), 20 kg or more of any Schedule III substance is level 20. Therefore, the offense level for 45 kg of either aprobarbital or allobarbital is level 20. However, because the drug equivalency tables convert such substances to marihuana, and marihuana is not capped at level 20, application of the conversion

procedure to 40 kg of allobarbital and 10 grams of aprobarbital (a smaller total quantity) produces an offense level of 24 (a substantially higher offense level).

(2) Under §2D1.1(c)(12), 40 kg of allobarbital is level 20; under the Drug Equivalency Tables, 1 gm of allobarbital = 2 gm of marihuana. Under the conversion procedure of Application Note 10, 40 kg of allobarbital and 1 gm of marihuana would produce an offense level of 24, a four level increase in offense level due to a single gram of marihuana.

One approach to address this issue would be to insert specific instructions in Application Note 10 that limit the conversions of Schedule I or II depressants, and Schedule III, IV, and V substances to their capped equivalents of marihuana and heroin (for example, in the case of Schedule IV substances, an instruction that the equivalent weight of all Schedule IV substances, or all Schedule IV and V substances taken together, shall not exceed 4.99 grams of heroin or 4.99 kilograms of marihuana). In U.S. v. Gurgiolo (1990 U.S. App. LEXIS 518 (January 12, 1990)), the Court of Appeals for the Third Circuit recently remanded a multiple controlled substance case for resentencing with instructions to limit the contribution of a Schedule III controlled substance to the capped equivalent amount of heroin. Another approach would be to amend §2D1.1(c) (the Drug Quantity Table) to remove the capped maximum offense levels for Schedule I or II depressants, and Schedule III, IV, and V substances, and provide increased offense levels for larger amounts of these substances (in relation to the equivalencies set forth in the Drug Equivalency Tables).

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15. §2D1.2 - Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals. Comment is requested on whether the Commentary to §2D1.2 should be amended to provide that the offense level from §2D1.1 refers to the offense level from §2D1.1 applicable to the entire quantity of drugs involved in the same course of conduct or common scheme or plan (see §1B1.3(a)(2)). Or, should §2D1.2 be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline (e.g., an offense involving several sales, only one of which is near a "protected" location); and if so, how should this be accomplished?

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16. Proposed Amendment: Section 2D1.6 is amended by deleting ":12" and inserting in lieu thereof: "(Apply the greater):

(1) the offense level from §2D1.1 applicable to the underlying offense; or

(2) 12.".

The Commentary to §2D1.6 is amended by inserting immediately before "Background" the following:

"Application Notes:

1. "Underlying offense" means the controlled substance offense committed, caused, or facilitated.

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2. It is expected that, in the vast majority of cases, the offense level for the underlying offense will be level 12 or greater. An alternative base offense level of 12 is provided under subsection (a)(2) because it may not always be possible to determine the offense level for the underlying offense. In the rare case in which it can be determined that the offense level for the underlying offense is less than level 12, a downward departure to reflect the actual scale of the offense is recommended.".

Reason for Amendment: This amendment is designed to reduce unwarranted disparity by requiring consideration of the amount of the controlled substance involved in the offense in the guideline itself, thus conforming this guideline section to the structure of §§2D1.1, 2D1.2, 2D1.4, and 2D1.5.

The statute to which this guideline applies (21 U.S.C. § 843(b)) prohibits the use of a communications facility to commit, cause, or facilitate a felony controlled substance offense. Frequently, a conviction under this statute is the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum.

The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense does not affect the guideline. This results in a departure being warranted in the vast majority of cases if the scale of the underlying drug offense is a permissible grounds for departure. The decision of the Second Circuit in U.S. v. Correa-Vargas, 860 F.2d 35 (1988), authorized a departure based upon the quantity of the controlled substance involved in the underlying offense.

Without guidance as to whether or how far to depart, the potential for unwarranted disparity is substantial. Under the proposed amendment, the guideline would take into account the scale of the underlying offense.

The Commission published a very similar amendment for comment last year but did not adopt it for transmission to Congress. Some comments expressed concern that the proposed amendment, by tying the offense level to the scale of the underlying offense, would make the "telephone count" statute to which this guideline applies overly attractive for plea bargaining in large scale cases (because the offense level, rather than being offense level 12 in each case as under the current guideline, would vary with the offense but the maximum sentence would be capped at four years). However, to the extent that a prosecutor desires this result, he can achieve it under the current guideline by obtaining a stipulation to the underlying conduct under §1B1.2(a). Or, he can obtain a similar result by a plea to the general conspiracy statute (18 U.S.C. § 371 -5 year maximum), which would reference §2D1.1 via §2D1.4. Therefore, this amendment will not permit more plea bargaining than is currently authorized. It will, however, avoid disparity in the determination of whether and how far to depart based on the scale of the offense, because the scale of the offense will be included in the guideline itself. It will also help reduce confusion and disparity as to how the provisions of Chapter Three, Part B (Role in the Offense) apply to offenses under this guideline. In addition, because the offense level of the underlying offense will be recorded for each case (rather than all cases being recorded as level 12), it will tend to make any plea bargaining in respect to this offense more visible and easier to monitor.

