Proposed Amendments to the Sentencing Guidelines

November 27, 2001 and January 17, 2002

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found in the Federal Register, November 27, 2001(66 Fed. Reg. 59330-59340) and January 17, 2002 (67 Fed. Reg. 2456-2475).

INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES PUBLISHED IN THE FEDERAL REGISTER NOVEMBER 27, 2001

5	**21**	**Acceptance of Responsibility.—**Proposes to (A) delete §3E1.1(b)(1), which provides an additional one-level reduction if the defendant timely provides complete information to the government concerning his own involvement in the offense; and (B) resolve a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction.
6	**24**	**Consent Calendar Amendments.—**Proposes to make the following technical and conforming changes: (A) clarifies that §5D1.2(c) is a policy statement; (B) conforms the language in §2B4.1(b)(2) to §2B1.1(b)(12); (C) inserts a missing "or" in §§2C1.7(b)(1)(A) and 2Q1.6(a)(3); (D) (i) updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillory J. Farias and Samantha Reid Date Rape Prevention Act; and (ii) corrects references to the new chemical quantity tables in §2D1.11; (E) corrects a change to the commentary of §2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package; (F) corrects a grammatical error in Note (D) of §2T1.1(c)(1); (G) adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) in response to the DNA Analysis Backlog Elimination Act of 2000; (H) deletes from Application Note 5 of §5E1.1 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act; (I) inserts a missing "Background" title in §5F1.7 (Shock Incarceration); (J) conforms Part A of Chapter Seven and §7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the condition of intermittent confinement as a condition of supervised release; (K) updates statutory references in §5F1.5 (Occupational Restrictions); (L) refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index); (M) repromulgates

amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to §4B1.4 (Armed Career Criminal) from amendment 568; (N) responds to new legislation as follows: (i) updates, in §2B1.1, a statutory reference in the definition of "means of identification" (ii) references in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, and (iii) references 16 U.S.C. § 1437(c) to §2A2.4 (Obstructing or Impeding Officers); and (O) proposes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386, pertaining to the new offense at 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion).

7 **Terrorism.**—In response to the USA PATRIOT Act of 2001 (the Act) and the Commission's assessment of the guidelines' treatment of offenses involving terrorism, this amendment (or issues for comment) proposes the following: (A) new predicate offenses to federal crimes of terrorism; (B) other predicate offenses to federal crimes of terrorism that are not currently referenced in the Statutory Index; (C) increases in statutory maximum penalties for predicate offenses to federal crimes of terrorism that currently are referenced in the Statutory Index; (D) penalties for terrorism conspiracies; (E) issues related to the terrorism adjustment in §3A1.4; (F) issues related to the money laundering provisions of the Act; (G) issues related to currency and counterfeiting provisions of the Act; and (H) miscellaneous issues.

8	**65**	**Drugs.**—Proposes amendments to §§2D1.1, 2D1.2, 2D1.8, 2D1.10, and 2D2.1, and issues for comment, as follows: (A) provides a maximum Base Offense Level of [24-32] if the defendant qualifies for an adjustment under §3B1.2 (Mitigating Role); (B) provides a graduated weapon enhancement; (C) provides a graduated bodily injury enhancement; (D) consolidates §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individual; Attempt or Conspiracy) into §2D1.1; (E) provides an enhancement for a prior felony conviction of a crime of violence or controlled substance offense; (F) provides an additional two level reduction if the defendant meets certain criteria and previously has not been convicted of any offense; (G) consolidates §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) into §2D1.1; (H) modifies the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in Application Note 11 of §2D1.1 to more accurately reflect the type and quantity of ecstasy typically trafficked and consumed; (I) eliminates the cross reference to §2D1.1 in §2D2.1 (Unlawful Possession; Attempt or Conspiracy) that applies if the defendant is convicted of possession of more than five grams of crack cocaine; and (J) requests comment regarding (i) the sentencing of defendants convicted of crack cocaine offenses under the sentencing guidelines; (ii) minimum offense levels in the proposed enhancements for weapon use and bodily injury; (iii) an enhancement for express or implied threat of death or bodily injury; (iv) minimum offense levels for all of proposed §2D1.1(b)(3); (v) minimum offense levels for the enhancement for a prior felony conviction; (vi) the scope of the proposed maximum base offense level for mitigating role defendants; (vii) whether the Commission should address certain circuit conflicts pertaining to mitigating role and whether, in this context, the Commission also should provide guidance on whether drug offenders who perform certain drug trafficking functions should or should not receive a mitigating role adjustment.
9	**85**	**Alternatives to Imprisonment.**—Provides three options to increase sentencing alternatives in Zone C of the Sentencing Table (Chapter Five, Part A).
10	**103**	**Discharged Terms of Imprisonment.—**Provides issue for comment regarding whether subsections (b) and (c) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) should be expanded to apply to discharged terms of imprisonment.

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

1. **Proposed Amendment: Cultural Heritage**

Synopsis of Proposed Amendment: *This amendment proposes to add to Chapter Two, Part B, a new guideline, §2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. The proposal was developed in response to concerns raised by the Departments of Justice and the Interior, among others, that the guidelines inadequately address such offenses.*

Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect these intrinsic differences.

The effect of cultural heritage resource crimes transcends monetary considerations. Individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects. For much of this cultural heritage in the United States, the federal government has a perpetual duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations. The current guidelines, however, do not specifically address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Therefore, a separate guideline amendment is proposed that takes into account the transcendent and irreplaceable, e.g., the non-pecuniary value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural heritage resource crimes.

First, the amendment proposes a base offense level of level 8, which is two levels higher than the base offense level for general property destruction. The higher base offense level represents the intangible and non-pecuniary harm caused by the theft of, damage to, or destruction of, essentially irreplaceable cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the loss table at §2B1.1, that assesses the monetary value of the damage caused. Use of the standard economic crime concept of "loss" is not used, however, because it implies a fungible and compensatory system of value which is inappropriate for measuring the harm caused by cultural heritage resources offenses. Instead, the calculation is based on either commercial value or archaeological value, as appropriate to the particular resource, which may be necessary to preserve or otherwise care for the resource, together with the cost of restoration and repair of the resource. These values already exist in federal law and are codified in federal regulations.

Third, the amendment proposes a two-level enhancement if the offense involved commercial advantage or private financial gain, in order to distinguish between offenders who are motivated by financial gain or commercial purposes from offenders who merely are motivated by their interest in the past and personal desire to possess cultural heritage resources, and is consistent with similar provisions elsewhere in the guidelines. See, e.g., §§2Q2.1(b)(1) and 2B5.3(b)(3). A two-level enhancement is also proposed if the offense involved a pattern of similar violations, which is defined as "two or more civil or administrative adjudications for misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit."

Fourth, the amendment proposes two-level enhancements that increase the offense level if the offense involves specially protected resources from specially protected places. A two-level enhancement will attach

if the offense involves a resource from one of seven locations particularly designated by Congress as dedicated solely to the preservation of the resource and further education of the public. An additional two-level increase attaches to four specific types of cultural heritage resources that have merited special treatment in federal law.

Fifth, the amendment proposes a two-level enhancement and a minimum offense level of level 14 if a firearm was possessed or a dangerous weapon (including a firearm) was brandished. This enhancement reflects the harm caused by the increased danger of violence and risk to law enforcement officers and innocent passers-by in vast expanses of land, and is consistent with similar provisions elsewhere in the guidelines. See, e.g., §2B1.1(b)(11)(B).

Sixth, an upward departure provision is proposed when the offense level substantially understates the seriousness of the offense. For example, if an upward departure may be warranted in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of other items such as administrative property. In such a case, the extent of the upward departure should not exceed the number of levels from the table in §2B1.1 corresponding to the dollar amount of the non-cultural heritage resources.

Seventh, the proposed guideline for cultural heritage resources contains three issues for comment. The first issue requests comment on the extent of the proposed enhancement in subsection (b)(4)(B) regarding "pattern of similar violations" and the proposed definition in Application Note 5. The second issue requests comment on proposed Application Note 7 regarding the nature of a structured upward departure for cases involving offense conduct that damages or destroys both cultural heritage resources and non-cultural heritage resources, specifically, is it appropriate to use the applicable numbers of levels from the loss table or the loss commentary in §2B1.1 for the determination of the non-cultural heritage resource harm caused. The second issue also requests comment on whether an upward departure should be provided if the value of the cultural heritage resource, as determined under proposed subsection (b)(1) and Application Note 2, underestimates its actual value. The third issue requests comment regarding whether the proposed guideline should include an enhancement for the use of explosives.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline.

Proposed Amendment:

§2B1.5. **Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources**

(a) Base Offense Level: [**8**]

(b) Specific Offense Characteristics

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

(2) If the offense involved a cultural heritage resource from, or located, prior to the offense, on or in (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by **2** levels.

(3) If the offense involved a cultural heritage resource constituting (A) human

remains; (B) a funerary object; (C) designated archaeological or ethnological material; or (D) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.

(4) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by **2** levels.

(5) If (A) a dangerous weapon (including a firearm) was brandished; or (B) a firearm was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541-546, 641, 661, 666, 668, 1152-1153, 1163, 1170, 1361, 2314-2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Meaning of "Cultural Heritage Resource".—For purposes of this guideline, "cultural heritage resource" means any of the following:

(A) A historic property, as defined in 16 U.S.C. § 470w(5).

(B) A historic resource, as defined in 16 U.S.C. § 470w(5).

(C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312).

(D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3)(see also 43 C.F.R. 10.2(d)).

(E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.

(F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a).

2. Value of the Cultural Heritage Resources.—This note applies to the determination of the value of the cultural heritage resources for purposes of subsection (b)(1).

(A) In General.—Except as provided in subdivision (B), the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair.

(B) Archaeological Resources.—The value of an archaeological resource is (i) the greater of its commercial value or its archaeological value; and (ii) the cost of restoration and repair.

(C) Definitions.—For purposes of this application note:

(i) "Archaeological value" of an archaeological resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting

laboratory analysis, and preparing reports as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)

(ii) "Commercial value" of a cultural heritage resource, including an archaeological resource, means the fair market value of the cultural heritage resource. In the case of a cultural heritage resource that has been damaged as a result of the offense, the fair market value shall be determined using the condition of the cultural heritage resource prior to commission of the offense, if the prior condition can be determined. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)

(iii) "Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

(D) Determination of Value in Cases Involving A Variety of Cultural Heritage Resources.—In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this note.

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

(A) "Museum" has the meaning given that term in 18 U.S.C. § 668(1).

(B) "National cemetery" has the meaning given that term in Application Note 1 of §2B1.1 (Theft, Property Destruction, and Fraud).

(C) "National Historic Landmark" has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).

(D) "National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.

(E) "National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).

(F) "National park system" has the meaning given that term in 16 U.S.C. § 1c(a).

(G) "World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):

(A) "Designated archaeological or ethnological material" has the meaning given that term in 19 U.S.C. § 2601(7).

(B) "Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

(C) "Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(D) "Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).

5. Enhancements in Subsection (b)(4).—

(A) Pecuniary Gain.—For purposes of subsection (b)(4)(A), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) Pattern of Similar Violations.—For purposes of subsection (b)(4)(B), "pattern of similar violations" means two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.

6. Dangerous Weapons Enhancement.—For purposes of subsection (b)(5), "brandished", "dangerous weapon", and "firearm" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

7. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if, in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources). In such a case, the extent of the upward departure should not exceed the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the dollar amount involved in the theft of, damage to, or destruction of, the items that are not cultural heritage items.

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

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(c) Cross References

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(4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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Commentary

Application Notes: * * *

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 12 through 15 as Notes 13 through 16; and by inserting after Note 11 the following:

12. Cross Reference in Subsection (c)(4).—For purposes of subsection (c)(4) "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

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(c) Cross Reference

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(1) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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Commentary

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Application Notes:

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6. For purposes of subsection (c)(1), "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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§3D1.2 Groups of Closely Related Counts

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B6.1;

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APPENDIX A - STATUTORY INDEX

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~~16 U.S.C. § 433~~	~~2B1.1, 2B1.3~~
16 U.S.C. § 470ee	2B1.5

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16 U.S.C. § 668(a)	2B1.5, 2Q2.1

16 U.S.C. § 707(b)	2B1.5, 2Q2.1
	* * *
18 U.S.C. § 541	2B1.5, 2T3.1
18 U.S.C. § 542	2B1.5, 2T3.1
18 U.S.C. § 543	2B1.5, 2T3.1
18 U.S.C. § 544	2B1.5, 2T3.1
18 U.S.C. § 545	2B1.5, 2Q2.1, 2T3.1
18 U.S.C. § 546	2B1.5
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18 U.S.C. § 641	2B1.1, 2B1.5
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18 U.S.C. § 661	2B1.1, 2B1.5
18 U.S.C. § 662	2B1.1, 2B1.5
	* * *
18 U.S.C. § 666(a)(1)(A)	2B1.1, 2B1.5
	* * *
18 U.S.C. § 668	~~2B1.1~~2B1.5
	* * *
18 U.S.C. § 1152	2B1.5
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4
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18 U.S.C. § 1163	2B1.1, 2B1.5
18 U.S.C. § 1168	2B1.1
18 U.S.C. § 1170	2B1.5
	* * *
18 U.S.C. § 1361	2B1.1, 2B1.5
	* * *
18 U.S.C. § 2232	2B1.5, 2J1.2
	* * *
18 U.S.C. § 2314	2B1.1, 2B1.5
18 U.S.C. § 2315	2B1.1, 2B1.5

Issues for Comment: *(1) The proposed amendment provides an enhancement in subsection (b)(4)(B) for a "pattern of similar violations", which proposed Application Note 5 defines as "two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit". The Commission requests comment on the extent of this enhancement. For example, in addition to civil or administrative adjudications, should the enhancement cover prior convictions for similar misconduct as well? Should the enhancement cover similar misconduct for which there has not been a civil or administrative adjudicate?*

(2) Proposed Application Note 7 provides, as an example of an upward departure that might be warranted, a structured upward departure for cases in which the offense also involved theft of, damage to, or destruction of, items that are not cultural heritage items. Instead of a structured upward departure, should the Commission provide an enhancement if the offense involved theft of, damage to, or destruction of, items that are not cultural heritage items? If so, should the extent of the enhancement correspond to the applicable number of levels from the loss table in §2B1.1 (Theft, Property Destruction, and Fraud), and should the loss commentary from §2B1.1 be used to determine the dollar amount of the theft, damage, or destruction?

