eliminate the cross reference in §2C1.1(c)(2)?

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

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

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

6. *The Commission requests comment regarding whether, in light of the proposed amendments to Chapter Two, Part C, it should amend other guidelines pertaining to bribery, gratuity, and extortion, and other similar offenses. For example, should the Commission increase the base offense levels for bribery and gratuity offenses in §2E5.1 in order to maintain consistent and proportionate sentencing with respect to §§2C1.1 and 2C1.2? Should the Commission*

consider making any amendments to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), or §2B3.3 (Blackmail and Similar Forms of Extortion)?

PROPOSED AMENDMENT 5: DRUGS (INCLUDING GHB)

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

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

Second, the proposed amendment adds to Application Note 5 of §2D1.1 a reference to controlled substance analogues. The note currently states that "[a]ny reference to a particular controlled substance in these guideline includes all salts, isomers, and all salts of isomers." The proposed amendment modifies the rule specifically to include that any reference to a particular controlled substance also includes any analogue of that controlled substance, unless otherwise provided (e.g., the Drug Quantity Table currently references fentanyl analogue). In addition, the proposed amendment provides an application note regarding controlled substances not currently referenced in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The note directs the court to use the marihuana equivalency of the closest analogue of the controlled substance in order to determine the base offense level. (Please note that the last two paragraphs of Note 5 are published in the January 14, 2004, edition of the Federal Register as a revision to the proposed amendment on controlled substance analogues published in the Federal Register on December 30, 2003 (see 68 F.R. 75339).)

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

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

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

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

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

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
* * *	
(10) * * *	**Level 20**
M At least 40,000 but less than 60,000 units of Schedule I or II Depressants ~~or Schedule III substances~~; M 40,000 or more units of Schedule III substances; M At least 2,500 but less than 3,750 units of Flunitrazepam.	
(11) * * *	**Level 18**
M At least 20,000 but less than 40,000 units of Schedule I or II Depressants ~~or Schedule III substances~~; M At least 20,000 but less than 40,000 units of Schedule III substances; M At least 1,250 but less than 2,500 units of Flunitrazepam.	
(12) * * *	**Level 16**
M At least 10,000 but less than 20,000 units of Schedule I or II Depressants ~~or Schedule III substances~~; M At least 10,000 but less than 20,000 units of Schedule III substances; M At least 625 but less than 1,250 units of Flunitrazepam.	
(13) * * *	**Level 14**
M At least 5,000 but less than 10,000 units of Schedule I or II Depressants ~~or Schedule III substances~~; M At least 5,000 but less than 10,000 units of Schedule III substances; M At least 312 but less than 625 units of Flunitrazepam.	
(14) * * *	**Level 12**
M At least 2,500 but less than 5,000 units of Schedule I or II Depressants ~~or Schedule III substances~~; M At least 2,500 but less than 5,000 units of Schedule III substances; M At least 156 but less than 312 units of Flunitrazepam; M 40,000 or more units of Schedule IV substances (except Flunitrazepam).	
(15) * * *	**Level 10**

M At least 1,000 but less than 2,500 units of Schedule I or II Depressants ~~or Schedule III substances~~;
M At least 1,000 but less than 2,500 units of Schedule III substances;
M At least 62 but less than 156 units of Flunitrazepam;
M At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) * * * **Level 8**

M At least 250 but less than 1,000 units of Schedule I or II Depressants ~~or Schedule III substances~~;
M At least 250 but less than 1,000 units of Schedule III substances;
M Less than 62 units of Flunitrazepam;
M At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
M 40,000 or more units of Schedule V substances.

(17) M Less than 250 G of Marihuana; **Level 6**
M Less than 50 G of Hashish;
M Less than 5 G of Hashish Oil;
M Less than 250 units of Schedule I or II Depressants ~~or Schedule III substances~~;
M Less than 250 units of Schedule III substances;
M Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
M Less than 40,000 units of Schedule V substances.

* * *

*Notes to Drug Quantity Table:

* * *

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 gm.

* * *

Commentary

Application Notes:

* * *

5. *Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, ~~and~~ all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.*

In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marihuana equivalency of the closest analogue of that controlled substance.