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17. Proposed Amendment: Chapter Two, Part D, Subpart 1 is amended by inserting as an additional guideline the following:

"2D1.11. Unlawfully Importing, Exporting, Possessing, or Distributing Listed Chemicals and Certain Equipment

(a) Base Offense Level:

(1) The offense level from §2D1.4 (Attempts and Conspiracies) determined as if the offense had constituted a conspiracy to manufacture a controlled substance.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(d)(1),(2), 843(a)(6), (7), 960(d)(1) (2).

Application Notes:

1. As in the case of a conspiracy to manufacture a controlled substance, the scale of the offense frequently will have to be inferred from information such as the types and quantities of chemicals involved in relation to the types and quantities of controlled substances that typically are produced from such chemicals. See Application Note 2 of the Commentary to §2D1.4 (Attempts and Conspiracies).".

Reason for Amendment: This amendment creates a new guideline covering offenses created by sections 6053, 6055, and 6057 of Anti-Drug Abuse Act of 1988. Under the proposed guideline, the offense level would vary with the type and amount of controlled substance that could be manufactured from a given amount of chemicals. That is, the offense would be treated as if it had constituted a conspiracy to manufacture a controlled substance. In some cases, however, it may not be possible to determine the scale of the offense with reasonable specificity. For this reason, comment is requested on whether an alterative base level should be included and, if so, the appropriate level.

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18. Proposed Amendment: Section 2D2.1(a)(1) is amended by deleting "or an analogue of these" and inserting in lieu thereof "an analogue of the above, or cocaine base".

Reason for Amendment: This amendment specifies the appropriate offense level for possession of cocaine base ("crack") in cases not covered by the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988.

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Chapter Two, Part F (Offenses Involving Fraud or Deceit)

19. Proposed Amendment: The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7 by deleting "In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell", and inserting in lieu thereof "The following are additional

examples: (1) If the fraud consisted of selling"; and by inserting "(2) If the offense consisted of selling fraudulently overvalued stock, the loss would be the amount by which the stock was overvalued." immediately following "this guideline.", and by inserting the following as an additional puragraph:

> "In cases of partially completed conduct, the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy); see Application Note 4 of the Commentary to §2X1.1.".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 8 by deleting "The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court" and inserting in lieu thereof "Where the exact loss is not readily ascertainable, the court, for the purposes of subsection (b)(1),".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 11 by deleting the last sentence and inserting in lieu thereof:

> "In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.".

Reason for Amendment: This amendment conforms the wording of the second sentence of Application Note 7 of §2F1.1 to the fifth sentence of Application Note 2 of §2B1.1. The reason for this amendment is to make clear that the treatment of attempts in fraud and theft is identical. The language of the Application Note in 2B1.1 is the more precise instruction. This amendment also adds an additional example to illustrate the determination of loss, clarifies Application Note 8 of the Commentary to §2F1.1, and conforms the language of Application Note 11 to the language used elsewhere in the guidelines.

* * *

Chapter Two, Part G (Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity)

20. Proposed Amendment: The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 3 by inserting the following at the end thereof:

> "This factor would apply, for example, where the ability of the person being transported to appraise or control their conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a child, this characteristic generally will not apply where the alcohol or drug was voluntarily taken.".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 5 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting the following in lieu thereof:

> "victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically

cited in the count of conviction or not, then each such individual shall be treated as if contained in a separate count of conviction.".

Reason for Amendment: This amendment clarifies the application of this guideline.

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21. Proposed Amendment: Section 2G1.2 is amended by inserting the following at the end thereof:

"(d) Cross Reference

(1) If the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material, Custodian Permitting Minor to Engage in Sexually Explicit Conduct, Advertisement for Minors to Engage in Production).".

The Commentary to §2G1.2 captioned "Statutory Provisions" is amended by deleting "§ 2423" and inserting in lieu thereof "§§ 2421, 2422, 2423".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting the following in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different minors are not to be grouped together under §3D1.2 (Groups of Closely-related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, then each such individual shall be treated as if contained in a separate count of conviction.".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 3 by inserting the following at the end thereof:

"This factor would apply, for example, where the ability of the person being transported to appraise or control their conduct was substantially impaired by drugs or alcohol.".

The Commentary to §2G1.2 captioned "Application Notes" is amended by inserting the following at the end thereof:

"4. 'Sexually Explicit Conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.

5. The cross reference in (d)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.".

Conforming Amendment: The Commentary to §3A1.1 (Vulnerable Victim) captioned "Application Notes" is amended in Note 2 by inserting the following at the end:

"For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was vulnerable for reasons unrelated to age.".