Generally, should proposed Application Note 7 provide an upward departure if the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, underestimates its actual value?

(3) Should the proposed amendment include an enhancement if the offense involved the use of destructive devices?

2. Proposed Amendment: Implementation of the Foreign Corrupt Practices Act

Synopsis of Proposed Amendment: *This amendment changes the Statutory Index reference for violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 through 78dd-3, from §2B4.1(Bribery in Procurement of Bank Loan and Other Commercial Bribery) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). This change is proposed because many such violations involve public corruption of foreign officials and therefore are more like public corruption cases than commercial bribery cases. In addition, such a change arguably would better implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires the United States, as a signatory, to impose comparable sentences for foreign bribery cases as for domestic bribery cases.*

Although this proposal references all offenses under the Foreign Corrupt Practice Act to §2C1.1, an issue for comment is included regarding whether some of the offenses under that Act should continue to be referenced to §2B4.1. Although offenses under 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), and 78dd-3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2)). Other offenses involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates currently are referenced to §2B4.1. Section 2B4.1 may continue to be the appropriate guideline for offenses which do not directly involve a foreign governmental official.

Proposed Amendment:

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

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Commentary

Statutory Provisions: ~~15 U.S.C. §§ 78dd-1, 78dd-2;~~ 18 U.S.C. §§ 215, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 53, 54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government, foreign governments, or public international organizations. See Part C, Offenses Involving Public Officials, if ~~governmental~~any such officials are involved.

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Background: * * *

This guideline also applies ~~to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2, and~~ to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 872, 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

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Appendix A- Statutory Index

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15 U.S.C. § 78dd-1	~~2B4.1~~2C1.1
15 U.S.C. § 78dd-2	~~2B4.1~~2C1.1
15 U.S.C. § 78dd-3	2C1.1
15 U.S.C. § 78ff	2B1.1, ~~2B4.1~~2C1.1

Issue for Comment: *Although this proposed amendment references all offenses under the Foreign Corrupt Practice Act to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), the Commission requests comment regarding whether some of the offenses under that Act should continue to be referenced to §2B4.1. Although offenses under 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), and 78dd-3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2)). Other offenses involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates under 26 U.S.C. §§ 9012(e) and 9042(d) currently are referenced to §2B4.1. Is §2B4.1 the appropriate guideline for offenses which do not directly involve a foreign governmental official? Alternatively, should offenses under 26 U.S.C. §§ 9012(e) and 9042(d) be referenced to §2C1.1 instead of §2B4.1, inasmuch as those offenses are more akin to public bribery than to commercial bribery?*

3. Proposed Amendment: Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a)

Synopsis of Proposed Amendment: *This proposed amendment provides special rules in §4B1.1 for determining and imposing a guideline sentence when the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a Career Offender under §4B1.1 and §4B1.2. The amendment reverses the decision made by the Commission in Amendment 600 (effective November 1, 2000), that such offenses do not qualify as a crime of violence or controlled substance offense for Career Offender purposes, except as a prior conviction. Some have expressed doubt about whether that decision complies with the statutory command in 28 U.S.C. § 994(h), as construed by the United States Supreme Court in United States v. Labonte, 520 U.S. 751 (1997).*

Operationally, this amendment achieves the goals of (1) permitting such offenses, whether as the instant or prior offense of conviction, to qualify for Career Offender purposes, and (2) ensuring that, when such an instant offense establishes the defendant as a Career Offender, the resulting guideline sentence is determined under §4B1.1 using a count of conviction that has a statutory maximum of life imprisonment. The resulting consecutive sentence to be imposed on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count is at least the minimum required by statute, and may be longer to the extent necessary to achieve the total Career Offender punishment. This amendment does not change the current guideline rules forbidding application of guideline weapon enhancements when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense. Furthermore, under this amendment, when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a Career Offender, the current guideline rules for sentencing on that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count continue to apply. Accordingly, under §2K2.4, the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapters Three or Four apply to adjust the guideline sentence for that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count.

However, under this amendment, when the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count establishes the defendant as a Career Offender, which the court will determine under §§4B1.1 and 4B1.2, new special rules/instructions will apply. To determine the guideline sentence on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count, the court moves directly from §2K2.4 to §4B1.1 and applies the new Special Instruction therein, including the instructions regarding multiple counts of conviction.

Proposed Amendment:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

~~(a) If the defendant, whether or not convicted of another crime, was convicted of violating:~~

~~(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.~~

~~(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.~~

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.

(~~b~~d) Special Instructions for Fines

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. (A) Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). ~~Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction.~~ Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute.~~, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a)~~ Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

(B) Application of Subsection (b).—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under this section shall run consecutively to any other term of imprisonment.

~~A~~In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history~~, particularly~~ in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense ~~and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses~~but is not determined to be a Career Offender under §4B1.1. See Application Note 3.

(C) Application of Subsection (c).—In a case in which the defendant (i) was convicted of violating

18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under §4B1.1(c).

2. *Weapon Enhancement.—* * * *

~~*In a few cases, the offense level for the underlying offense determined under the preceding paragraphs 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 had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).*~~

3. *Chapters Three and Four.—*~~*Do*~~*Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction). For those cases covered by subsection (c), the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c). No other adjustments in Chapter Three and no provisions of Chapter Four (Criminal History and Criminal Livelihood), other than §§4B1.1 and 4B1.2, shall apply in determining the guideline sentence on a conviction under 18 U.S.C. § 924(c) or § 929(a).*

4. *Terms of Supervised Release.—* * * *

5. *Fines.—* * * *

§4B1.1. **Career Offender**

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) ~~If~~Except as provided in subsection (c), if the offense level for a career ~~criminal~~offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level*
(A)	Life	**37**
(B)	25 years or more	**34**

(C)	20 years or more, but less than 25 years	**32**
(D)	15 years or more, but less than 20 years	**29**
(E)	10 years or more, but less than 15 years	**24**
(F)	5 years or more, but less than 10 years	**17**
(G)	More than 1 year, but less than 5 years	**12**.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant (1) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under subsection (a):

(A) The offense level shall be—

(i) in the case of a conviction only of an offense under 18 U.S.C. § 924(c) or § 929(a): level **37**, decreased by the number of levels corresponding to any adjustment under §3E1.1 (Acceptance of Responsibility) that applies; or

(ii) in the case of multiple counts of conviction: the greater of (I) the offense level applicable to the counts of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count, or (II) level **37**, decreased by the number of levels corresponding to any adjustment under §3E1.1 that applies.

(B) The criminal history category shall be Category VI.

(C) The amount of the mandatory term of imprisonment that is imposed to run consecutively shall be determined as follows:

(i) A consecutive sentence of imprisonment shall be imposed on any count of conviction under 18 U.S.C. § 924(c) or § 929(a). The length of such consecutive sentence shall be at least the minimum term required by law.

(ii) After taking into account the required statutory minimum consecutive sentence under subdivision (i), the balance of the total punishment shall be allocated and imposed, to the extent possible, on the counts of conviction, other than 18 U.S.C. §§ 924(c) and 929(a), in accordance with the rules in §5G1.2 (Sentencing on Multiple Counts of Conviction), as applicable.

(iii) If the statutory minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) together with the sentence imposed on the remaining counts is less than the total punishment, then the minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) shall be increased to the extent necessary to achieve the total punishment.

* * * *

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

* * * *

Commentary

Application Notes:

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

* * * *

~~*A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).*~~

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).

* * *

~~*2. The guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction). Accordingly, do not apply this guideline if the only offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a). For provisions pertaining to an upward departure from the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a), see Application Note 1 of §2K2.4.*~~

2. Application of §4B1.1(c).—

(A) In General.—Section 4B1.1(c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) Imposition of Consecutive Term of Imprisonment.—The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under §4B1.1(c). The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) must, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. In the case of a career offender to whom §4B1.1(c) applies, typically the court will determine the applicable statutory minimum sentence, subtract that minimum from the total punishment determined for all counts considered together, impose that minimum consecutive sentence on the 18 U.S.C. § 924(c) or

§ 929(a) count, and then impose the balance of the total punishment on the other counts in accordance with the rules provided in §5G1.2 (Sentencing on Multiple Counts of Convictions). In some cases covered by §4B1.1(c), a consecutive term of imprisonment longer than the minimum required by the 18 U.S.C. § 924(c) or § 929(a) statute will be necessary in order both to achieve the required total punishment determined by the court and also comply with the applicable statutory requirements. Note that a consecutive sentence longer than the statutory minimum under 18 U.S.C.
§ 924(c) or § 929(a) will be necessary when the total guideline punishment determined by the court exceeds the aggregate statutory maximum term(s) of imprisonment on any counts other than 18 U.S.C. §§ 924(c) and 929(a) by more than the aggregate statutory minimum terms on the 18 U.S.C. §§ 924(c) and 929(a) counts.

(C) Examples.—The following examples illustrate the application of §4B1.1(c) in a variety of multiple count situations in which the 18 U.S.C. § 924(c) count establishes the defendant as Career Offender:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking crime (15 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum of 20 years applies). Applying §4B1.1(c), the court determines a combined offense level of 34 (assuming a 3-level reduction under §3E1.1), and determines that a total punishment of 300 months is appropriate. The court then imposes a minimum sentence of 60 months, as statutorily required under 18 U.S.C. § 924(c), and also as required by 18 U.S.C. § 924(c), imposes that sentence to run consecutively to a sentence of 240 months (300 - 60 = 240) imposed on the 21 U.S.C. § 841 count. Alternatively, had the court determined that a sentence of 327 months (top of the guideline range) was appropriate, it necessarily would have increased the consecutive sentence on the 18 U.S.C. § 924(c) count to 87 months.

(ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (firearm possession in furtherance of drug trafficking), one count of drug trafficking under 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum sentence of 30 years applies), and one count of violating 21 U.S.C. § 843(b) (statutory maximum of 4 years). Applying §4B1.1(c), the court determines a combined offense level of 36 and selects a total punishment of 324 months. Sentence is imposed as follows: (I) a minimum sentence of 60 months on the 18 U.S.C. § 924(c) count imposed to run consecutively to all other counts; (II) a sentence of 264 months on the 21 U.S.C. § 841 count (324 - 60 = 264 months balance of total punishment to be allocated and imposed on the non- 924(c) counts); and (III) a sentence of 48 months on the 21 U.S.C. § 843(b) count, imposed to run concurrently with the 21 U.S.C. § 841 count. Alternatively, if the court had determined that a sentence of 405 months (top of the guideline range) was appropriate, the sentence on the 21 U.S.C. § 841 count would have been increased to 345 months (405 - 60 = 345).

(iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (for possessing a firearm in two separate drug trafficking offenses), and one count of conspiracy under 21 U.S.C. § 846 (assume a statutory maximum of life and minimum of ten years is applies). The court determines, under §4B1.1(c), that the combined offense level is 42 and that a total punishment of 480 months is appropriate. As required by statute, a minimum consecutive sentence of 60 months is imposed on the first 18 U.S.C. § 924(c) count, and a minimum consecutive sentence of 300 months is imposed on the second 18 U.S.C. § 924(c) count. The balance of the total punishment, 120 months

(480 - (60 + 300) = 120), is imposed on the 21 U.S.C. § 846 count.

* * * *

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

(a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently, except as provided in §4B1.1(Career Offender).

* * *

Commentary

Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category. ~~To the extent possible,~~Except as otherwise required by law or by §4B1.1(c), the total punishment is to be imposed on each count~~. Sentences~~, and the sentences on all counts are imposed to run concurrently~~, except as required to achieve the total sentence, or as required by law~~ to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

* * *

2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Special Instruction).—Subsection (a) applies if a statute (~~1~~A) specifies a term of imprisonment to be imposed; and (~~2~~B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment). ~~The~~Except for certain Career Offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is ~~determined~~ the minimum required by the statute of conviction, and is independent of ~~a~~the guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

4. Proposed Amendment: Expansion of Official Victims Enhancement

Synopsis of Proposed Amendment: *This amendment proposes to expand the persons who may qualify as an official victim for purposes of the enhancement in §3A1.2 (Official Victim). Specifically, this proposed amendment responds to United States v. Walker, 202 F.3d 181 (3d Cir. 1999), which held that the enhancement under §3A1.2(b) was not applicable in the case of a defendant prison inmate who attacked his supervisor, a food service department employee at the prison. Walker held that the work supervisor was not a corrections officer within the meaning of §3A1.2. The proposed amendment amends §3A1.2(b) to apply to assaults of any prison employee or other person retained or designated by the prison to perform duties within the prison. The amendment also limits application of the enhancement, in the case of assaults on corrections officers and prison employees, to offenses that occurred while the defendant was in the custody or control of the correctional facility or prison.*

A general request for comment follows regarding the appropriate scope of coverage under the enhancement (i.e., who should be considered an official victim for purposes of proposed subsection (b)(2)).