For purposes of this guideline "analogue" has the meaning given "controlled substance analogue" in 21 U.S.C. § 802(32).

* * *

10. * * *

DRUG EQUIVALENCY TABLES

* * *

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

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

Gamma-hydroxybutyric Acid

Option One:	[1 liter of gamma-hydroxybutyric acid =	26,420 gm of marihuana]
Option Two:	[1 liter of gamma-hydroxybutyric acid =	5,284 gm of marihuana]

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

(2) If the defendant is convicted of violating 21 U.S.C. §§ 841(~~d~~)(c)(2), (g)(f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.

* * *

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

Listed Chemicals and Quantity	**Base Offense Level**

(1) List I Chemicals **Level 30**

* * *

400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
~~10,000 KG~~ [757][3785] L or more of Gamma-butyrolactone;
714 G or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

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

* * *

At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~3,000 KG~~ [227.1][1135.5] L but less than ~~10,000 KG~~ [757][3785] L of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

(3) List I Chemicals

* * *

At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~1,000 KG~~ [75.7][378.5] L but less than ~~3,000 KG~~ [227.1][1135.5] L of Gamma-butyrolactone;
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~700 KG~~ [53][265] L but less than ~~1,000 KG~~ [75.7][378.5] L of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~400 KG~~ [30.3][151.4] L but less than ~~700 KG~~ [53][265] L of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least ~~100 KG~~ [7.6][37.9] L but less than ~~400 KG~~ [30.3][151.4] L of Gamma-butyrolactone;
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~80 KG~~ [6.1][30.3] L but less than ~~100 KG~~ [7.6][37.9] L of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~60 KG~~ [4.5][22.7] L but less than ~~80 KG~~ [6.1][30.3] L of Gamma-butyrolactone;
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least ~~40 KG~~ [3][15.1] L but less than ~~60 KG~~ [4.5][22.7] L of Gamma-butyrolactone;
At least 3 G but less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
Less than ~~40 KG~~ [3][15.1] L of Gamma-butyrolactone;
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(1), (2), (f)(1), 960(d)(1), (2), (3), (4).

Application Notes:

* * *

5. *Convictions under 21 U.S.C. §§ 841~~(d)~~(c)(2), ~~(g)~~(f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was*

to be used to manufacture a controlled substance unlawfully. ~~Where~~In a case in which the defendant possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.

* * *

APPENDIX A - STATUTORY INDEX

* * *

~~21 U.S.C. § 957 2D1.1~~

* * *

Issue for Comment:

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

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

3. *The Commission requests comment regarding whether it should amend §2D1.1 to account more adequately for offenses that involve drug facilitated sexual assault, specifically in a case in which the victim of the sexual assault knowingly and voluntarily ingested the drug. Currently, the cross reference in §2D1.1(d)(2) applies if the defendant was convicted under 21 U.S.C. § 841(b)(7) and the victim of the sexual assault did not knowingly ingest the drug. If the victim of the sexual assault, however, knowingly and voluntarily ingested the drug, 21 U.S.C. § 841(b)(7) and thus the cross reference do not apply. The Commission requests comment regarding whether the scope of the cross reference should be expanded to include a case in which the victim of a sexual assault knowingly and voluntarily ingested the drug, even if the defendant is not convicted under 21 U.S.C. § 841(b)(7). Alternatively, would the heightened base offense levels in §2D1.1(a)(1) and (2) apply in such a case and, if so, would they account adequately for drug facilitated sexual assaults of this nature? If not, should the heightened base offenses levels be modified or should the Commission provide a specific offense characteristic to account more adequately for drug facilitated sexual assaults?*