Reason for Amendment: This amendment clarifies the application of this guideline. In addition, a cross-reference is inserted where the offense involves conduct that is more appropriately covered at §2G1.1 to better reflect the severity of this conduct. The Commission, in addition, seeks comment on the appropriate relationship between this guideline and the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse).

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22. Proposed Amendment: Section 2G2.1 is amended in the title by inserting ", Custodian Permitting Minor to Engage in Sexually Explicit Conduct, Advertisement for Minors to Engage in Production" immediately following "Printed Material".

Section 2G2.1(b) is amended by deleting subsection (1) in its entirety and inserting the following:

"(1) If the offense involved a minor under the age of twelve years or who appears to be prepubescent, increase by 4 levels; otherwise, if the offense involved a minor under the age of 16 years, increase by 2 levels.

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

(c) Special Instruction

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

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "8 U.S.C. § 1328" and by inserting "(a), (b), (c)(1)(B)" immediately following "18 U.S.C. § 2251".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 by inserting the following immediately after "(Groups of Closely-Related Counts).":

"Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, then each such minor shall be treated as if contained in a separate count of conviction.".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 by inserting two new application notes as follows:

"2. Specific offense characteristic (b)(2) is intended to have broad application, and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to §2G2.1 captioned "Background Statement" is deleted in its entirety.

Reason for Amendment: This amendment provides consistent treatment of minor victims of sex offenses under the guidelines. The amendment also provides for an increase for those who abuse a position of private trust and exploit minor children and explains that characteristic with an application note. The special instruction is added to conform the operation of the multiple count rule in this guideline with related guidelines §§2G1.1, 2G1.2. Finally, an amendment to the statutory provisions removes 8 U.S.C. §1328 offenses from the direct operation of the guideline. These offenses are now brought under this guideline by the cross reference appearing in §2G1.2. Further, the reference to §2251 is made specific to the appropriate subsections.

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23. Section 2G2.2 is amended by deleting the guideline and inserting the following in lieu thereof:

"§2G2.2 Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) 13, if the offense involved only possession or mere receipt of, or advertising for, pornographic materials; or

(2) 15, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table at §2F1.1(b)(1) corresponding to the retail value of the material, but in no event less than 6 levels.

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

(3) If the defendant sexually abused a minor at any time prior to the commission of the offense, and the offense level as determined above is less than 21, increase to level 21.

(4) If the material involved a minor under the age of twelve years or who appears to be prepubescent, increase by 4 levels; otherwise, if the material involved a minor under the age of 16 years, increase by 2 levels.

(c) Cross Reference

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

Commentary

Statutory Provision: 18 U.S.C. §§1460, 2251(c)(1)(A), 2252.

Application Notes:

1. Subsection (a)(1) applies to offenses committed under sections 1460 and 2251(c)(1)(A) of title 18 and to offenses committed under section 2252(a)(2) of title 18 involving only mere receipt of pornographic materials. Section 1460 prohibits possession with intent to sell on Federal lands or facilities or within the special maritime or territorial jurisdiction of the United States and carries a two-year maximum term of imprisonment. Section 2251(c)(1)(A) prohibits advertising for certain pornographic materials.

2. The commission of offenses under the statutes covered by this guideline, combined with prior criminal acts involving the sexual abuse of a minor is an extremely strong indicator of the danger which such an offender poses to the community because of the offender's propensity to commit future acts of sexual abuse. Historically, such prior acts have been considered by courts in substantially increasing penalties for offenses covered by this guideline. Specific offense characteristic (b)(3) applies to all prior felony conduct involving the sexual abuse of a minor under either state or federal law, whether evidenced by conviction or other reliable information. Where the defendant has a previous conviction for an offense involving the sexual abuse of a minor, the adjustment under subsection (b)(3) is applied in lieu of adding points to the criminal history score for such a conviction in Chapter Four, Part A (Criminal History).

3. 'Sexually Explicit Conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. §2256.

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

Conforming Amendments: Appendix A is amended: in the line beginning "8 U.S.C. §1328" by deleting "2G2.1, 2G2.2"; in the line beginning "18 U.S.C. §1460" by inserting "2G2.2" immediately before 2G3.1; in the line beginning "18 U.S.C. §2251" by deleting "2251" and inserting in lieu thereof "2251(a), (b), (c)(1)(B)"; and, by inserting in the appropriate place the following:

"2251(c)(1)(A) 2G2.2".

Reason for Amendment: This amendment provides an alternate base offense level that provides penalties that better reflect the severity of more grievous offenses, and provides specific offense characteristics for age, materials involving depictions of violence, and prior incidents of felonious sexual abuse of minors. The amendment also provides a cross-reference for offenses more appropriately sentenced under §2G2.1.

24. Section 2G3.1 is amended by deleting the guideline and inserting the following in lieu thereof:

"§2G3.1 Importing, Mailing, or Transporting Obscene Materials Involving Adults

(a) Base Offense Level:

(1) 15, if the offense involved distribution for pecuniary gain;

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the offense level is determined under subsection (a)(1), increase by the number of levels from the table at §2F1.1(b)(1) corresponding to the retail value of the obscene matter.