Proposed Amendment:

§3A1.2. Official Victim

If --

* * *

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was—

(1) a law enforcement officer, or

(2) a corrections officer or prison employee, in the case of an offense that occurred 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,

assaulted such officer or employee in a manner creating a substantial risk of serious bodily injury,

increase by **3** levels.

Commentary

Application Notes:

* * *

5. Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement officer, ~~or~~ corrections officer, or prison employee, committed in the course of, or in immediate flight following, another offense~~, such as bank robbery~~. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims (such as a bank robbery), its applicability is limited to assaultive conduct against law enforcement officers, ~~or~~ corrections officers, or prison employees that is sufficiently serious to create at least a "substantial risk of serious

bodily injury" and that is proximate in time to the commission of the offense.

"Prison employee", for purposes of subsection (b)(2), includes any individual retained or designated by a prison or other correctional facility to perform any duty or function within the prison or other correctional facility, regardless of whether the individual is compensated for the performance of the duty or function and whether the individual technically is an employee of the prison or other correctional facility. For example, the term "prison employee" includes an individual employed by the prison as a kitchen supervisor, as well as a nurse who, under contract, provides medical services to prisoners in the prison health facility.

* * *

Issue for Comment: *The Commission requests comment on the appropriate scope of the enhancement provided in §3A1.2(b)(2). Are there particular individuals or groups of individuals against whom assaults by the defendant in a correctional or prison setting should subject the defendant to enhanced punishment? For example, should the enhancement be expanded, further than that proposed in the amendment, to include individuals who assist law enforcement officers in the performance of official duties? Should the enhancement cover individuals who perform functions within a prison (as an employee, under contract, or otherwise) but who do not have regular contact with, or exercise any supervision of, prisoners (e.g., an electrician under contract who repairs wiring in a building typically off-limits to prisoners)? Should the enhancement cover, for example, a minister or attorney who is assaulted while providing volunteer services to inmates?*

5. Proposed Amendment: Acceptance of Responsibility

Synopsis of Proposed Amendment: *This proposal amends §3E1.1 (Acceptance of Responsibility) by (1) deleting subsection (b)(1) which provides an additional one-level reduction if the defendant timely provides complete information to the government concerning his own involvement in the offense; and (2) resolving a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction.*

Section 3E1.1(b) provides alternative reductions for either (1) timely providing complete information to the government concerning the defendant's own involvement in the offense; or (2) timely notifying authorities of the defendant's intention to enter a plea of guilty. Subsection (b)(2) specifically addresses the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. However, it has been argued that subsection (b)(1) undermines the incentive to plead guilty in subsection (b)(2), because the defendant can receive the reduction even if the defendant has caused the government and the court to devote substantial resources to preparing the case for trial. Under this proposal, a defendant who accepts responsibility for the offense would receive a two-level reduction under subsection (a), and an additional one-level reduction only if the defendant timely notifies authorities of his intent to plead guilty. This proposal is intended to save both judicial and governmental resources by providing defendants a stronger incentive to timely plead guilty.

This amendment also resolves a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. The majority of circuits have held that the sentencing court may consider new criminal conduct (i.e., conduct occurring after the defendant has been charged for the instant offense), such as subsequent drug use or the commission of the new offense, when determining whether an adjustment for acceptance of responsibility is warranted. The Sixth Circuit, the sole minority circuit, has held that the court may not look at post-indictment conduct unrelated to the offense of conviction when assessing the defendant's acceptance of responsibility for the underlying offense (see United States v. Morrison, 983 F.2d 730 (6th Cir. 1993)). This amendment adopts the majority view by making clear that a defendant who commits another offense while pending trial or sentencing on the instant offense ordinarily is not entitled to a reduction under this guideline.

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

* * *

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and the defendant ~~has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:~~

~~(1) timely providing complete information to the government concerning his own involvement in the offense; or~~

~~(2) timely notifying~~ timely* notified authorities of his intention to enter a plea of

*The Federal Register publication of this proposed amendment indicates that the amendment proposes to strike the word "timely" from the provision. However, it was the Commission's intent to retain the timeliness requirement. The word "timely" was inadvertently struck in the proposal. The Commission's January 2002 Federal

guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by **1** additional level.

Commentary

Application Notes:

* * *

1. *Appropriate Considerations in Determining Applicability of Acceptance of Responsibility.—*

* * *

2. *Convictions by Trial.—* * * *

3. *Application of Subsection (a).—* * * *

4. *Inapplicability of Adjustment.—~~Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.~~ A defendant who (A) receives an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice); or (B) commits another offense while pending trial or sentencing on the instant offense, ordinarily is not entitled to a reduction under this guideline.* [*There may, however, be extraordinary cases in which an adjustment under this guideline is warranted even though the defendant received an enhancement under §3C1.1, or committed another such offense, or both.*]

5. *Deference on Review.—* * * *

6. *Application of Subsection (b).—~~Subsection (a) provides a 2-level decrease in offense level.~~ Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who ~~has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b)~~timely notified authorities of the defendant's intention to enter a guilty plea. The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)~~(1) or (2)~~ will occur particularly early in the case. For example, to qualify under subsection (b)~~(2)~~, the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.*

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense ~~by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action)~~ is appropriately

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Register notice provided notice of a technical amendment to the proposal in order to maintain the "timeliness" requirement.

given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and ~~has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b)~~timely notified authorities of the defendant's intention to enter a guilty plea. Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

6. Proposed Amendment: Consent Calendar Amendments (Part I)

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

(1) Clarifies that language in §5D1.2(c) (recommending the maximum term of supervised release for sex offenders) is a policy statement;

(2) Conforms the language in §2B4.1(b)(2) concerning offenses that "affect a financial institution" with subsection (b)(12) of §2B1.1 (Larceny, Embezzlement, and other forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit).

(3) Inserts a missing "or" in §§2C1.7(b)(1)(A) and 2Q1.6(a)(3).

(4) (A) Updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillory J. Farias and Samantha Reid Date Rape Prevention Act; and (B) corrects references to the new chemical quantity tables in §2D1.11.

(5) Corrects a change to the commentary of §2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package.

(6) Corrects a grammatical error in Note (D) of §2T1.1(c)(1) by replacing "subdivisions (A), (B), or (C)" with "subdivision (A), (B), or (C)".

(7) Adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide DNA if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000. Pursuant to section 3 of this Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (e.g., murder, kidnapping).

(8) Deletes from Application Note 5 of §5E1.2 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.

(9) Inserts a missing "Background" title in §5F1.7 (Shock Incarceration).

(10) Conforms Part A of Chapter Seven and §7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the condition of intermittent confinement as a condition of supervised release.

(11) Updates statutory references in §5F1.5 (Occupational Restrictions).

(12) Refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index).

(13) Repromulgates amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to §4B1.4 (Armed Career Criminal) from amendment 568.

(14) Responds to new legislation as follows:

(A) Updates, in §2B1.1, a statutory reference in the definition of "means of identification" to correspond to a redesignation made by the Internet False Identification Prevention Act of 2000, Pub. L. 106–578, Dec. 28, 2000, 114 Stat. 305.

(B) References in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106–569, Dec. 27, 2000, __ Stat. __. Section 5410(b) of title 42, which provides that knowing and willful violations of a state's installation program standards shall be punishable as a Class A misdemeanor, is referenced to §2N2.1. Section 14905 of title 42, which provides a criminal penalty of a $250,000 fine and five years' imprisonment for equity skimming, is referenced to §2B1.1.

(C) References 16 U.S.C. § 1437(c) to §2A2.4 (Obstructing or Impeding Officers). Section 1437, as amended by the National Marine Sanctuaries Act of 2000, Pub. L. 106–513, Nov. 13, 2000, 114 Stat. 2387, prohibits the interference with the enforcement of conservation activities authorized in title 16, United States Code, including refusing to permit any officer authorized to enforce such title to board a vessel for purposes of conducting a search or inspection in connection with the enforcement of title 16. The Act provides a statutory maximum of six months, or if the offense involved the use of a dangerous weapon or resulted in bodily injury, a statutory maximum of 10 years. Section 1437(c) seems sufficiently similar to other offenses referenced to §2A2.4 to warrant reference to this guideline.

(15) Proposes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386, pertaining to the new offense at 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion). Section 1591 prohibits knowingly transporting or harboring any person, or benefitting from such transporting or harboring, knowing either that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act, or that the person is not 18 years old and will be forced to engage in a commercial sex act.

In response to the Act, the Commission, in March 2001, passed an amendment that (A) referenced 18 U.S.C. § 1591 to §§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (B) provided an encouraged upward departure in §2G1.1 to address cases in which (i) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (ii) the offense involved more than 10 victims. Staff had recommended additional changes to §2G1.1 at that time but because adequate public notice regarding those changes had not been provided, staff recommended that the changes be made during this amendment cycle.

This amendment proposes three substantive changes to §2G1.1. First, this amendment broadens the conduct covered by the guideline to all commercial sex acts. Currently, the conduct covered by the guideline is limited to prostitution. Second, this amendment expands the "force or coercion" prong of §2G1.1(b)(1) to also cover offenses involving fraud. This change addresses the increased punishment provided by section 1591 for offenses effected by "force, fraud, or coercion". Third, after reviewing again the statute and the encouraged upward departure note that the Commission passed in March, staff recommends deleting the portion of the note pertaining to the age of the victim because it encourages a departure for

conduct arguably covered by the guideline in subsection (b)(2).

Proposed Amendment:

(1) Clarifies That §5D1.2(c) Is a Policy Statement

§5D1.2. Term of Supervised Release

* * *

(c) (Policy Statement) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.

* * *

(2) Conforming Amendment to §2B4.1

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(b) Specific Offense Characteristics

* * *

~~(2) If the offense --~~

~~(A) substantially jeopardized the safety and soundness of a financial institution; or~~

~~(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,~~

~~increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.~~

(2) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

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

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

* * *

Commentary

* * *

Application Notes:

* * *

~~*4. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*~~

~~*5. "The defendant derived more than $1,000,000 in gross receipts from the offense," as used in subsection (b)(2)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*~~

4. Gross Receipts Enhancement under Subsection (b)(2)(A).—

(A) In General.—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

(B) Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

5. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.

* * *

(3) Amendment to Insert Missing "Or" in §2C1.7(b)(1)(A) and 2Q1.6(a)(3)

§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

(b) Specific Offense Characteristic

(1) (If more than one applies, use the greater):

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i) exceeded $2,000 but did not exceed $5,000, increase by **1** level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount~~.~~; or

* * *

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

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

* * *

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault); or

* * *

(4) Updates Statutory References in §§2D1.9, 2D1.11, and 2D1.13, Corrects References to Quantity Table in §2D1.11

§2D1.9. Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy

(a) Base Offense Level: **23**

Commentary

Statutory Provision: 21 U.S.C. § 841(ed)(1).

* * *

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

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e) ~~below~~, as appropriate.

* * *

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

Listed Chemicals and Quantity	**Base Offense Level**

* * *

---

*Notes:

(A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) ~~of this guideline~~ or (e) of this guideline, as appropriate.

* * *

Commentary

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

* * *

§2D1.13. Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(~~d~~c)(3), (~~g~~f)(1), 843(a)(4)(B), (a)(8).

* * *

APPENDIX A - STATUTORY INDEX

*** * ***

21 U.S.C. § 841(~~d~~c)(1),(2)	2D1.11
21 U.S.C. § 841(~~d~~c)(3)	2D1.13
21 U.S.C. § 841(~~e~~d)	2D1.9
21 U.S.C. § 841(~~g~~f)(1)	2D1.11, 2D1.13

(5) Conforms Reference to Consolidated Theft and Fraud Guideline

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

* * *

Commentary

* * *

Application Notes:

* * *

2. The cross reference at subsection (b)(1) addresses cases in which the offense involved ~~theft, property destruction, or~~ fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., bribery).

* * *

(6) Corrects Grammatical Error in §2T1.1(c)(1)(D)

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

* * *

(c) Special Instructions

For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

* * *

(D) If the offense involved (i) conduct described in subdivisions (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

* * *

(7) Adds New Mandatory Condition of Probation and Supervised Release to §§5B1.3 and 5D1.3

§5B1.3. Conditions of Probation

(a) Mandatory Conditions–

* * *

(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.;

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

* * *

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions–

* * *

(7) a defendant convicted of a sexual offense as described in 18 U.S.C.

§ 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.;

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

* * *

(8) Deletes Incorrect Statement Regarding Fines and the Clean Air Act

§5E1.2. Fines for Individual Defendants

* * *

Commentary

Application Notes:

* * *

5. Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to $50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act~~; and 42 U.S.C. § 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act~~.