4. *The Commission has become aware of a circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. The relevant language of the note states "[i]f, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing." A conflict has arisen over whether this language is limited to a defendant who is the seller in a sting operation. See United States v. Smack, _ F.3d _, 2003 WL 22419914 (3rd Cir., October 24, 2003) (opining that the language in Note 12 is ambiguous); United States v. Williams, 109 F.3d 502, 511-12 (8th Cir. 1997) (same). Some circuits have concluded that the last sentence of the note is intended to apply only to sellers. See United States v. Gomez, 103 F.3d 249, 252-53 (2d Cir. 1997) (concluding that the last sentence of Note 12 applies only to sellers); United States v. Perez de Dios, 237 F.3d 1192 (10th Cir.2001) (same); United States v. Brassard, 212 F.3d 54, 58 (1st Cir.2000) (same). Others have concluded that the language also applies to buyers in reverse sting operations. See United States v. Minore, 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); United States v. Estrada, 256 F.3d 466, 476 (7th Cir. 2001) (same).*

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

PROPOSED AMENDMENT 6: MITIGATING ROLE

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

Proposed Amendment:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

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

* * *

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c)~~, except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30~~.

* * *

§3B1.2. **Mitigating Role**

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

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

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

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

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

Base Offense Level from §2D1.1 or §2D1.11		Additional Reduction
(1)	level **[30]**	**[1]** level
(2)	level **[32 - 34]**	**[1][2]** levels
(3)	level **[36 - 38]**	**[1][2][3]** levels.

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

PROPOSED AMENDMENT 7: HOMICIDE AND ASSAULT

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

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

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

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

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

> *"(1) IN GENERAL.—Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and the policy statements of the commission, if appropriate, to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18, United States Code.*
>
> *(2) FACTORS FOR CONSIDERATION.—In carrying out this section, the United States Sentencing Commission shall consider, with respect to each offense described in paragraph (1)—*
>
> *(A) any expression of congressional intent regarding the appropriate penalties for the offense;*
>
> *(B) the range of conduct covered by the offense;*
>
> *(C) the existing sentences for the offense;*
>
> *(D) the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;*
>
> *(E) the extent to which the Federal sentencing guideline sentences for the offense have been constrained by statutory maximum penalties;*
>
> *(F) the extent to which the Federal sentencing guidelines for the offense*

adequately achieve the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

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

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

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

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

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

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

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

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

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

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

Proposed Amendment:

PART A - OFFENSES AGAINST THE PERSON

1. HOMICIDE

§2A1.1. First Degree Murder

(a) Base Offense Level: **43**

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 2113(e), 2118(c)(2), 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *Applicability of Guideline.—This guideline applies in cases of premeditated killing. This~~The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this~~guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering.*

2. *Imposition of Life Sentence.—*

   (A) In General.—An offense level of 43 (i.e., the base offense level under this guideline) results in a guideline sentence of life imprisonment in all criminal history categories. In cases in which a statutory mandatory minimum sentence is life imprisonment, the defendant shall be sentenced to life imprisonment, even if the defendant received a reduction for acceptance of responsibility under §3E1.1 (Acceptance of Responsibility).

   (B) Offenses Involving Premeditated Killing.—In the absence of capital punishment, life

imprisonment is the appropriate sentence in the case of premeditated killing. A downward departure would not be appropriate in such a case.

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

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

§2A1.2. Second Degree Murder

(a) Base Offense Level: ~~33~~[37][38]

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

~~*Background: The maximum term of imprisonment authorized by statute for second degree murder is life.*~~

* * *

§2A1.3. Voluntary Manslaughter

(a) Base Offense Level: ~~25~~[26-30]

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

~~*Background: The maximum term of imprisonment authorized by statute for voluntary manslaughter is ten years.*~~

§2A1.4. Involuntary Manslaughter

(a) Base Offense Level:

(1) **12,** if the ~~conduct was criminally~~ offense involved criminally **negligent** conduct; or

(2) Apply the greater:

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

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

(b) Special Instruction

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note~~s~~:

1. Definitions.—For purposes of this guideline:

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

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

"Reckless" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted

a gross deviation from the standard of care that a reasonable person would exercise in such a situation. "Reckless" includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

~~*1. "Reckless" refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.*~~

~~*2. "Criminally negligent" refers to conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.*~~

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

(a) Base Offense Level: ~~28~~[32-37]

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 371, 373, 1117, 1751(d).