(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, or material purporting to depict a person under the age of 18, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved material depicting persons actually under the age of 18, apply §2G2.2

(Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to receive Material Involving the Sexual Exploitation of a Minor).

Commentary

Statutory Provisions: 18 U.S.C. §§1460-1463, 1465-1466, 1735, 1737.

Application Notes:

1. 'Distribution,' as used in this guideline includes production, transportation, mailing, and possession with intent to distribute.

2. 'Material purporting to depict a person under the age of 18' means photographs or other visual depictions of adults disguised as, or otherwise portraying, children. The fact that such materials may contain statements that the persons depicted therein are above the age of 18 does not preclude application of this adjustment.".

Reason for Amendment: This amendment provides penalties that more adequately reflect the severity of more egregious offenses sentenced under the guideline; provides a specific offense characteristic for offenses involving materials which purport to depict children; and provides a cross-reference for offenses involving materials which in fact depict children to ensure that the penalty for such offenses adequately reflect their severity.

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Chapter Two, Part H (Offenses Involving Individual Rights)

25. Proposed Amendment: Section 2H1.1 is amended in the title by inserting "Conspiracy to Interfere with Civil Rights" before "Going".

Section 2H1.2 is amended by deleting the guideline and commentary.

Reason for Amendment: This amendment eliminates unnecessary duplication within the guidelines, and raises the minimum base offense level from level 13 to level 15 for cases currently covered under §2H1.2 to better reflect the severity of this offense.

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26. Chapter Two, Part H, Subpart 1 - The Commission takes note of an increase in the frequency of "hate crimes" and other offenses intended to deprive persons of civil or political rights. The Commission seeks comment on whether the sentencing guidelines in part H, subpart 1 of chapter 2 provide penalties that adequately reflect the severity of felony violations of the Federal civil rights statutes contained in title 18 and title 42 of the United States code.

Specifically, section 241 of title 18, which prohibits conspiracies to interfere with civil rights, provides a maximum penalty of 10 years imprisonment, increased to life imprisonment where death results from the offense. Sections 242 through 245 of title 18 and section 3136 of title 42 include felony provisions carrying penalties of a maximum of 10 years imprisonment for various civil rights offenses that involve bodily injury and any

term of years or life imprisonment where death results from the commission of such offenses. Additionally, section 247 of title 18 prohibits destruction of religious property and the obstruction of the free exercise of religious belief and includes felony provisions carrying penalties of a maximum of 20 years imprisonment where serious bodily injury occurs and any term of years or life imprisonment where death results from the commission of the offense.

Generally, the guidelines in part H, subpart 1 of chapter 2 provide penalties for violations of those statutes based upon the following calculation. First, alternate base offense levels are available whereby the greater of a fixed base offense level(s) or 2 levels in addition to the offense level applicable to any underlying offense is selected. Additionally, a specific offense characteristic providing a 4 level increase is provided where the defendant was a public official at the time of the offense. For example, if a defendant were sentenced under §2H1.2 (Conspiracy to Interfere with Civil Rights) his base offense level would be the greater of level 13 or 2 levels plus the offense level applicable to any underlying offense (e.g., aggravated assault, kidnapping, or arson). If the defendant was a public official at the time of the offense, an additional 4 levels would be added to the offense level.

The Commission solicits comments on whether the guidelines in part H, subpart 1 of chapter 2 adequately reflect the seriousness of felony violations of Federal civil rights statutes. Specifically, the Commission seeks comments on the following issues:

1. whether an increase (as currently provided) of 2 levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm such crimes inflict on society when they are used as a means of insidious discrimination or to suppress the exercise or enjoyment of Federal rights; if not, should the Commission amend sections 2H1.1(a)(2), 2H1.2(a)(2), 2H1.3(a)(3) and 2H1.5(a)(2) by deleting "2" and inserting "4" in lieu thereof and by making comparable revisions to section 2H1.4;

2. whether any chapter 3 general adjustment the Commission may adopt for offenses that are not prosecuted as civil rights offenses yet nevertheless involve the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin or by the victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States (see proposed amendment 49) should have the same or a comparable structure and/or adjustment levels as the guidelines in part H, subpart 1 of chapter 2.

3. Whether the Commission should provide a general adjustment in chapter 3 where offenses have been committed by public officials under color of law or otherwise under the cloak of official duty or authority (in cases other than described above) that is distinct from the provision in §3B1.3 (Abuse of Position of Trust or Use of Special Skill); and, if so, whether the amount of such an adjustment should be the same as the 4-level increase for public officials contained in the guidelines in part H, subpart 1 of chapter 2.

Finally, the Commission welcomes comments concerning any issues relevant to the operation of the guidelines in part H, subpart 1 of chapter 2.