(9) Inserts Missing "Background" Title

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background:

* * *

(10) Updates Chapter Seven to Reflect Status of Current Law Regarding Intermittent Confinement and Provides Explanatory Note

CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

* * *

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

With the exception of ~~intermittent confinement~~residency in, or participation in the program of, a community corrections facility*, which is available only for a sentence of probation, the conditions of supervised release authorized by statute are the same as those for a sentence of probation. When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at subsection (b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and re-designated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

* * *

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

* * *

Commentary

Application Notes:

* * *

5. Intermittent confinement is authorized only as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)~~(11)~~(10). ~~Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d).~~*

*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at subsection (b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and re-designated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

* * *

(11) Updates Statutory References in §5F1.5

§5F1.5. Occupational Restrictions

* * *

Commentary

Background: The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563~~(b)(6)~~(b)(5), or supervised release, 18 U.S.C. § 3583(d). Pursuant to § 3563~~(b)(6)~~(b)(5), a court may require a defendant to:

> *[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.*

* * *

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563~~(b)(6)~~(b)(5) if ~~"~~the sentence includes ~~. . .~~ a more limiting condition of probation or supervised release ~~under section 3563(b)(6) . . .~~ than the maximum established in the guideline.~~"~~ See 18 U.S.C. § 3742(a)(3)~~(A)~~. The government may appeal if the sentence includes a ~~"~~less limiting~~"~~ condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)~~(A)~~.

(12) Refers 18 U.S.C. § 2245 to §2A1.1

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2244	2A3.4
18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2251(a),(b)	2G2.1

(13) Corrects Inadvertent Omission from Earlier Amendment

Amendment 568, effective November 1, 1997, is repromulgated with the following additional change:

§4B1.4. Armed Career Criminal

* * *

(b) The offense level for an armed career criminal is the greatest of:

* * *

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in ~~§4B1.2(1)~~§4B1.2(a) and (b), respectively, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(14) Responds to New Legislation

(A) Updates Statutory Reference for "Means of Identification"

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

* * *

Commentary

* * *

Application Instructions:

* * *

7. Application of subsection (b)(9).—

* * *

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028~~(d)(3)~~(d)(4), 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) Appendix A (Statutory Index) References for New Offenses

APPENDIX A - STATUTORY INDEX

16 U.S.C. § 1417(a)(5), (6), (b)(2)	2A2.4
16 U.S.C. § 1437(c)	2A2.4
	* * *
42 U.S.C. § 5157(a)	2B1.1
42 U.S.C. § 5410(b)	2N2.1
	* * *
42 U.S.C. § 9603(d)	2Q1.2
42 U.S.C. § 14905	2B1.1

(15) Changes to Human Trafficking Guideline

Promoting ~~Prostitution~~A Commercial Sex Act or Prohibited Sexual Conduct

2G1.1. Promoting ~~Prostitution~~A Commercial Sex Act or Prohibited Sexual Conduct

* * *

(b) Specific Offense Characteristics

(1) If the offense involved (A) ~~prostitution~~ a commercial sex act; and (B) the use of physical force, fraud, or coercion ~~by threats or drugs or in any manner~~, increase by **4** levels.

(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by **4** levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by **2** levels.

* * *

(4) If subsection (b)(3) does not apply; and—

(A) the offense involved the knowing misrepresentation of a participants identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~a commercial sex act; or

(B) a participant otherwise unduly influenced a minor to engage in ~~prostitution~~a commercial sex act,

increase by **2** levels.

(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by **2** levels.

(c) Cross References

* * *

(3) If the offense did not involve promoting ~~prostitution~~a commercial sex act, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) Special Instruction

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

Commentary

* * *

Application Notes:

1. For purposes of this guideline—

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

* * *

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

"Victim" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, ~~prostitution~~a commercial sex act or prohibited sexual conduct, whether or not the person consented to the ~~prostitution~~ commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion~~,~~ that occurs as part of a ~~prostitution~~ commercial sex act offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

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

4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, ~~prostitution~~ a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts

involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of ~~prostitution~~ a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

* * *

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

The misrepresentation to which the enhancement in subsection (b)(4)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~ a commercial sex act. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

* * *

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(4)(B), that such participant unduly influenced the minor to engage in ~~prostitution~~ a commercial sex act. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

8. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~ a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.

* * *

11. The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting ~~prostitution~~a commercial sex act, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used; i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

12. Upward Departure Provision~~s~~.—An upward departure may be warranted ~~in either of the following circumstances~~ if the offense involved more than 10 victims.~~:~~

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

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

* * *

7. Proposed Amendment: Terrorism

Overview: *On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56. Among other things, the Act created a number of new terrorism, money laundering, and currency offenses, and increased the statutory maximum penalties for certain pre-existing offenses. In light of this legislation, the Commission is assessing the Guidelines' treatment of terrorism offenses, and certain money laundering and currency offenses as they may be related to terrorism.*

This amendment cycle, the Commission is interested in considering amending the guidelines as they pertain to these newly created offenses and those offenses modified by the Act. Additionally, the Commission is requesting comment regarding the efficacy of guideline 3A1.4, the sentencing enhancement for terrorism. The proposed amendment provides a definition for terrorism for certain money laundering and immigration offenses. In addition, the proposed amendment contains a number of modifications to existing guidelines, the statutory index, the terrorism adjustment, and provides issues for comment.

Synopsis of Proposed Amendment: *This is a multi-part amendment proposed in response to the USA PATRIOT Act of 2001 (the Act) and the Commission's assessment of the guidelines' treatment of offenses involving terrorism. Parts (A) through (E) address offenses that involve, or potentially involve, terrorism. Providing guideline treatment for these offenses in Chapter Two (Offense Conduct) is important, in part, to ensure applicability of the Chapter Three adjustment for terrorism, §3A1.4. Specifically, Parts (A) through (E) of this amendment provide guideline treatment (or issues for comment) for the following: (A) new predicate offenses to federal crimes of terrorism; (B) other predicate offenses to federal crimes of terrorism that are not currently referenced in the Statutory Index; (C) increases in statutory maximum penalties for predicate offenses to federal crimes of terrorism that currently are referenced in the Statutory Index; (D) penalties for terrorism conspiracies; and (E) issues related to the terrorism adjustment in §3A1.4.*

Part (F) of this amendment addresses money laundering provisions of the Act. Part (G) addresses currency and counterfeiting provisions of the Act. Part (H) addresses miscellaneous issues.

Part (A): New Predicate Offenses to Federal Crimes of Terrorism

Synopsis of Proposed Amendment: *This amendment amends Chapter Two, Part A, Subpart 5 (Air Piracy) to include offenses against mass transportation systems under 18 U.S.C. § 1993 within the scope of that Subpart and provides references in the Statutory Index to a number of guidelines. Section 1993, added by section 801 of the Act, prohibits (1) willfully wrecking, derailing, setting fire to, or disabling a mass transportation system; (2) willfully or recklessly placing any biological agent or toxin for use as a weapon or destructive device on or near a mass transportation system vehicle or ferry; (3) willfully or recklessly setting fire to, or placing any biological agent or toxin for use as a weapon or destructive device in or near a mass transportation system garage, terminal, structure, supply, or facility; (4) willfully removing appurtenances from, damaging, or otherwise impairing the operation of a mass transportation signal system without authorization; (5) willfully or recklessly interfering with, disabling, or incapacitating any dispatcher, driver, captain, or person employed in dispatching, operating, or maintaining a mass transportation system; (6) committing an act, including the use of a dangerous weapon, with intent to cause death or serious bodily injury to an employee or passenger of a mass transportation system; (7) conveying or causing to be conveyed false information, knowing the information to be false, concerning an attempt to do any act prohibited by this section; and (8) attempting, threatening, or conspiring to do any of the above acts. The maximum term of imprisonment is 20 years, or life imprisonment if the offense results in death.*

The amendment also includes several issues for comment, including an issue regarding how hoaxes should be treated and an issue regarding how the guidelines should treat offenses involving the conveying of false information and threats under 18 U.S.C. § 1993(a)(7) and (8) and under 49 U.S.C. § 46507. Section 46507 prohibits (i) conveying or causing to be conveyed false information, knowing the information to be false, concerning an air piracy and similar offenses under title 49, United States Code, and (ii) threatening to commit air piracy or similar offenses under title 49, United States Code, having the apparent determination and will to carry out the threat. The maximum term of imprisonment is 5 years. Currently, section 46507 offenses are not listed in the Statutory Index.

This amendment also references the new offense at 49 U.S.C. § 46503 to §2A5.2 (Interference with Flight Crew Member or Flight Attendant). That offense, created by section 114 of the Aviation and Transportation Security Act, prohibits an individual in an area within a commercial service airport in the United States from assaulting a Federal, airport, or air carrier employee who has security duties within the airport, thereby interfering with the performance of the employee's duties or lessening the ability of that employee from performing those duties. The maximum term of imprisonment is 10 years, or, if the individual used a dangerous weapon in committing the assault or interference, any term of years or life.

The amendment expands the guideline covering nuclear, biological, and chemical weapons, §2M6.1, to cover new offenses created by section 817 of the Act involving possession of biological agents, toxins, and delivery systems. Specifically, section 817 added a new offense at 18 U.S.C. § 175(b), which prohibits a person from knowingly possessing any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose. The maximum term of imprisonment is 10 years. Section 817 also added a new offense at 18 U.S.C. § 175b, which prohibits certain classes of individuals from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any biological agent or toxin, or receiving any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent in applicable federal regulations. The maximum term of imprisonment is 10 years.

The amendment also proposes to amend the Statutory Index to reference 18 U.S.C. § 2339 to §§2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). This offense prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit, one of several enumerated offenses. The maximum statutory term of imprisonment is 10 years.

Proposed Amendment (Part (A)):

5. AIR PIRACY, OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS

* * *

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry

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

(1) **30**, if the offense involved intentionally endangering the safety of: (A) ~~the~~ an aircraft; (B) a mass transportation vehicle or a ferry; or (C) ~~and passengers~~ any person in, upon, or near an aircraft, a mass transportation vehicle, or a ferry, with the intent to endanger the safety of an aircraft, a mass transportation

vehicle, or a ferry, during the course of its operation; ~~or~~

(2) **18**, if the offense involved recklessly endangering the safety of: (A) ~~the~~ an aircraft; (B) a mass transportation vehicle or a ferry; or (C) ~~and passengers~~ any person in, upon, or near an aircraft, a mass transportation vehicle, or a ferry, with the intent to endanger the safety of an aircraft, a mass transportation vehicle, or a ferry, during the course of its operation; ~~or~~

(3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or

(4) **9**.

Commentary

Statutory Provisions: 18 U.S.C. § 1993(a)(4), (5), (6); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definition.—For purposes of this guideline, "mass transportation" has the meaning given that term in 49 U.S.C. § 5302(a)(7).

Background: An adjustment is provided where the defendant intentionally or recklessly endangered the safety of ~~the~~an aircraft, a mass transportation vehicle, or a ferry, or ~~and passengers~~any person in, upon, or near an aircraft, a mass transportation system, or a ferry. The offense of carrying a weapon aboard an aircraft, which is proscribed by 49 U.S.C. § 46505, is covered in §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).

* * *

Issues for Comment: *The Commission requests comment regarding whether §2A5.2 should be amended to provide an enhancement or a cross-reference to the homicide guidelines if death results, and also whether a specific offense characteristic should be added if the offense endangered or harmed multiple victims. In order to take into account aggravating conduct under 49 U.S.C. § 46503, should §2A5.2 provide an enhancement for assaulting airport security personnel? Alternatively, should there be a more general enhancement in that guideline for jeopardizing the security of an airport facility, mass transportation vehicle, or ferry? Should the Commission limit application of such an enhancement so that it does not apply to assaults that do not jeopardize the overall safety or security of an airplane, mass transportation vehicle, or ferry?*

The Commission also requests comment regarding how the guidelines should treat offenses involving the conveying of false information and threats under 18 U.S.C. § 1993(a)(7) and (8) and under 49 U.S.C. § 46507. Section 1993(a)(7) and (8) prohibit conveying or causing to be conveyed false information, knowing the information to be false, concerning an attempt to do any act prohibited by this section, and attempting, threatening, or conspiring to do any of the above acts. Section 46507 prohibits (i) conveying or causing to be conveyed false information, knowing the information to be false, concerning an air piracy and similar offenses under title 49, United States Code, and (ii) threatening to commit air piracy or similar offenses under title 49, United States Code, having the apparent determination and will to carry out the threat. Currently, section 46507 offenses are not listed in the Statutory Index. Should the offense levels for such cases be the same as the offense levels that would pertain if the threatened offense (or the offense about which false information had been

conveyed) had actually been committed, or should the guidelines provide a reduction in offense level for such cases?

The Commission also requests comment regarding whether any of the base offense levels in §2A5.2 should be increased to cover offenses under 18 U.S.C. § 1993 and 49 U.S.C. § 46503.

The Commission generally requests comment on how the guidelines should treat hoaxes concerning attempts to commit any act of terrorism. Should a hoax be treated the same as the underlying offense which was the object of the hoax?

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

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

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

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

(3) **20**, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear by-product material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry out the threat~~.~~; or

(4) [**14-22**], if the defendant (A) was a restricted person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 175(b) or § 175b.

* * *

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Nuclear material" has the meaning given that term in 18 U.S.C. § 831(f)(1).

"Restricted person" has the meaning given that term in 18 U.S.C. § 175b(b)(2).