* * * * *

2. ASSAULT

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

(a) Base Offense Level:

(1) ~~28~~[32-37], if the object of the offense would have constituted first degree murder; or

(2) ~~22~~ [26][28][30], otherwise.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

~~*1. Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are*~~

~~*found in the Commentary to §1B1.1 (Application Instructions).*~~

~~*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.*~~

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

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

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

~~*3*~~*2.* *Upward Departure Provision.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.*

Background: This section applies to the offenses of assault with intent to commit murder and attempted murder. An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault).

§2A2.2. Aggravated Assault

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

(1) **15**; or

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

* * *

Commentary

* * *

Application Notes:

* * *

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

~~*3*~~*2.* *More than Minimal Planning.—For purposes of subsection (b)(1), "more than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present*

would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

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

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

* * *

§2A2.3. Minor Assault

(a) Base Offense Level:

(1) **6**[9], if the ~~conduct~~offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or

(2) ~~3~~[6], otherwise.

(b) Specific Offense Characteristic

(1) (Apply the greater) If (A) the victim sustained bodily injury, increase by **2** levels; or (B) the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by **4** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

~~*1. "Minor assault" means a misdemeanor assault, or a felonious assault not covered by §2A2.2.*~~

~~*2. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions).*~~

~~*3. "Substantial bodily injury" means "bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1).*~~

1. Definitions.—For purposes of this guideline:

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

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

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

Background: Minor assault and battery are covered in this section.

§2A2.4. Obstructing or Impeding Officers

(a) Base Offense Level: ~~6~~[12]

(b) Specific Offense Characteristics

(1) If the ~~conduct~~offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by **3** levels.

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

* * *

Commentary

* * *

Application Notes:

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

~~1~~2. Application of Certain Chapter Three Adjustments.—The base offense level ~~reflects~~incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), ~~requires~~ the offense level ~~to be~~is determined under §2A2.2 (Aggravated Assault) and the base offense level under §2A2.2(a)(2) does not apply. Conversely, the base offense level does not ~~reflect~~incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).

~~*2. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1*~~

~~*(Application Instructions):*~~

3. *Upward Departure Provision.—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).*

* * *

CHAPTER THREE - ADJUSTMENTS

PART A - VICTIM-RELATED ADJUSTMENTS

* * *

§3A1.2. Official Victim

Increase by [6] levels if—

(a1) ~~If (1)~~(A) the victim was (~~A~~i) a government officer or employee; (~~B~~ii) a former government officer or employee; or (~~C~~iii) a member of the immediate family of a person described in subdivision (~~A~~i) or (~~B~~ii); and (~~2~~B) the offense of conviction was motivated by such status~~, increase by 3 levels.~~; or

(b2) ~~If,~~ in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(~~1~~A) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(~~2~~B) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility~~,~~

~~increase by 3 levels.~~

Commentary

Application Notes:

* * *

2. *Nonapplicability in Case of Incorporation of Factor in Chapter Two.—Do not apply this adjustment if the offense guideline specifically incorporates this factor. In most cases, the offenses to which ~~subdivision (a)~~this adjustment will apply will be from Chapter Two, Part A (Offenses Against the Person). The only offense guidelines in Chapter Two, Part A, that specifically incorporate this factor ~~is~~are (A) subsection (a)(2) of §2A2.2 (Aggravated Assault);*

and (B) §2A2.4 (Obstructing or Impeding Officers).

3. *Application of ~~Subsection (a)~~Subdivision (1).—"Motivated by such status" in ~~subsection (a)~~subdivision (1) means that the offense of conviction was motivated by the fact that the victim was a government officer or employee, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute. This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(a)) that takes such conduct into account.*

4. *Application of ~~Subsection (b)~~Subdivision (2).—*

   (A) In General.—~~Subsection (b)~~Subdivision (2) applies in circumstances tantamount to aggravated assault (i) against a law enforcement officer, committed in the course of, or in immediate flight following, another offense; or (ii) against a prison official, while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility. While ~~subsection (b)~~subdivision (2) may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against such official victims that is sufficiently serious to create at least a "substantial risk of serious bodily injury".