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Chapter Two, Part J (Offenses Involving the Administration of Justice)

27. Proposed Amendment: Section 2J1.6 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the offense constituted a failure to report for service of sentence, apply §2P1.1 (Escape, Instigating or Assisting Escape).".

Reason for Amendment: This amendment adds a cross reference providing that failure to surrender for sentence will be treated under §2P1.1 rather than §2J1.6. That is, such conduct will be treated as equivalent to an escape.

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Chapter Two, Part K (Offenses Involving Public Safety)

28. Proposed Amendment: Section 2K1.4 is deleted in its entirety, including title and accompanying commentary, and the following inserted in lieu thereof:

"§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 intentionally, or (B) involved the destruction or attempted destruction of a dwelling;

(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 a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;

(3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristic

(1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.".

Reason for Amendment: The Commission has determined that the current guideline is unclear in a number of respects and, in addition, does not adequately reflect the seriousness of the offenses typically prosecuted under the statutes that it covers. The proposed amendment restructures this guideline to provide more adequate offense levels and greater clarity.

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29. Proposed Amendment: Section 2K1.6(a) is amended by deleting "greater" and inserting in lieu thereof "greatest" and by inserting the following additional subdivision:

"(3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).".

Reason for Amendment: This amendment adds an additional alternative base offense level to cover the situation in which the commission of this offense actually results in death.

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30. Proposed Amendment: Section 2K1.7 is amended by inserting "(a)" immediately before "If", and by inserting the following additional subsection:

"(b) Special Instruction for Fines

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.".

The Commentary to §2K1.7 captioned "Application Notes" is amended by inserting the following additional notes:

"3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is because, in such cases, the offense level for the underlying offense may be reduced as any specific offense characteristic for use of fire or explosive would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.".

Conforming Amendment: The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by inserting ", although a fine is authorized under 18 U.S.C. § 3571" immediately before the period at the end of the last sentence.

Reason for Amendment: This amendment conforms §2K1.7 to §2K2.4, which includes specific instructions concerning treatment of fines and double counting. Both sections are based upon similarly written statutes that provide for a fixed mandatory, consecutive sentence of imprisonment. In addition, the last sentence of Application Note 4 of the Commentary to §2K2.4 is expanded for greater clarity.

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31. Armed Career Criminals. The Commission is considering a guideline for defendants sentenced under 18 U.S.C. §924(e), a statutory sentence enhancement to a conviction under 18 U.S.C. §922(g) carrying a mandatory minimum penalty of fifteen years' imprisonment and a maximum of life. This statute, the content of which is similar to the career offender guideline (§4B1.1), is specifically designed to punish repeat offenders.

Concerns about §924(e) sentences center around situations where the court wishes to impose a sentence above the mandatory minimum of fifteen years. Under the current Guidelines, some have found that they could not do so because the guideline for the count of conviction (18 U.S.C. §922(g)-§2K2.1) carries an offense level of 12. Because that offense level provides for a sentence well below the statutory minimum, even at criminal history level VI, the statutory minimum automatically becomes the guideline sentence. See §5G1.1(b). Thus, any sentence of more than fifteen years requires a departure from the guidelines.

Just as there is a guideline range for career offenders, this amendment would create a guideline permitting a range of sentences above the statutory minimum for defendants sentenced under 18 U.S.C. §924(e).

Two options under consideration are shown below:

Proposed Amendment: Chapter Two, Part K, Subpart 2 is amended by inserting the following additional guideline:

OPTION 1

"§2K2.6. Armed Career Criminal

Stat. amend. alternative proposal

(a) Base Offense Level: 34.

(b) Specific Offense Characteristics

(1) If, in connection with the use of the weapon or ammunition, a victim sustained death, increase by 5 levels; permanent or life-threatening injury, increase by 4 levels; serious bodily injury, increase by 3 levels; bodily injury, increase by 2 levels;

(c) Cross Reference

(1) If the defendant used or possessed the weapon or ammunition in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt, Solicitation, or Conspiracy), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant's criminal history category is less than Category III, increase to Category III.

Commentary

Statutory Provisions: 18 U.S.C. §§922(g); 924(e).

Background: This section implements 18 U.S.C. §924(e), which requires a minimum sentence of imprisonment for fifteen years for a defendant who violates 18 U.S.C. §922(g) and has three previous convictions for a violent felony or a serious drug offense. Setting the criminal history category at a minimum of Category III is designed to take into account the seriousness of the prior convictions of the defendant. If the criminal history as computed under Chapter Four is higher than Category III, then the higher Criminal History Category shall apply.".

Conforming Amendments: The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting "(except when sentence is imposed under 18 U.S.C. § 924(e), then apply §2K2.6" immediately following "(g)".

Appendix A (Statutory Index) is amended in the line beginning "18 U.S.C. § 922(g)" by inserting ", 2K2.6 (when sentence is imposed under 18 U.S.C. § 924(e))" immediately following "2K2.1".