Issue for Comment: *The Commission requests comment regarding whether the specific offense characteristics in §2M6.1(b)(1) and (b)(3) should be applicable to offenses under 18 U.S.C. §§ 175b and 175(b).*

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 175	2M6.1
18 U.S.C. § 175b	2M6.1

* * *

18 U.S.C. § 1992	2A1.1, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. § 1993(a)(1)	2K1.4
18 U.S.C. § 1993(a)(2)	2K1.4, 2M6.1
18 U.S.C. § 1993(a)(3)	2K1.4, 2M6.1
18 U.S.C. § 1993(a)(4)	2A5.2, 2B1.1
18 U.S.C. § 1993(a)(5)	2A5.2
18 U.S.C. § 1993(a)(6)	2A2.1, 2A2.2, 2A5.2

* * *

18 U.S.C. § 2332a	2K1.4, 2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1

* * *

49 U.S.C. § 46502(a), (b)	2A5.1, 2X1.1
49 U.S.C. § 46503	§2A5.2

* * *

Part (B): Pre-existing Predicate Offenses to Federal Crimes of Terrorism Not Covered by the Guidelines

Synopsis of Proposed Amendment: *A number of offenses that currently are enumerated in 18 U.S.C. § 2332b(g)(5) as federal crimes of terrorism are not listed in the Statutory Index (Appendix A). This means that the court needs to look for an analogous Chapter Two guideline for these offenses. The amendment proposes a number of Statutory Index references, as well as modifications to various Chapter Two guidelines, for these offenses.*

Specifically, 18 U.S.C. § 2332b(a)(1), prohibits, as part of conduct transcending national boundaries and in certain enumerated circumstances, killing, maiming, committing an aggravated assault, or creating a substantial risk of serious bodily injury by destroying or damaging real or personal property. The maximum statutory penalty for such offenses is life imprisonment. The amendment proposes to reference these offenses to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, and 2A2.2, as
§ 2332b offenses are by definition offenses against the person and therefore are analogous to offenses currently referenced to those guidelines.

The amendment also provides an issue for comment on how the Commission should treat threat cases under 18 U.S.C. § 2332b(a)(2), which prohibits threats to commit an offense under 18 U.S.C. § 2332b(a)(1). Those offenses prohibit, as part of conduct transcending national boundaries and in certain enumerated circumstances, killing, maiming, committing an aggravated assault, or creating a substantial risk of serious bodily injury by destroying or damaging real or personal property. (The amendment also proposes to reference 18 U.S.C. § 2332b(a)(2) to §§2A1.5 and 2A2.1, to the extent attempt or conspiracy to commit murder is involved.). The maximum term of imprisonment for threats to commit an offense under 18 U.S.C. § 2332b(a)(1) is ten years.

This amendment also creates a new guideline, at 2M6.3 (Providing Material Support to Terrorists and Foreign Terrorist Organizations), for the following two offenses:

(1) 18 U.S.C. § 2339A, which prohibits the provision of material support or resources to terrorists, knowing or intending that they will be used in the preparation for, or in carrying out, specified crimes (i.e., those designated as predicate offenses for "federal crimes of terrorism") or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation. The maximum term of imprisonment is 15 years.

(2) 18 U.S.C. § 2339B, which prohibits the provision of material support or resources to a foreign terrorist organization. The maximum term of imprisonment is 15 years.

An issue for comment is included on how the new guideline proposed to be added at §2M6.3 should cover the wide variety of conduct encompassed by the offenses at 18 U.S.C. §§ 2339A and 2339B, and whether there exists sufficiently analogous guidelines for these offenses. Further, the Commission requests comment on whether 18 U.S.C. §§ 2339A and 2339B offenses should be referenced to the same or different guidelines. For example, should § 2339A be referenced to §2X2.1 (Aiding and Abetting) in a case in which the offense occurred prior to the underlying terrorism offense, and be referenced to §2X3.1 (Accessory After the Fact) in a case in which the offense occurred after the underlying terrorism offense. Should § 2339B be referenced to §2M5.1?

The amendment also proposes to reference torture offenses under 18 U.S.C. § 2340A to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping,

Abduction, Unlawful Restraint). The statutory maximum penalty for this offense is 20 years imprisonment, or life imprisonment if death results. "Torture" is defined in 18 U.S.C. § 2340(1) as "an act committed by a person under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control". Although this offense has not been listed in the Statutory Index for some time, reference in the Statutory Index is recommended at this time because the offense is now a predicate offense that may qualify as a "federal crime of terrorism".

The amendment also proposes to reference 49 U.S.C. § 60123(b)(damaging or destroying an interstate gas or hazardous liquid pipeline facility) to §§2B1.1 (Theft, Property Destruction, and Fraud), 2K1.4 (Arson; Property Damage by Use of Explosives), 2M2.1 Destruction of, or Production of Defective, War Material, Premises, or Utilities), and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities). The maximum penalty is 20 years, or life imprisonment if the offense resulted in the death of any person. Although this offense has not been listed in the Statutory Index for some time, reference in the Statutory Index is recommended at this time because the offense is now a predicate offense that may qualify as a "federal crime of terrorism". An issue for comment is included regarding which, if any, of the guidelines listed above are appropriate for these offenses.

Proposed Amendment (Part B):

6. NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MATERIALS, AND OTHER WEAPONS OF MASS DESTRUCTION; PROVIDING MATERIAL SUPPORT TO TERRORISTS

*** * ***

§2M6.3. Providing Material Support or Resources to Terrorists or Designated Foreign Terrorist Organizations

(a) Base Offense Level: **[26][32]**

Commentary

Statutory Provisions: 18 U.S.C. §§ 2339A, 2339B.

Application Note:

1. Application of Terrorism Adjustment.—An offense covered by this guideline is not precluded from (A) application of the adjustment in §3A1.4 (Terrorism), or (B) if the adjustment does not apply, an upward departure under Application Note 3 of §3A1.4.

APPENDIX A - STATUTORY INDEX

*** * ***

18 U.S.C. § 2332a	2K1.4, 2M6.1

18 U.S.C. § 2332b(a)(1)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.2
18 U.S.C. § 2332b(a)(2)	2A1.5, 2A2.1, 2M6.3
18 U.S.C. § 2339A	2M6.3
18 U.S.C. § 2339B	2M6.3
18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.2, 2A4.1
18 U.S.C. § 2342(a)	2E4.1
	* * *
49 U.S.C. 46506	2A5.3
49 U.S.C. 60123(b)	2B1.1, 2K1.4, 2M2.1, 2M2.3

* * *

Issues for Comment: *The Commission requests comment on the appropriate treatment in the guidelines for threat cases under 18 U.S.C. § 2332b(a)(2), which prohibits threats to commit an offense under 18 U.S.C. § 2332b(a)(1). Those offenses prohibit, as part of conduct transcending national boundaries and in certain enumerated circumstances, killing, maiming, committing an aggravated assault, or creating a substantial risk of serious bodily injury by destroying or damaging real or personal property. (The amendment also proposes to reference 18 U.S.C. § 2332b(a)(2) to §§2A1.5 and 2A2.1, to the extent attempt or conspiracy to commit murder is involved.) The maximum term of imprisonment for threats to commit an offense under 18 U.S.C. § 2332b(a)(1) is ten years. Should the offense levels for such threat cases be the same as the offense levels that would pertain if the threatened offense had actually been committed, or should the guidelines provide a reduction in offense levels for such cases? Would a reference to §2A6.1 (Threatening or Harassing Communications) be appropriate? If so, how should that guideline be amended in order to account for the seriousness of threats under 18 U.S.C. § 2332b (e.g., should the base offense level be increased for such offenses)?*

The maximum term of imprisonment for providing material support to terrorists under 18 U.S.C. § 2339A(a) was increased from 10 years to 15 years, or for any term of years or life if the offense resulted in the death of any person. This amendment proposes a new guideline, §2M6.3, to cover such offenses. Accordingly, the Commission requests comment regarding whether the offense levels provided for that offense in the proposed new guideline are appropriate. Should there be alternative base offense levels and/or specific offense characteristics in the new guideline to provide enhanced punishment for the most serious cases covered by the guideline (e.g., should there be a cross reference to Chapter Two, Part A guidelines if death resulted)? What are the most serious cases? For example, should there be an enhancement for providing material support to a designated foreign terrorist organization? Is, for example, providing lodging to a defendant after the commission of a terrorist offense in order to allow that defendant to escape prosecution less serious than providing weapons to a defendant to enable the defendant to carry out a terrorist offense, or should those two cases be treated the same under the guidelines?

Part (C): Increases to Statutory Maximum Penalties For Predicate Offenses Covered by the Guidelines

Synopsis of Proposed Amendment: *Section 810 of the Act increased statutory maximum terms of imprisonment for several offenses. An issue for comment follows regarding whether guideline penalties should be increased in response.*

Issue for Comment: *The Commission requests comment regarding whether guideline penalties should be increased for any of the following offenses for which statutory maximum terms of imprisonment were increased by section 810 of the Act. Specifically:*

(1) The maximum statutory term of imprisonment for arson of a dwelling under 18 U.S.C. § 81 was increased from 20 years to any term of years or life. That offense is covered by §2K1.4 (Arson; Property Damage by Use of Explosives).

(2) The maximum statutory term of imprisonment for destruction of an energy facility under 18 U.S.C. § 1366 was increased from 10 years to 20 years, or for any term of years or life if the offense resulted in the death of any person. That offense is covered by §2B1.1 (Theft, Property Destruction, and Fraud).

(3) The maximum term of imprisonment for providing material support to terrorists under 18 U.S.C. § 2339A(a) was increased from 10 years to 15 years, or for any term of years or life if the offense resulted in the death of any person. This amendment proposes a new guideline, §2M6.3, to cover such offenses. Accordingly, the Commission requests comment regarding whether the offense levels provided for that offense in the proposed new guideline are appropriate.

(4) The maximum term of imprisonment for providing material support to designated foreign terrorist organizations under 18 U.S.C. § 2339B(a)(a) was increased from 10 years to 15 years, or for any term of years or life if the offense resulted in the death of any person. This amendment proposes a new guideline, §2M6.3, to cover such offenses. Accordingly, the Commission requests comment regarding whether the offense levels provided for that offense in the proposed new guideline are appropriate.

(5) The maximum statutory term of imprisonment for destruction of national defense materials under 18 U.S.C. § 2155(a) was increased from 10 years to 20 years, or for any term of years or life if the offense resulted in the death of any person. That offense is covered by §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities).

(6) The maximum statutory term of imprisonment for sabotage of nuclear facilities or fuel under 42 U.S.C. § 2284 was increased from 10 years to 20 years, or for any term of years or life if the offense resulted in the death of any person. That offense is covered by §§2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) and 2M2.3.

(7) The maximum statutory term of imprisonment for willfully or recklessly carrying a weapon or explosive on an aircraft under 49 U.S.C. § 46505 was increased from 15 years to 20 years, or for any term of years or life if the offense resulted in the death of any person. That offense is covered by §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard

an Aircraft).

(8) The maximum statutory term of imprisonment for damaging or destroying an interstate gas or hazardous liquid pipeline facility under 49 U.S.C. § 60123 was increased from 15 years to 20 years, or for any term of years or life if the offense resulted in the death of any person.

Part (D): Penalties for Terrorist Conspiracies

Synopsis of Proposed Amendment: *Section 811 of the Act amended the following offenses to provide that a conspiracy to commit any of those offenses shall subject the offender to the same penalties prescribed for the offense, commission of which was the object of the conspiracy: (1) arson under 18 U.S.C. § 81; (2) killings in federal facilities under 18 U.S.C. § 930(c); (3) willful or malicious injury to or destruction of communications lines, stations, or systems under 18 U.S.C. § 1362; (4) destruction of buildings or property within the maritime of territorial jurisdiction of the United States under 18 U.S.C. § 1363; (5) wrecking trains under 18 U.S.C. § 1992; (6) providing material support to terrorists under 18 U.S.C. § 2339A; (7) torture under 18 U.S.C. § 2340A; (8) sabotage of nuclear facilities or fuel under 42 U.S.C. § 2284; (9) interference with flight crew members and attendants under 49 U.S.C. § 46504; (10) willfully or recklessly carrying a weapon or explosive on an aircraft under 49 U.S.C. § 46505; and (11) damaging or destroying an interstate gas or hazardous liquid pipeline facility under 49 U.S.C. § 60123(b).*

An issue for comment follows regarding whether the Commission should amend §2X1.1 (Attempt, Solicitation, or Conspiracy) to provide that conspiracies to commit any of these offenses are expressly covered by the applicable Chapter Two offense guidelines.

Issue for Comment: *The Commission requests comment regarding the appropriate treatment under the guidelines for conspiracies to commit certain terrorist offenses. Specifically, section 811 of the Act amended the following offenses to provide that a conspiracy to commit any of those offenses shall subject the offender to the same penalties prescribed for the offense, commission of which was the object of the conspiracy: (1) arson under 18 U.S.C. § 81; (2) killings in federal facilities under 18 U.S.C. § 930(c); (3) willful or malicious injury to or destruction of communications lines, stations, or systems under 18 U.S.C. § 1362; (4) destruction of buildings or property within the maritime of territorial jurisdiction of the United States under 18 U.S.C. § 1363; (5) wrecking trains under 18 U.S.C. § 1992; (6) providing material support to terrorists under 18 U.S.C. § 2339A; (7) torture under 18 U.S.C. § 2340A; (8) sabotage of nuclear facilities or fuel under 42 U.S.C. § 2284; (9) interference with flight crew members and attendants under 49 U.S.C. § 46504; (10) willfully or recklessly carrying a weapon or explosive on an aircraft under 49 U.S.C. § 46505; and (11) damaging or destroying an interstate gas or hazardous liquid pipeline facility under 49 U.S.C. § 60123(b).*

Should the Commission amend §2X1.1 (Attempt, Solicitation, or Conspiracy) and the heading of each applicable Chapter Two Offense guideline to provide that conspiracies to commit any of these offenses are expressly covered by the applicable Chapter Two offense guideline? Should there be a special instruction in §2X1.1 (Attempt, Solicitation, or Conspiracy) to treat these offenses the same as the substantive offense which was the object of the conspiracy if the offense involved terrorism?