   (B) Definitions.—For purposes of ~~subsection (b)~~subdivision (2):

* * *

5. *Upward Departure Provision.—~~Certain high level officials, e.g., the President and Vice President, although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted.~~If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.*

ISSUES FOR COMMENT:

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

   Are there additional, related enhancements that the Commission should provide in the assault guidelines, particularly given the directive to consider providing sentences at or near the statutory maximum for the most egregious cases? Would such an enhancement be appropriate

for other Chapter Two guidelines that cover these offenses, such as the guidelines covering attempted murder (§2A2.1), kidnapping (§2A4.1), and threatening communications (§2A6.1)?

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

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

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

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

   Should the base offense level in the aggravated assault guideline generally be decreased by two levels? Should it be decreased by two levels in cases in which none of the specific offense characteristics apply (i.e., in cases in which there are no aggravating circumstances)?

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

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

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

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

PROPOSED AMENDMENT 8: MISCELLANEOUS AMENDMENTS PACKAGE

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

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

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

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

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

The guidelines currently address the use of a minor to commit an offense in §3B1.4 (Using a Minor To Commit a Crime). That guideline provides a two-level adjustment and applies to any offense in which a defendant used or attempted to use a minor to commit the offense or assist

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

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

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

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

The proposed amendment also adds to the definition of "crime of violence" possession of a sawed-off shotgun and other firearms of the type described in 26 U.S.C. § 5845(a). Congress determined that such firearms are inherently dangerous and, when possessed unlawfully, serve only violent purposes. Accordingly, Congress passed The National Firearms Act, Pub. L. 90–618, which in part requires such firearms to be registered with National Firearms Registration and Transfer Record. See 26 U.S.C. § 5861(d). Notwithstanding that Application Note 1 of §4B1.2 excludes from the definition of "crime of violence" the offense of unlawful possession of a firearm by a felon, several circuit courts have held that possession of a sawed-off shotgun is a "crime a violence" because under §4B1.2(a)(2) the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another". See, e.g., United States v. Serna, 309 F.3d 859, 864 (5th Cir. 2002) (unlawful possession of a sawed-off shotgun constitutes conduct that, by its nature, poses a serous potential risk of injury to another and is therefore a crime of violence under §4B1.2(a)); United States v. Johnson, 246 F.3d 330 (4th Cir. 2001) (possession of a sawed-off shotgun always creates a serious risk of physical injury to another person and therefore is a crime of violence for career offender purposes); United States v. Brazeau, 237 F.3d 842, 845 (7th Cir. 2001) (sawed-off shotguns are inherently dangerous and the possession of such a firearm is a crime of violence); see also United States v. Fortes, 141 F.3d 1 (1st Cir. 1998) (possession of a sawed-off shotgun is a "violent felony" for purposes of 18 U.S.C. § 924(e) (the Armed Career Criminal Act)). An important distinguishing factor for these courts' holdings is that "most weapons do not have to be registered - only those weapons that Congress found to be inherently dangerous" must be registered. Brazeau at 845. "If the weapon is not so labeled, mere possession by a felon is not a crime of violence." Id. Indeed, at the time the Commission amended §4B1.2 to exclude the offense of felon in possession from the definition of "crime of violence", it was only concerned with felons possessing ordinary handguns and rifles and did not address more

serious firearms.

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

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

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

- *Amends §6A1.2 (Disclosure of Presentence Report; Issues in Dispute) to set out the specific procedural requirements governing the disclosure of the presentence report and any issues in dispute as required by Rule 32. Currently, §6A1.2 provides that the court should adopt procedures for the timely disclosure of the presentence report, the resolution of disputed issues prior to the sentencing hearing, and the identification of any unresolved issues. Rule 32 was amended in 1997 to provide particular procedural deadlines and requirements for the disclosure of the presentence report and issues in dispute and, in December 2002, those deadlines and requirements were reorganized to read more easily. This proposed amendment reflects those changes.*

- *Moves Application Note 1 of §6A1.2, regarding a requirement that the court provide notice of departure, to its own policy statement. The Commission added the application note in 1997 in light of Burns v. United States, 501 U.S. 129, 138-39 (1991), in which the Court held that, before a sentencing court may depart upward on a ground not previously identified in the presentence report, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a departure. The Court also stated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departed either upward or downward. Proposed policy statement §6A1.4 (Notice of Possible Departure) reflects the substantive amendment that added subsection (h) to Rule 32 specifically to incorporate the Burns holding.*

- *Deletes outdated commentary regarding pre-guidelines procedures.*

- *Fully incorporates into §6B1.3 the procedure set forth in Rule 11(c)(5) that the court*

must follow when the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C).