Appendix A (Statutory Index) is amended by inserting the following in the appropriate order by title and section:

"18 U.S.C. § 924(e) 2K2.6.".

OPTION 2

"§2K2.6 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon

(a) Base Offense Level: 34, if the defendant is subject to sentencing under 18 U.S.C. §924(e).

(b) Specific Offense Characteristics

(1) Use the greater of (A) or (B):

(A) If a victim sustained serious bodily injury or death in connection with an offense resulting in a prior conviction or in connection with the instant offense, increase the offense level by 4 levels if the injury was permanent or life-threatening or if death resulted; increase by 2 levels otherwise.

(B) If a prior conviction was for a sexual abuse felony; or if the instant offense involves conduct not included in a count of conviction that would constitute a felony under chapter 109A of title 18, United States Code, increase by 2 levels.

(2) If, in connection with an offense resulting in a prior conviction or in connection with the instant offense, a dangerous weapon (including a firearm) was used or brandished, increase by 4 levels.

(3) If an offense resulting in a prior conviction involved a quantity of controlled substances specified in 21 U.S.C. §841(b)(1)(A) or (B), increase by 2 levels.

(4) If the instant offense involved a loaded firearm or both an unloaded firearm and ammunition that could be used in the firearm, increase by 2 levels.

(c) Cross Reference

If the guideline applicable to the underlying conduct produces a higher offense level, apply that guideline.

(d) Special Instruction

If the defendant's criminal history category is less than Category III, increase to Category III. This instruction operates regardless of whether the cross-reference in subsection (c) applies or there are multiple counts of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§922(g) and 924(e).

Application Notes:

1. To determine whether any of the specific offense characteristics are applicable, the relevant conduct rules of §1B1.3 apply, regardless of whether the offense is a prior offense or the instant offense.

2. The specific offense characteristics relating to prior convictions are to be applied to those prior convictions set out in 18 U.S.C. §924(e).

3. If a prior conviction would result in an enhancement under more than one specific offense characteristic, apply only the specific offense characteristic resulting in the greatest enhancement.

4. If any specific offense characteristic from this section applies on the basis of a previous conviction, do not include such conviction in the calculation of the criminal history score under Chapter Four, unless the cross reference in subsection (c) applies. If subsection (c) applies calculate defendant's criminal history score under Chapter Four, taking into account all prior sentences subject to that chapter.

5. The specific offense characteristic in subsection (b)(1)(B) includes conduct that would constitute a felony under chapter 109A of title 18, United States Code, regardless of whether the conduct occurred within the special maritime and territorial jurisdiction of the United States.

Section 2K2.1(c) is amended by inserting at the end:

"(3) If the defendant is subject to sentencing under 18 U.S.C. §924(e), apply §2K2.6.".

Background: This section implements 18 U.S.C. §924(e), which requires a minimum sentence of imprisonment for fifteen years for a defendant who violates 18 U.S.C. §922(g) and has three previous convictions for a violent felony or a serious drug offense. This section incorporates factors relating to the seriousness and specific nature of the defendant's past offenses and adopts a more detailed approach to criminal history, as appropriate to the requirements of §924(e), than does Chapter Four. Chapter Four does not address the specific nature of the defendant's past criminal conduct but is based primarily on the number of convictions and, to a limited extent, the length of sentence. For criminal history purposes generally, Chapter Four treats a conviction for a felony resulting in a twenty-year sentence in the same manner as one resulting in a fourteen-month sentence. Moreover, the criminal history score determined under Chapter Four does not use an alternate measure of the seriousness of past criminal conduct, such

as injury caused or use of a weapon. Because Congress has required a minimum sentence of fifteen years' imprisonment for persons sentenced under 18 U.S.C. §924(e) as a result of past violent or drug convictions, greater refinement in assessing criminal history is needed under this provision. To guard against double counting, Application Note 3 provides that if a prior conviction results in an increase in the offense level under this guideline, such conviction should not be used in the calculation of the criminal history score under Chapter Four.".

In addition, the Commission is considering the following issues as relating to the proposed guideline:

Should the Commission provide a three-level enhancement if the defendant used the weapon or ammunition in connection with the commission of a violent felony as a specific offense characteristic? Should the Commission provide a two-level enhancement as a specific offense characteristic if the defendant used the weapon or ammunition in connection with the commission of a serious drug offense?

The Commission also seeks comment on possible alternative guideline solutions for addressing these problems. Such alternatives may be designed to similarly raise the sentence for those who possess firearms and have the requisite priors, whether charged with a firearm count or not. The Commission seeks comment regarding the following:

1. Should a guideline be developed to provide enhancements for offenders who possess guns in connection with any instant offense and have prior convictions for violent or drug offenses?

2. Should the career offender guideline be amended to apply to all instant offenses involving possession of a gun? Or, should the guideline for 18 U.S.C. § 924(e) cases be incorporated within §2K2.1?