Part (E): Terrorism Adjustment in §3A1.4

Synopsis of Proposed Amendment: *This amendment adds an invited structured upward departure in §3A1.4 (Terrorism) for offenses that involve domestic terrorism or international terrorism but do not otherwise qualify as offenses that involved or were intended promote "federal crimes of terrorism" for purposes of the terrorism adjustment in §3A1.4. An issue for comment also follows regarding whether terrorist offenses should be sentenced at or near the statutory maximum for the offense of conviction.*

Proposed Amendment (Part (E)):

§3A1.4. Terrorism

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

~~*1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, a federal crime of terrorism. "Federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g).*~~

1. Federal Crime of Terrorism Defined.—For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5). Accordingly, in order for the adjustment under this guideline to apply, the offense (A) must be a felony that involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); and (B) pursuant to 18 U.S.C. § 2332b(g)(5)(A), must have been calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

2. Computation of Criminal History Category.—Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

3. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of Pub. L. 104–132, the adjustment provided by this guideline applies only to Federal crimes of terrorism. However, there may be cases that involve international terrorism (as defined in 18 U.S.C. § 2331(1)) or domestic terrorism (as defined in 18 U.S.C. § 2331(5)) but to which the adjustment under this guideline technically does not apply. For example, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B) but the

terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the resulting sentence may not exceed the top of the guideline range that would result if the adjustment under this guideline had been applied.

Issues for Comment: *The Commission generally requests comment on whether the current terrorism enhancement at §3A1.4 addresses the sentencing of terrorists appropriately. Should the Commission amend §3A1.4 to clarify that the adjustment may apply in the case of offenses that occurred after the commission of the federal crime of terrorism, e.g., a case in which the defendant, in violation of 18 U.S.C. § 2339A, concealed an individual who had committed a federal crime of terrorism.*

As an alternative to the upward departure provision in proposed Application Note 3 of §3A1.4, should the Commission provide an additional enhancement for terrorism offenses to which the current adjustment does not apply? If so, should this additional enhancement be the same as, or less severe than the current adjustment at §3A1.4?

Part (F): Money Laundering Offenses

Synopsis of Proposed Amendment: *This amendment amends §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports) to incorporate the following new money laundering provisions created by the Act. The amendment proposes to reference these provisions to the structuring guideline and proposes a number of changes to that guideline in order to more fully incorporate the new offenses. Specifically:*

(1) 31 U.S.C. § 5318A(b), created by section 311 of the Act, authorizes the Secretary of the Treasury to (i) require domestic financial institutions to maintain records, file reports, or both, concerning transactions with financial institutions or jurisdictions outside the United States if the Secretary finds that such transactions are of "primary money laundering concern"; (ii) require domestic financial institutions to provide identifying information about payable-through accounts on such transactions that are of "primary money laundering concern"; and (iii) prohibit domestic financial institutions from opening or maintaining a payable-through account on or behalf of a foreign banking institution, if any such transactions could be conducted. The applicable penalty provision, 31 U.S.C. §5322, provides for a maximum term of imprisonment of 5 years, or ten years if the defendant engaged in a pattern of unlawful activity.

(2) 31 U.S.C. § 5318(i), added by section 312 of the Act, requires financial institutions that established or maintains a private banking account or correspondent account in the United States for a non-United States person, to establish due diligence policies, procedures, and controls that are reasonably designed to detect and report money laundering through those accounts, and a new subsection (h), which prohibits financial institutions from establishing or maintaining a correspondent account for a foreign bank that does not have a physical presence in any country. The applicable penalty provision, 31 U.S.C. §5322, provides for a maximum term of imprisonment of 5 years, or ten years if the defendant engaged in a pattern of unlawful activity.

The amendment revises the definition of "value of the funds" for purposes of calculating the base offense level in §2S1.3(a) in order to incorporate these offenses into the guideline.

The amendment also adds an enhancement if the defendant committed the offense as part of a pattern of unlawful activity. This enhancement takes into account the enhanced penalty provisions (imprisonment of not more than ten years) under 31 U.S.C. § 5322(b) for such conduct if the pattern of unlawful activity involved more than $100,000 in a 12-month period.

An issue for comment follows regarding how the Commission should treat these offenses.

(3) 31 U.S.C. § 5331, added by section 365 of the Act, which requires nonfinancial trades or businesses to report the receipt of more than $10,000 in coins and currency in one transaction or two or more related transactions. The maximum term of imprisonment is five years, or ten years if the defendant engaged in a pattern of unlawful activity.

(4) 31 U.S.C. § 5332, added by section 371 of the Act, prohibits concealing on one's person or any conveyance more than $10,000 in currency or other monetary instruments in order to

evade currency reporting requirements (i.e., bulk cash smuggling). The maximum term of imprisonment is not more than five years. An issue for comment follows regarding whether an enhancement for bulk cash smuggling should be added to the guidelines.

In addition, section 315 of the Act expanded the predicate offenses under 18 U.S.C. § 1956 to include public corruption. An issue for comment follows regarding whether the money laundering guideline, §2S1.1, should be amended to add public corruption offenses to the list of offenses that qualify for the 6-level enhancement in subsection (b)(1) because of the seriousness of these offenses.

The amendment also proposes to add a definition of "terrorism" for purposes of the 6-level enhancement in §2S1.1(b)(1). The definition of terrorism is added for consistency of application within the guidelines.

Proposed Amendment (Part (F)):

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

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

"Terrorism" means domestic terrorism (as defined in 18 U.S.C. § 2331(5)), a federal crime of terrorism (as defined in 18 U.S.C. §2332b(g)(5)), or international terrorism (as defined in 18 U.S.C. § 2331(1)).

*** * ***

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

(a) Base Offense Level: **6** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds.

(b) Specific Offense Characteristics:

(1) If the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity, increase by **2** levels.

(2) If the defendant committed the offense as part of a pattern of unlawful activity [involving more than $100,000 in a 12-month period], increase by **2** levels.

(~~2~~3) If (A) subsection (b)(1) does not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1960; 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5318, 5318A(b), 5324, 5326, 5331, 5332. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ~~For purposes of this guideline, "value of the funds" means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.~~

Definition of "Value of the Funds".—

(A) In General.—Except as provided in subdivision (B), the "value of the funds" for purposes of subsection (a) means the amount of the funds involved in the structuring or reporting conduct.

(B) Exceptions.—If the offense involved a correspondent account or payable-through account prohibited or restricted under 31 U.S.C. § 5318A(b)(5), the "value of the funds" means the total amount of funds routed through that account on behalf of a foreign jurisdiction, foreign financial institution, or class of transaction that the Secretary of the Treasury found to be of primary money laundering concern.

If the offense involved a correspondent account for or on behalf of a foreign bank that does not have a physical presence in any country, in violation of 31 U.S.C. § 5318, the "value of the funds" means the total amount of funds routed through that account on behalf of that foreign bank.

The terms "correspondent account" and "payable-through account" have the meaning given those terms in 31 U.S.C. § 5318A(e)(1).

2. *Enhancement for Pattern of Unlawful Activity.—For purposes of subsection (b)(2), a pattern of unlawful activity means [at least two separate and unrelated occasions of unlawful activity] [unlawful activity involving a total amount of more than $100,000 in a 12-month period], without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.*

Background: ~~The~~Some of the offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over $10,000 Received in a Trade or Business.

Other offenses covered by this guideline, under 31 U.S.C. §§ 5318 and 5318A, relate to records, reporting and identification requirements, and prohibited accounts involving certain foreign jurisdictions, foreign institutions, foreign banks, and other account holders.

* * *

APPENDIX A - STATUTORY INDEX

* * *

31 U.S.C. § 5316	2S1.3
31 U.S.C. § 5318	2S1.3
31 U.S.C. § 5318A(b)	2S1.3
31 U.S.C. § 5322	2S1.3
31 U.S.C. § 5326	2S1.3, 2T2.2
31 U.S.C. § 5331	2S1.3
31 U.S.C. § 5332	2S1.3
33 U.S.C. § 403	2Q1.3

* * *

Issues for Comment: *Offenses under 31 U.S.C. § 5318A(b)(5) prohibit domestic financial institutions from opening or maintaining a payable-through account on or behalf of a foreign banking institution, if any such transactions could be conducted. Offenses under 31 U.S.C. § 5318(j) prohibit financial institutions from establishing or maintaining a correspondent account for a foreign bank that does not have a physical presence in any country. How should the guidelines treat such offenses? Specifically, should such offenses be referenced to §2S1.3? If so, does §2S1.3 adequately account for all the conduct prohibited by these offenses? For example, for purposes of computing the base offense level under subsection (a), should the definition of the "value of the funds" be revised to include the total amount of the funds maintained in a payable-through account or in a prohibited correspondent account for a foreign bank, or would such a calculation overestimate the seriousness of the offense? Is there a more appropriate method to determine the value of the funds in such cases?*

Offenses under 31 U.S.C. § 5332, added by section 371 of the Act, prohibit concealing on one's person or any conveyance more than $10,000 in currency or other monetary instruments in order to evade currency

reporting requirements (i.e., bulk cash smuggling). Congress has indicated that these offenses are more serious than failing to file a customs report, even though the statutory maximum terms of imprisonment are the same for both of these offenses. See H.Rept. 107–250. The Commission requests comment on whether an enhancement should be added to §2S1.3 (Structuring Transactions to Evade Reporting Requirements) if the offense involved bulk cash smuggling.

In addition, section 315 of the Act expanded the predicate offenses under 18 U.S.C. § 1956 to include foreign public corruption. The Commission requests comment regarding whether the money laundering guideline, §2S1.1, should be amended to add all forms of public corruption offenses to the list of offenses that qualify for the 6-level enhancement in subsection (b)(1) because of the seriousness of these offenses.

Part (G): Currency and Counterfeiting Offenses

Synopsis of Proposed Amendment: *Sections 374 and 375 of the Act increase the statutory maximum terms of imprisonment for a number of offenses involving counterfeiting domestic and foreign currency and obligations. The Act increased the statutory maximum terms of imprisonment to 20 years or 25 years for all counterfeiting offenses that had a statutory maximum term of imprisonment of 10 years or 15 years. Penalties for counterfeiting foreign bearer obligations that had a maximum term of imprisonment of one, three, and five years were increased to ten years or, in some cases, 20 or 25 years. In response, an issue for comment is provided regarding whether guideline penalties should be increased in light of the increased statutory maximum penalties.*

Issue for Comment: *Section 374 of the Act changed or otherwise increased the statutory maximum penalties for counterfeiting domestic currency obligations as follows: the statutory maximum penalty for violations of 18 U.S.C. § 470 (counterfeit acts committed outside the United States) was changed from 20 years to the punishment "provided for the like offense within the United States;" the statutory maximum penalty for violations of 18 U.S.C. § 471 (obligations or securities of the United States) was increased from 15 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. § 472 (uttering counterfeit obligations or securities) was increased from 15 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. § 473 (dealing in counterfeit obligations or securities) was increased from 10 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. § 476 (taking impressions of tools used for obligations or securities) was increased from 10 years to 25 years; the statutory maximum penalty for violations of 18 U.S.C. § 477 (possessing or selling impressions of tools used for obligations or securities) was increased from 10 years to 25 years; the statutory maximum penalty for violations of 18 U.S.C. § 484 (connecting different parts of different notes) was increased from 5 years to 10 years; and the statutory maximum penalty for violations of 18 U.S.C. § 493 (bonds and obligations of certain lending agencies) was increased from 5 years to 10 years. The Commission requests comment regarding whether the guideline penalties for these offenses should be increased in light of the increased statutory maximum penalties.*

Section 375 of the Act increased the statutory maximum penalties for counterfeiting foreign currency obligations as follows: the statutory maximum penalty for violations of 18 U.S.C. § 478 (foreign obligations or securities) was increased from 5 years to 10 years; the statutory maximum penalty for violations of 18 U.S.C. § 479 (uttering foreign obligations) was increased from 3 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. § 480 (possessing foreign counterfeit obligations) was increased from 1 year to 20 years; the statutory maximum penalty for violations of 18 U.S.C. § 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) was increased from 5 years to 25 years; the statutory maximum penalty for violations of 18 U.S.C. § 482 (foreign bank notes) was increased from 2 years to 20 years; and finally, the statutory maximum penalty for violations of 18 U.S.C. § 483 (uttering foreign counterfeit bank notes) was increased from 1 year to 20 years. The Commission requests comment regarding whether the guideline penalties for these offenses should be increased in light of the increased statutory maximum penalties.

Currently, offenses under 18 U.S.C. §§ 478, 479, 480, 481, 482, and 483 are referenced to §2B1.1. Should these offenses also be referenced to §2B5.1, and should that guideline be reworked in order to cover the counterfeiting of foreign obligations?