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

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

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

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

Proposed Amendment:

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

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

* * *

(b) Specific Offense Characteristics

* * *

(7) If (A) the offense involved ~~(A)~~ (i) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; ~~(B)~~ (ii) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; ~~(C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D)~~ (iii) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education~~,~~; or (B) the defendant violated a prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

Commentary

* * *

Application Notes:

* * *

6. *Application of Subsection (b)(7).—*

* * *

(B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(7)(A)(i) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(7)(A)(i) applies, for example, to the following:

* * *

~~*(C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*~~

~~(D)~~(C) College Scholarship Fraud.—For purposes of subsection (b)(7)~~(D)~~(A)(iii):

* * *

(D) Offenses Committed in Contravention of Prior Judicial Order.—Subsection (b)(7)(B) provides an enhancement if the defendant commits an offense in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless

engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(7)(A)(i).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(A)(i) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(7)~~(B)~~(A)(ii) and ~~(C)~~(B).—If the conduct that forms the basis for an enhancement under subsection (b)(7)~~(B)~~(A)(ii) or ~~(C)~~(B) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

(B) Expanding Special Rule for Theft of Mail to Include Privately Owned Mailboxes

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

* * *

Commentary

* * *

Application Notes:

* * *

4. Victim and Mass-Marketing Enhancement under Subsection (b)(2).—

(B) Undelivered United States Mail.—

* * *

(ii) ~~Special Rule.—A case described in subdivision (B)(i) of this note that involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved 50 or more victims.~~

Special Rule.—A case described in subdivision (B)(i) of this note that involved a relay box, a collection box, a delivery vehicle, a satchel, a cart, a housing unit cluster box, an apartment box, or any other thing used or designed for use in the conveyance of [Option 1: a large volume of] United States mail [Option

2: to multiple addresses], whether such thing is privately owned or owned by the United States Postal Service, shall be considered to have involved 50 or more victims.

* * *

(C) SAFE ID Act:

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

* * *

(b) Specific Offense Characteristic

(9) If the offense involved (A) the possession or use of any (i) device-making equipment; or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device; (ii) or authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

* * *

Commentary

* * *

Application Notes:

* * *

8. Application of Subsection (b)(9).—

(A) Definitions.—For purposes of subsection (b)(9):

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

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

* * *

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)~~(4)~~(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

* * *

(B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

* * *

Background:

* * *

Subsections (b)(9)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone ProtectionAct, Public Law 105–172.

* * *

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

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

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

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

Commentary

Statutory Provision: 18 U.S.C. § 25.

Application Notes:

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

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

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

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 4	2X4.1
18 U.S.C. § 25	2X6.1

* * *

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

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

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

5. * * *

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(b) making false statements, not under oath, to law enforcement officers, unless Application Note ~~3(g)~~4(g) above applies;

* * *

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

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

"Crime of violence" does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm of a type described in 26 U.S.C. § 5845(a). ~~Where~~ If the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

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

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

* * *

(G) Chapter Six Update

§6A1.1. Presentence Report (Policy Statement)

~~A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.~~

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

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

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

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

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

Commentary

A thorough presentence investigation is essential in determining the facts relevant to sentencing. ~~*In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(b)(1)*~~ *Rule 32(c)(1)(A) permits the judge to dispense with a presentence report*~~*, but only after explaining, on the record, why sufficient information is already available*~~ *in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to meaningfully exercise its statutory sentencing authority and explains its finding on the record.*

§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

~~Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. Rule 32(b)(6), Fed. R. Crim. P.~~

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

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

further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.