3. Should criminal history guidelines be amended to provide higher adjustments (more than the current three points) for each prior sentence (or convictions) involving violent or serious drug offenses? Should the number of criminal history categories be expanded to account for these?

4. Should a criminal history guideline be developed that provides additional enhancements for those who exhibit patterns of prior violent or serious drug offenses?

5. Should existing Chapter Two guidelines that incorporate violent activities or gun possession provide additional adjustments due to prior violent or serious drug convictions or sentences?

32. Proposed Amendment: Section 2K2.1(b)(1) is amended by inserting ", other than a firearm covered in 26 U.S.C. §5845(a)," immediately following "ammunition".

Section 2K2.1(b) is amended by inserting the following additional specific offense characteristic:

"(3) If the instant offense involved the shipment, transportation, possession, or receipt of a loaded firearm or both an unloaded firearm and ammunition that could be used in the firearm, increase by 2 levels."

Reason for Amendment: This amendment provides that the reduction in offense level under subsection (b)(1) for possession of a weapon for sporting purposes or collection may not be applied in the case of any weapon described in 26 U.S.C. § 5845(a).

In addition, the amendment inserts an additional subsection (b)(3) that provides a 2-level enhancement in every case in which the defendant is in possession of any loaded firearm or an unloaded firearm and ammunition that could be used in that firearm.

Furthermore, comment is requested as to whether an offender who is convicted of possessing a firearm or ammunition and has one or two prior serious drug or violent felony convictions but is not subject to sentencing under 18 U.S.C. §924(e) should be subject to a two-level enhancement under §2K2.1 for each prior conviction of a serious drug offense or a violent felony?

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33. Proposed Amendment: Chapter Two, Part K, Subpart 3 is amended by inserting the following additional guideline:

"§2K3.2. Feloniously Mailing Injurious Articles

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

(1) If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or

(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provision: 18 U.S.C. § 1716 (felony provisions only).

Background: This guideline applies only to the felony provisions of 18 U.S.C. § 1716. The Commission has not promulgated a guideline for the misdemeanor provisions of this statute.".

Reason for Amendment: This amendment adds an additional guideline covering the felony provisions of 18 U.S.C. § 1716.

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Chapter Two, Part L (Offenses Involving Immigration, Naturalization, and Passports)

34. Proposed Amendment: Section 2L1.1(b)(1) is amended by deleting "and without knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29),".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Application Note 6, formerly Note 7, and inserting in lieu thereof:

"7. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted.".

Reason for Amendment: This amendment deletes a portion of specific offense characteristic (b)(1) that is unclear in application, and in any event rarely occurs, and replaces it with an application note indicating that an upward departure may be warranted in the circumstances specified.

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

"If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.",

and inserting in lieu thereof:

"If the offense involved the smuggling, transporting, or harboring of six or more aliens, increase as follows:

Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(A) 6-12	add 2
(B) 13-24	add 4
(C) 25-49	add 6
(D) 50 or more	add 8.".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Note 2 and inserting in lieu thereof the following:

"2. The number of unlawful aliens smuggled, transported, or harbored does not include the defendant.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 8 in the first sentence by deleting "large numbers of aliens or," and by inserting immediately before the period at the end of the sentence ", or the reckless endangerment of the safety of others in an effort to avoid apprehension for the offense (e.g., during a high speed chase)".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Note 4, and renumbering Notes 5, 6, 7, and 8 as 4, 5, 6, and 7 respectively.

The Commentary to §2L1.1 captioned "Background" is amended by deleting the last sentence.

Conforming Amendments: Section 2L2.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

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

Number of Documents	Increase in Level
(A) 6-12	add 2
(B) 13-24	add 4
(C) 25-49	add 6
(D) 50 or more	add 8.".

The Commentary to §2L2.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes" and by inserting the following additional Note:

"2. Where it is established that multiple documents are part of a set intended for use by a single person, treat the set as one document.".

Section 2L2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

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

Number of Passports	Increase in Level
(A) 6-12	add 2
(B) 13-24	add 4
(C) 25-49	add 6
(D) 50 or more	add 8.".

Section 3D1.2(d) is amended in the third paragraph by deleting "2L1.1, 2L2.1," and "2L2.3,", and in the second paragraph by inserting in the appropriate place by section "§§2L1.1, 2L2.1, 2L2.3;".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting example 7.

Reason for Amendment: Currently, §2L1.1 provides the same offense level for a defendant who smuggles, transports, or harbors 1, 6, 25, 50, or any number of aliens. The Commission attempted to address the scope of such offenses in the initial guidelines by inserting specific offense characteristic (b)(2). However, this specific offense characteristic "prior conviction for the same or similar offense" simply is not a good proxy for the scale of the instant offense, and is inconsistent with the Commission's general approach to the treatment of prior criminal history.