Additionally, the guidelines provide in §§2B1.1(b)(8)(B) a two-level enhancement, with a minimum offense level of level 12, if a substantial portion of a fraudulent scheme was committed from outside the United States. Should this enhancement be amended to provide an alternative prong if the offense was intended to promote terrorism?

Finally, the guidelines provide in §2B5.1(b)(5) a two-level enhancement if any part of the offense was committed outside the United States. Should this enhancement be amended to provide an alternative prong if the offense was intended to promote terrorism? Should an additional enhancement be provided if the offense was intended to promote terrorism, and if so, what should be the extent of the enhancement?

Part (H): Miscellaneous Amendments

Synopsis of Proposed Amendment: *This part of the amendment proposes to address eight miscellaneous issues related to terrorism:*

(1) It provides a definition of terrorism for purposes of the prior conviction enhancement in the illegal reentry guideline, §2L1.2. For consistency, the definition is the same definition proposed to be added to the money laundering guideline and to the Chapter Three terrorism adjustment.

(2) It provides two options for amending the obstruction of justice guideline, §3C1.1, in response to section 319(d) of the Act. Section 319(d) amends the Controlled Substances Act at 21 U.S.C. § 853(e) to require a defendant to repatriate any property that may be seized and forfeited and to deposit that property in the registry of the Court or with the U.S. Marshal. That section also states that the failure to comply with a protective order and an order to repatriate property "may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines."

(3) It amends the guideline on terms of supervised release, §5D1.2, in response to section 812 of the Act, which authorizes a term of supervised release of any term of years or life for a defendant convicted of a federal crime of terrorism the commission of which resulted in, or created a substantial risk of, death or serious bodily injury to another person.

(4) It amends the theft, property destruction and fraud guideline, §2B1.1, to delete the special instruction pertaining to the imposition of not less than six months imprisonment for a defendant convicted under section 1030 of title 18, United States Code. Section 814(f) of the Act directed the Commission to amend the guidelines "to ensure that any individual convicted of a violation of section 1030 of title 18, United States Code, can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment."

(5) It adds a reference in the Statutory Index to the bribery guideline, §2C1.1, for the new offense created by section 329 of the Act. Section 329 prohibits a Federal official or employee, in connection with administration of the money laundering provisions of the Act, to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of an official act, being influenced to commit or aid in committing any fraud on the United States, or being induced to do or omit to do any act in violation of official duties. The term of imprisonment is not more than 15 years.

(6) It amends §2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. § 2332d, which prohibits a person, knowing or having reasonable cause to know that a country is designated under the Export Administration Act as a country supporting international terrorism, to engage in a financial transaction with the government of that country. The amendment also proposes to provide for application of the base offense level of level 26, for 18 U.S.C. § 2332d offenses.

(7) It proposes an issue for comment regarding how the Commission should treat an offense under 18 U.S.C. § 1036. That offense, added by section 2 of the Enhanced Federal Security Act of 2000, Pub. L. 106–547, prohibits, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport. The

maximum penalty is five years imprisonment.

(8) It provides an issue for comment on how the guidelines should treat offenses involving fraudulent statements under 18 U.S.C. § 1001, particularly such offenses committed in connection with acts of terrorism.

Proposed Amendment (Part (H)):

§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

* * *

~~(d) Special Instruction~~

~~(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.~~

Commentary

* * *

Background:

* * *

~~*Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104–132.*~~

*** * ***

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

* * *

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

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

* * *

Commentary

* * *

Application Notes:

1. Application of Subsection (b)(1).—

* * *

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

* * *

(iv) "Terrorism offense" means any offense involving domestic terrorism (as defined in 18 U.S.C. § 2331(5)), a federal crime of terrorism (as defined in 18 U.S.C. §2332b(g)(5)), or international terrorism (as defined in 18 U.S.C. § 2331(1)).

*** * ***

§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

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

(1) **26**, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or

(2) **14**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 50 U.S.C. App. §§ 2401-2420.

Application Notes:

* * *

4. For purposes of subsection (a)(1)(B), "a country supporting international terrorism" means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).

*** * ***

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

* * *

Commentary

Application Notes:

* * *

4. The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

[Option 1: * * *

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);

(j) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p).]

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

[Option 2:
This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

This adjustment may also apply if the defendant failed to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p).]

* * *

§5D1.2. Term of Supervised Release

(a) Subject to subsection (b), if a term of supervised release is ordered, the length of the term shall be:

(1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;

(2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;

(3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.

Notwithstanding subdivisions (1) through (3), the length of the term of supervised release shall be [not less than three years][life] for any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

* * *

APPENDIX A - STATUTORY INDEX

	* * *
18 U.S.C. § 2332a	2K1.4, 2A6.1
18 U.S.C. § 2332d	2M5.1
	* * *
50 U.S.C. App. § 2410	2M5.1
Section 329 of the USA PATRIOT Act of 2001, Pub. L. 107–56	2C1.1

Issues for Comment: *The Commission requests comment regarding how the Commission should treat an offense under 18 U.S.C. § 1036. That offense, added by section 2 of the Enhanced Federal Security Act of 2000, Pub. L. 106–547, prohibits, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport. The maximum penalty is five years imprisonment. Should such offenses be referenced to §2B2.3 (Trespass)? If so, how should that guideline be amended to take into account the seriousness of these offenses (e.g., should the enhancement at §2B2.3(b)(1) be amended to cover trespasses occurring with respect to a vessel or aircraft of the United States, a secure area of an airport, and/or a secure area of a mass transportation system)?*

The Commission also requests comment on how the guidelines might more appropriately treat offenses under 18 U.S.C. § 1001, particularly such offenses that are committed in connection with acts of terrorism. Currently, offenses under 18 U.S.C. § 1001 (making false statements) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud), and a cross reference at §2B1.1(c)(3) calls for application of another Chapter Two guideline if the conduct set forth in the count of conviction under § 1001 establishes an offense specifically covered by that other Chapter Two guideline.

8. Proposed Amendment: Drugs

Synopsis of Proposed Amendment:

In General

The Commission has begun a long term assessment of the guidelines pertaining to drug offenses and is studying how it might amend the guidelines to (A) decrease somewhat the contribution of drug quantity on penalty levels for drug trafficking offenses generally; (B) more adequately account for aggravating and mitigating conduct that may be unrelated to drug quantity; (C) address various circuit conflicts that pertain to the drug guidelines; and (D) improve generally the overall operation of the drug guidelines.

This amendment cycle, the Commission is particularly interested in considering amending the guidelines as they pertain to offenses involving cocaine base ("crack cocaine"). In deciding how best to address various concerns that have been expressed regarding the penalties for crack cocaine offenses, the Commission is considering adding a number of enhancements to the primary drug trafficking guideline, §2D1.1, to account more adequately for aggravating conduct sometimes associated not only with crack cocaine offenses, but also with drug trafficking offenses generally. The Commission is paying particular attention to the considerations stated in Pub. L. 104–38, the legislation enacted in 1995 disapproving the prior Commission's amendment which, among other things, would have equalized the penalties based on drug quantity for crack cocaine and powder cocaine. The proposed amendment contains a number of enhancements that directly address many of those considerations, especially those that focus on violence, and apply across drug type.

As part of its assessment, and in light of the proposed enhancements which, if adopted, would apply across drug type, the Commission also is exploring how it might amend the guidelines to decrease penalties in appropriate cases in which the current penalty structure may overstate the culpability of the defendant. Accordingly, the Commission is studying a number of options, including a maximum base offense level for offenders who qualify for a mitigating role adjustment and a two level reduction for offenders who meet the "safety valve" criteria set forth in §5C1.2 and have no prior convictions.

Base Offense Level

Mitigating Role Adjustment

The proposed amendment provides a maximum base offense level of [24-32] if the defendant qualifies for an adjustment under §3B1.2 (Mitigating Role). This base offense level cap is designed to limit somewhat the exposure of low level drug offenders to increased penalties based on drug quantity alone. The impact of the proposed base offense level cap will vary depending on the level at which the cap is set. If level 32 is adopted as the maximum base offense level for these defendants, 805 cases would be affected, and their average sentence would decrease from 82 months to 60 months. If the Commission adopted level 26, 2,062 cases would be affected, and their average sentence would decrease from 60 months to 37 months.

Two issues for comment pertaining to mitigating role follow the proposed amendment. The first issue invites comment regarding whether application of the maximum base offense level should be limited in some manner, for example to defendants who receive a minimal role adjustment under §3B1.2 or who do not receive enhancements for aggravating conduct such as weapon involvement or bodily injury. The second issue invites comment regarding whether the Commission also should address three circuit conflicts that remain pertaining to mitigating role, and if so, how should those conflicts be resolved. The issue then requests comment

regarding whether the Commission should provide guidance on whether particular drug offenders who perform certain drug trafficking functions (e.g., courier or mule) should or should not receive a mitigating role adjustment.

Enhancements

Violence

The proposed amendment also contains a number of enhancements. First, the proposed amendment contains a number of modifications to §2D1.1 to more adequately account for violence sometimes associated with drug trafficking offenses. Subsection (b)(1) currently provides a two level enhancement for offenses involving possession of a dangerous weapon, but it does not differentiate penalties to account for the defendant's weapon use, the seriousness of the weapon use, or the type and number of firearms involved.

Accordingly, the proposed amendment modifies subsection (b)(1) to provide a graduated enhancement of [2] to [6] levels for weapon involvement to account more adequately for these factors. Specifically, proposed subsection (b)(1)(A) provides a [6] level enhancement if the defendant discharged a firearm. Proposed subsection (b)(1)(B) provides a [4] level enhancement if the defendant (i) brandished or otherwise used a dangerous weapon (including a firearm); or (ii) possessed a firearm described in 18 U.S.C. § 921(a)(30) or 26 U.S.C. § 5845(a). Proposed subsection (b)(1)(C) provides (i) a [2] level enhancement if a dangerous weapon (including a firearm) was possessed; or (ii) a [4] level enhancement if eight or more firearms were possessed. An option for an upward departure provision if the number of firearms involved in the offense substantially exceeded eight firearms is provided in proposed Application Note 3.

The enhanced penalties provided by this part of the amendment are likely to apply in a minority of cases. In fiscal year 2000, 21.3 percent of crack cocaine cases received either the enhancement for possession of a dangerous weapon in §2D1.1(b)(1) or a penalty for a violation of 18 U.S.C. § 924(c), 18.7 percent of methamphetamine cases, 10.6 percent of powder cocaine cases, 6.6 percent of heroin cases, and 5.9 percent of marijuana cases. The proposed heightened penalties in subsection (b)(1) would apply in a subset of those cases.

Proposed subsection (b)(2) provides a graduated enhancement of [2] to [8] levels for [death] or bodily injury, depending on the degree of injury. The enhancement does not apply to injury resulting from the use of the controlled substance because subsection (a) already provides heightened base offense levels that account for death or serious bodily injury resulting from such use. Proposed subsection (b)(2) provides an option for an eight level enhancement for death. The option is provided because the cross reference to §2A1.1 (First Degree Murder) provided by subsection (d) does not apply if a victim was killed under circumstances that would not constitute murder under 18 U.S.C. § 1111 (e.g., manslaughter). Proposed subsection (b)(2) also provides a bracketed option that limits the cumulative adjustments from subsections (b)(1) and (b)(2) to [10][12] levels because weapon use and bodily injury are so interrelated.

Two issues for comment follow the proposed amendment pertaining to these proposed enhancements. The first issue invites comment regarding whether subsections (b)(1) and (b)(2) also should provide minimum offense levels, particularly in light of the minimum offense level currently provided in subsection (b)(5) for methamphetamine and amphetamine manufacturing offenses that create a substantial risk of harm to human life. The second issue invites comment regarding whether the Commission also should provide an enhancement that would apply if the offense involved an express or implied threat of death or bodily injury, and if so, what would be an appropriate increase and should the enhancement be applied cumulatively to the proposed enhancements in subsections (b)(1) and (b)(2).

Protected Locations, Underage or Pregnant Individuals

The primary drug trafficking guideline, §2D1.1, currently does not provide an enhancement for drug distribution near protected locations or distribution involving underage or pregnant individuals. Section §3B1.4 (Using a Minor to Commit a Crime) provides a two level enhancement if the defendant used or attempted to use a person less than eighteen years of age to commit the offense. Enhanced penalties also are provided in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals), but a conviction for a statutory violation of drug trafficking in a protected location (21 U.S.C. § 860) or to underage or pregnant individuals (21 U.S.C. §§ 859 and 861) is necessary in order for §2D1.2 to be applied.

The proposed amendment consolidates §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) into §2D1.1, and makes conforming changes to the Statutory Index for offenses currently referenced to §2D1.2 (21 U.S.C. §§ 849, 859, 860, 861, and 963). Proposed subsection (b)(3) provides a two level enhancement if the defendant (A) was convicted of an offense under 21 U.S.C. §§ 849[, § 859] § 860[, or § 861]; (B) distributed to a pregnant individual [knowing, or having a reasonable cause to believe, that the individual was pregnant at that time]; (C) distributed to a minor individual [knowing, or having a reasonable cause to believe, that the individual was a minor at that time]; or (D) used a minor individual to commit the offense or to assist in avoiding detection or apprehension for the offense. The requirement that the defendant be convicted of a statutory violation of drug trafficking in a protected location is retained because otherwise the enhancement could apply in an overly broad manner, particularly for trafficking offenses occurring in dense urban areas.