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

Commentary

~~*Application Note:*~~

~~*1. Under Rule 32, Fed. R. Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure. Burns v. United States, 501 U.S. 129, 135-39 (1991).*~~

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. Rule ~~32(b)(6)(B)~~32(f), Fed. R. Crim. P.

§6A1.3. Resolution of Disputed Factors (Policy Statement)

* * *

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule ~~32(c)(1)~~Rule 32(i), Fed. R. Crim. P.

Commentary

~~*[In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.*~~

* * *

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, ~~117 S. Ct. 633, 635~~ 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the

conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, ~~117 S. Ct. at 637~~519 U.S. at 157; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

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

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

Commentary

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

PART B - PLEA AGREEMENTS

Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11~~(e)(1)~~(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices:

(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and

(2) do not perpetuate unwarranted sentencing disparity.

~~These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E).~~ Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). In pursuit of this goal, the Commission ~~shall~~ will continue to study plea agreement practice under the guidelines [~~and ultimately develop standards for judges to~~

~~*use in determining whether to accept plea agreements]. [Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission's work.]*~~

~~*The present policy statements move in the desired direction in two ways. First, the*~~ *These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge.* ~~*[This is a reaffirmation of pre-guidelines practice.] Second, the*~~ *The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will continue to be carefully analyzed by the Commission* ~~*[and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process].*~~

§6B1.1. Plea Agreement Procedure (Policy Statement)

(a) ~~If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.~~ The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) ~~If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea.~~ To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.

~~(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under §6A1.1.~~

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

Commentary

This provision parallels the procedural requirements of Rule ~~*11(e)*~~ *11(c), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.*

Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. ~~Rule 11(e)(2)~~ Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer ~~acceptance~~ a decision pending consideration of the presentence report. ~~Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by §6A1.1 (Presentence Report) and amended Rule 32(c)(1).~~ ~~Since~~ Given that a presentence report normally will be prepared, the court ~~must~~may defer acceptance of the plea agreement until the court has ~~had an opportunity to consider~~ reviewed the presentence report.

§6B1.3. Procedure Upon Rejection of a Plea Agreement (Policy Statement)

~~If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed. R. Crim. P.~~

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

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

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

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

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

Commentary

This provision implements the requirements of Rule ~~11(e)(4)~~11(c)(5). It assures the defendant an opportunity to withdraw his plea when the court has rejected a plea agreement that would require dismissal of charges or imposition of a specific sentence.

(H) Conforming PROTECT Act Amendments (Departures)

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

* * *

Commentary

* * *

Application Notes:

* * *

5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. ~~When~~ In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, ~~creation of a risk may provide a ground for imposing a sentence above the applicable guideline range~~ an upward departure may be warranted. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*

* * *

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

* * *

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for ~~sentencing above the guideline range~~ an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

§1B1.8. Use of Certain Information

* * *

Commentary

* * *

Application Notes:

1. *This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to ~~increase the defendant's sentence above the applicable guideline range by upward departure~~depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart ~~below the applicable guideline range~~downward on the basis of such information.*

* * *

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Commentary

* * *

Application Notes:

* * *

7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including ~~a sentence below the applicable guideline range~~downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

7. *In the case of a defendant with previous antitrust convictions, a sentence at~~, or even above,~~ the maximum of the applicable guideline range, or an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

§2T1.8. Offenses Relating to Withholding Statements

* * *

Commentary

* * *

Application Note:

1. *If the defendant was attempting to evade, rather than merely delay, payment of taxes, ~~a sentence above the guidelines~~ an upward departure may be warranted.*

* * *

3. CUSTOMS TAXES

Introductory Commentary

This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and is designed to address violations involving revenue collection or trade regulation. It is not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, if applicable, or for ~~imposing a sentence above that specified in the guideline in this Subpart~~ departing upward.

* * *

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Commentary

Application Notes:

* * *

4. *Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same*

victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for ~~a sentence above the guideline range~~ an upward departure. See §5K2.5 (Property Damage or Loss).