The proposed amendment addresses these issues by substituting the number of aliens smuggled, transported, or harbored as a more direct measure of the scope and gravity of the offense. As under current guidelines, §3B1.1 (Aggravating Role) will provide an additional increase of 4 or 2 levels for organizers, managers, and supervisors. Due to the

nature of the offense, this role adjustment is particularly likely to apply in cases involving the transportation of large numbers of aliens.

The Commission requests comment on the appropriateness of the proposed adjustment both as to the number of aliens in each category and as to the increases in offense level associated with these numbers.

The proposed amendment also adds commentary to §2L1.1 expressly indicating that an upward departure may be warranted for the reckless endangerment of the safety of others in an effort to avoid apprehension for the offense.

Sections 2L2.1 and 2L2.3 are also amended to provide equivalent increases.

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36. Proposed Amendment: The caption of §2L2.1 is amended by inserting the following at the end "; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by inserting "8 U.S.C. § 1325(b);" immediately before "18 U.S.C.", and by inserting "1015(c), (d)," immediately after "§§".

The caption of §2L2.2 is amended by inserting the following at the end: "; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§" and inserting in lieu thereof "8 U.S.C. § 1325(b); 18 U.S.C. §§ 911, 1015(c),".

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

" 8 U.S.C. § 1325(b)	2L2.1, 2L2.2",
"18 U.S.C. § 911	2F1.1, 2L2.2",
"18 U.S.C. § 1015(a)	2J1.3
18 U.S.C. § 1015(b)	2F1.1
18 U.S.C. § 1015(c)	2L2.1, 2L2.2
18 U.S.C. § 1015(d)	2L2.1.".

Reason for Amendment: This amendment makes the coverage of these offense guidelines more comprehensive by expressly including violations of 8 U.S.C. § 1325, 18 U.S.C. § 911, and 18 U.S.C. § 1015.

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Chapter Two, Part M (Offenses Involving National Defense)

37. Proposed Amendment: Section 2M4.1(b)(1) is amended by deleting "while" and inserting in lieu thereof "at a time when", and by deleting "into the armed services, other than in time of war or armed conflict" and inserting in lieu thereof "for compulsory military service".

The Commentary to §2M4.1 captioned "Application Notes" is amended in the caption by deleting "Notes" and inserting in lieu thereof "Note", and by deleting Note 1 and 2 in their entirety and inserting in lieu thereof:

"1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.".

Reason for Amendment: As currently written, §2M4.1 contains an anomaly in that the offense level for failure to register and evasion of military service in time of war or armed conflict is lower than during a peace time draft. This amendment corrects this anomaly. In addition, the amendment makes a technical correction to the language of the guideline that enables the elimination of current Application Note 1.

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38. Proposed Amendment: Section 2M5.2 is amended by deleting subsection (a) in its entirety and inserting in lieu thereof: "(a) Base Offense Level: 22".

The Commentary to §2M5.2 captioned "Application Notes" is amended in Note 1 by inserting the following immediately before "In the case of a violation":

"Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to the security and foreign policy of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted.".

The Commentary to §2M5.2 captioned "Application Notes" is amended in Note 2 by inserting "or foreign policy" immediately after "security".

Reason for Amendment: The proposed amendment creates a single base offense level of 22 to reflect the Commission's view of the serious nature of this type of offense. This base offense level assumes that the conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. Proposed Application Note 1 indicates that a downward departure may be warranted in the unusual case that lies outside the 'heartland' described above.

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Chapter Two, Part N (Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws)

39. Proposed Amendment: Section 2N1.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

(1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.".

Reason for Amendment: This amendment adds a cross reference to ensure that in the case of an offense involving extortion, the offense level will not be lower than that under §2N1.2 (which contains a cross reference to §2B3.2).

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40. Proposed Amendment: Section 2N1.2(a) is amended by deleting "(Apply the greater)".

Section 2N1.2(a)(1) is amended by deleting "(1)", and by deleting the semicolon at the end and inserting in lieu thereof a period.

Section 2N1.2 is amended by deleting subsection (a)(2) in its entirety and inserting in lieu thereof:

"(b) Cross Reference

(1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).".

The Commentary to §2N1.2 is captioned "Application Notes" is amended by deleting "Notes" and inserting in lieu thereof "Note", by deleting Note 1 in its entirety, and by redesignating Note 2 as Note 1.

Reason for Amendment: This amendment conforms the structure of this guideline to that used in other guidelines.

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41. Proposed Amendment: The Commentary to §2N2.1 captioned "Application Notes" is amended by deleting Note 2 in its entirety and inserting in lieu thereof:

"2. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline (e.g., theft, fraud, property destruction, bribery, or graft), apply that guideline rather than §2N2.1. Otherwise, in such cases, §2N2.1 is to be applied, but an upward departure from the guidelines may be considered.".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 1 by inserting "or reckless" immediately before "conduct".

Reason for Amendment: This amendment conforms the language of Application Note 2 to the guideline at §1B1.2 (see, for example, Application Note 13 of §2F1.1). This amendment also makes a clarifying change in Application Note 1.