* * *

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth ~~verbatim~~ below:

* * *

§5H1.1. Age (Policy Statement)

Age (including youth) is not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~departure is warranted. Age may be a reason to ~~impose a sentence below the applicable guideline range when~~ depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~departure is warranted, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

* * *

§5H1.5. **Employment Record (Policy Statement)**

Employment record is not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~ departure is warranted.

§5H1.6. **Family Ties and Responsibilities (Policy Statement)**

~~Family~~ In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.~~*~~

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

~~*Note: Section 401(b)(4) of Public Law 108-21 (the "Protect Act") directly amended §5H1.6 to add the second paragraph, effective April 30, 2003. The Commission incorporated this direct amendment in the Supplement to the 2002 Guidelines Manual but inadvertently omitted the second paragraph in the Federal Register notice of amendments dated October 21, 2003. The policy statement should be read as containing the second paragraph, pursuant to the direct amendment made by Public Law 108-21.~~

Commentary

* * *

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

§5H1.11. **Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)**

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~ departure is warranted.

§5H1.12. **Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)**

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant~~grounds for imposing a sentence outside the applicable guideline range~~ in determining whether a departure is warranted.

§5K2.14. **Public Welfare (Policy Statement)**

If national security, public health, or safety was significantly endangered, the court may

~~increase the sentence above the guideline range~~ depart upward to reflect the nature and circumstances of the offense.

§5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure ~~below the applicable guideline range for that offense~~ may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

§5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may ~~increase the sentence above the guideline range~~ depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to impose a ~~sentence below the applicable guideline range~~ depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to impose a ~~sentence below the applicable guideline range~~ depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason for ~~imposing~~ a ~~sentence below the guidelines~~ downward departure.

§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A ~~sentence below the applicable guideline range~~ downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

(I) Correction of Example in §5G1.2

§5G1.2. Sentencing on Multiple Counts of Conviction

* * *

Commentary

* * *

Application Notes:

* * *

3. Career Offenders Covered under Subsection (e).—

* * *

(B) Examples.—The following examples illustrate the application of subsection (e) in a multiple count situation:

* * *

(iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. ~~§ 2113(a)~~113(a)(3) (~~20~~10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of ~~400~~460 months is appropriate (applicable guideline range of ~~360~~460 - ~~life~~485). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of ~~40~~100 months on the 18 U.S.C. § ~~2113(a)~~113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.

(J) Issue for Comment Regarding "Double-Counting" Issue in §4B1.4 (Armed Career Criminal)

Issue for Comment: *The Commission requests comment regarding application of the guidelines in cases in which the defendant (1) is convicted under 18 U.S.C. § 922(g) (felon in possession); (2) is an armed career criminal under §4B1.4; and (3) is convicted under 18 U.S.C. § 924(c) (use of a firearm during a drug trafficking offense or crime of violence).*

Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) provides that in cases in which a defendant is convicted of 18 U.S.C. § 924(c) and of the underlying offense, the weapon enhancement in the guideline for the underlying offense is not to be applied. This rule is provided because the mandatory minimum consecutive sentence required by 18 U.S.C. § 924(c) is sufficient to account for the possession or use of the weapon in the underlying offense. Section 4B1.4 (Armed Career Criminal) provides for an "enhanced" sentence (i.e., an offense level of level 34 pursuant to §4B1.4(b)(3)(A) and Criminal History Category VI pursuant to

§4B1.4(c)(2)) for cases in which an armed career criminal uses or possesses a firearm in connection with a crime of violence or controlled substance offense. Unlike §2K2.4, however, §4B1.4 does not currently contain a rule to provide an exception to application of the "enhanced" sentence in cases in which the defendant also is convicted under 18 U.S.C. § 924(c) (or a similar offense carrying a "flat" mandatory consecutive penalty e.g., 18 U.S.C. § 844(h) or 18 U.S.C. § 929(a)). The Commission requests comment regarding whether such a rule should be provided in §4B1.4.

For example, should the Commission add §4B1.4 to the list of guidelines to which the special exception in §2K2.4 applies? Should the Commission also provide an upward departure note to §4B1.4 for the few cases in which the application of the exception may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level and criminal history category had been applied?