A minimum offense level of [26] is provided if subdivision (C) or (D) applies. This minimum offense level is required by the directive to the Commission contained in section 6454 of the Anti-Drug Abuse Act of 1988. An issue for comment follows the proposed amendment that invites comment regarding whether the minimum offense level should be extended to apply to any of the other subdivisions of proposed subsection (b)(3).

The impact of this enhancement should be limited but it will allow increased sentences in appropriate cases. Compared to the 22,639 defendants sentenced under §2D1.1 in fiscal year 2000, only 196 were convicted under any of the statutes referenced to §2D1.2. The majority of those cases (89.3%) were for violations of 21 U.S.C. § 860 for trafficking in a protected location. There likely would be no net penalty increase from this part of the proposed amendment because the proposed amendment still would require a conviction under that statute. Also, in fiscal year 2000, only 131 defendants received the adjustment in §3B1.4 (Use of a Minor) and, for those cases, no net increase results from this part of the proposed amendment because proposed Application Note 22 expressly provides that if proposed subsection (b)(3)(D) applies, §3B1.4 does not apply. This proposed application note corresponds to Application Note 2 in §3B1.4, which instructs that if the Chapter Two offense guideline incorporates use of a minor to commit a crime, §3B1.4 should not be applied.

Prior Criminal Conduct

Proposed subsection (b)(8) provides a [2][4] level increase if the defendant committed any part of the instant offense after sustaining one felony conviction of [either a crime of violence or] a controlled substance offense. Chapter Four operates generally to provide increased punishment for past criminal conduct and includes a number of particular provisions often applicable in drug trafficking cases, such as the career offender provision. The proposed enhancement, however, may more adequately account for certain prior

criminal conduct, particularly drug trafficking offenses. Proposed subsection (b)(8) also presents an option that extends application of the enhancement to convictions for prior crimes of violence.

Proposed Application Note 23 defines "controlled substance offense" and "crime of violence" as those terms are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1) and defines "felony conviction" as a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. (The definitions also are consistent with the approach taken in §2K2.1.) Proposed Application Note 23 also presents an option that limits application of proposed subsection (b)(8) to felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). Additionally, proposed Application Note 23 expressly provides that prior felony convictions that trigger application of proposed subsection (b)(8) also are counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

An issue for comment follows the proposed amendment that invites comment regarding whether a minimum offense level should be provided in proposed subsection (b)(8), similar to the minimum offense level provided in §2K2.1(a)(4).

Reduction for No Prior Convictions

The proposed amendment provides, in proposed subsection (b)(9)(B), an additional reduction of two levels for defendants who previously have not been convicted of any offense and who currently qualify for a two level reduction for meeting the criteria set forth in subdivisions (1) through (5) of §5C1.2(a). This additional reduction is available only to defendants who meet that criteria and who previously have not been convicted of any offense. For purposes of applying the reduction, "convicted" means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere, without regard to the applicable time periods set forth in §4A1.2(e). [The definition also includes juvenile adjudications.] Although tribal, foreign, and military convictions are excluded for criminal history purposes under Chapter Four, such convictions are considered "convictions" for purposes of applying the proposed reduction, and any such conviction would disqualify the defendant from receiving the additional two level reduction. Expunged convictions and convictions for certain petty offenses set forth in §4A1.2(c)(2) are specifically excluded from the definition. By permitting the court to consider tribal, foreign, and military convictions, as well as permitting the court to consider convictions outside of the applicable time periods from Chapter Four, the proposed amendment differentiates penalties for defendants with zero or one criminal history point and defendants who do not have any prior convictions.

This portion of the proposed amendment also clarifies the application of the current two level reduction in §2D1.1(b)(6) (redesignated as subsection (b)(9) by this proposed amendment) by stating more clearly that the reduction applies regardless of whether the defendant was subject to a mandatory minimum term of imprisonment. Additionally, the proposed amendment makes clear that §5C1.2(b), which provides a minimum offense level of 17 for certain defendants, is not pertinent to the application of the current two level reduction.

Maintaining Drug-Involved Premises and Ecstasy Offenses

Concerns have been raised that §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) does not adequately punish certain defendants convicted under 21 U.S.C. § 856 (Establishment of manufacturing operations). That statute originally was enacted to target so-called "crack houses" and more recently has been applied to defendants who promote drug use at commercial dance parties frequently called "raves."

Currently, §2D1.8 provides two alternative base offense level computations. For defendants who participate in the underlying controlled substance offense, the offense level from §2D1.1 applies pursuant to §2D1.8(a)(1). For defendants who had no participation in the underlying controlled substance offense other than allowing use of the premises, subsection (a)(2) provides a four level reduction from the offense level from §2D1.1 and a maximum offense level of 16. Because many club owners and rave promoters who do not participate in the underlying offense nonetheless facilitate, promote and profit, at least indirectly, from the use of illegal drugs (primarily 3,4-methylenedioxymethamphetamine, more commonly known as MDMA or ecstasy), the maximum offense level of 16 may not adequately account for the seriousness of these offenses.

The proposed amendment addresses this concern by consolidating §2D1.8 into §2D1.1 and making a conforming change to the Statutory Index. The proposed consolidation will have no impact on the offense level for cases in which §2D1.8(a)(1) previously applied. Proposed Application Note 24 effectively retains the four level reduction currently provided in §2D1.8(a)(2) by providing that a minimal role adjustment under §3B1.2 shall apply if the defendant (a) was convicted under 21 U.S.C. § 856; and (b) had no participation in the underlying controlled substance offense other than allowing use of the premises.

The maximum offense level for those defendants for which §2D1.8(a)(2) applied, however, will be increased because the level 16 base offense level cap currently provided in §2D1.8(a)(2) effectively will be increased to [24-32], the proposed maximum base offense level for defendants who qualify for a mitigating role adjustment. In addition, under the proposed consolidation, the enhancements contained in §2D1.1 can apply to those defendants. Although the overall impact of the proposed consolidation on drug trafficking sentences will be minimal (only 69 defendants were sentenced under §2D1.8 in fiscal year 2000), 95.6 percent of defendants sentenced under §2D1.8 received a base offense level of 16 and likely will be affected by the proposed consolidation.

The proposed amendment also amends the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in Application Note 11 of §2D1.1 to more accurately reflect the type and quantity of ecstasy typically trafficked and consumed. Specifically, the proposed amendment adds a reference in the Typical Weight Per Unit Table for MDMA and sets the typical weight at 250 milligrams per pill. Ecstasy usually is trafficked and used as MDMA, not MDA, the drug currently listed in the table. In addition, the proposed amendment revises upward the typical weight for MDA from 100 milligrams to 250 milligrams and deletes the asterisk that previously indicated that the weight per unit shown is the weight of the actual controlled substance, and not the weight of the mixture or substance containing the controlled substance. The absence of MDMA from the table and the use of an estimate of the actual weight of the controlled substance (MDA) rather than an estimate of the weight of the mixture or substance containing the controlled substance may create an incentive to improperly apply the MDA estimate in cases in which the drug involved is MDMA, resulting in underpunishment in some cases, and generally resulting in unwarranted disparity.

Simple Possession of Crack Cocaine

Defendants convicted of possession of five or more grams of a mixture or substance containing cocaine base receive a mandatory minimum sentence of five years under 21 U.S.C. § 844(a). The mandatory minimum for simple possession is unique to crack cocaine. The guidelines incorporate the mandatory minimum in §2D2.1 (Unlawful Possession; Attempt or Conspiracy) by providing a cross reference at subsection (b)(1) to §2D1.1 if the defendant is convicted of possession of more than five grams of crack. The proposed amendment deletes the cross reference to the drug trafficking guideline, but retains the heightened base offense level of 8.

The cross reference to the drug trafficking guideline is deleted to more adequately differentiate between the seriousness of an offense involving the distribution of crack cocaine and an offense merely involving simple

possession of crack cocaine, with no intent to distribute. The impact of the proposed deletion of the cross reference will have minimal impact on drug penalties overall because a total of only 67 defendants have been cross referenced from §2D2.1 to §2D1.1 in the past three fiscal years.

Proposed Amendment:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Renting or Managing a Drug Establishment; Attempt or Conspiracy**

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

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; ~~or~~

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) ~~below~~, except that if the defendant qualifies for an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall not exceed level [**24-32**].

(b) Specific Offense Characteristics

(1) ~~If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.~~
(Apply the greatest):

(A) If the defendant discharged a firearm, increase by [**6**] levels.

(B) If the defendant (i) brandished or otherwise used a dangerous weapon (including a firearm); or (ii) possessed a firearm described in 18 U.S.C. § 921(a)(30) or 26 U.S.C. § 5845(a), increase by **[4]** levels.

(C) If (i) a dangerous weapon (including a firearm) was possessed, increase by [**2**] levels; or (ii) eight or more firearms were possessed, increase by [**4**] levels.

(2) If the offense involved [death or] bodily injury other than [death or] bodily injury that resulted from the use of the controlled substance, increase the offense level according to the seriousness of the injury:

Degree of Injury		Increase in Level
(A)	Bodily Injury	add [**2**] levels
(B)	Serious Bodily Injury	add [**4**] levels
(C)	Permanent or Life-Threatening Bodily Injury	add [**6**] levels
[(D)	Death	add [**8**] levels.]

[The cumulative adjustments from subsections (b)(1) and (b)(2) shall not exceed [**10**][**12**] levels.]

(3) If the defendant (A) was convicted of an offense under 21 U.S.C. § 849, [§ 859,] § 860 [, or § 861]; (B) distributed a controlled substance to a pregnant individual [knowing, or having a reasonable cause to believe, that the individual was pregnant at that time]; (C) distributed a controlled substance to a minor individual [knowing, or having a reasonable cause to believe, that the individual was a minor at that time]; or (D) used a minor individual to commit the offense or to assist in avoiding detection or apprehension for the offense, increase by [**2**] levels. If subdivision (C) or (D) applies and the offense level is less than [**26**], increase to level [**26**].

~~(2)~~(4) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

~~(3)~~(5) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

~~(4)~~(6) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

~~(5)~~(7) (Apply the ~~greater~~greatest):

* * *

(8) If the defendant committed any part of the instant offense after sustaining one felony conviction of [either a crime of violence or] a controlled substance offense, increase by [**2**][**4**] levels.

~~(6)~~(9) (A) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

(B) If (i) subsection (A) applies; and (ii) the defendant previously has not been convicted of any offense, decrease by **2** levels.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 849, 856, 859, 860, 861, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

3. ~~Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).~~

Application of Subsection (b)(1).—

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

"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"A firearm described in 18 U.S.C. 921(a)(30)" does not include a weapon described in 18 U.S.C. § 922(v)(3).

(B) Possession of Dangerous Weapon or Firearm.—Subsections (b)(1)(B)(ii) and (b)(1)(C) apply if a dangerous weapon or firearm was present, unless it is clearly improbable that the dangerous weapon or firearm was connected with the offense. For example, the enhancement would not apply if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

[(C) Upward Departure Based on Number of Firearms.— If the number of firearms involved in the offense substantially exceeded eight firearms, an upward departure may be warranted.]

8. * * *

Note, however, that if an adjustment from subsection ~~(b)(2)(B)~~(b)(4)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

11. *If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.*

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

*MDA**	*~~100 mg~~250 mg*
MDMA	*250 mg*
Mescaline	*500 mg*
*PCP**	*5 mg*
Peyote (dry)	*12 gm*
Peyote (wet)	*120 gm*
*Psilocin**	*10 mg*
Psilocybe mushrooms (dry)	*5 gm*
Psilocybe mushrooms (wet)	*50 gm*
*Psilocybin**	*10 mg*
*2,5-Dimethoxy-4-methylamphetamine (STP, DOM)**	*3 mg*

* * *

19. *Hazardous or Toxic Substances.—Subsection ~~(b)(5)(A)~~ (b)(7)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection ~~(b)(5)(A)~~ (b)(7)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).*

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) Factors to Consider.—In determining, for purposes of subsection ~~(b)(5)(B)~~ (b)(7)(B) or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

* * *

(B) Definitions.—For purposes of subsection ~~(b)(5)(C)~~(b)(7)(C):

* * *

21. Subsection (b)(2) Definitions.—For purposes of subsection (b)(2), "bodily injury", "permanent or life-threatening bodily injury", and "serious bodily injury" have the meaning given those terms in Application Note 1 of §1B1.1 (Application Instructions).

22. Non-applicability of §3B1.4.—If subsection (b)(3)(D) applies, do not apply §3B1.4 (Using a Minor to Commit a Crime).

23. Application of Subsection (b)(8).—

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

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

["Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.]

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

(B) [Qualifying Prior Felony Conviction and] Computation of Criminal History Points.—[For purposes of applying subsection (b)(8), use only a prior felony conviction that receives criminal history points under §4A1.1(a), (b), or (c).] A prior felony conviction that results in application of subsection (b)(8) also is counted for purposes of determining criminal history points under Chapter 4, Part A (Criminal History).

24. Application of §3B1.2 for Defendant Convicted Under 21 U.S.C. § 856.—If the defendant (A) was convicted under 21 U.S.C. § 856; and (B) had no participation in the underlying controlled substance offense other than allowing use of the premises, an adjustment under §3B1.2(a) for minimal role in the

offense shall apply.

25. Application of Subsection (b)(9).—

(A) In General.—Subsection (b)(9)(A) applies regardless of whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the application of subsection (b)(9)(A).

(B) Subsection (b)(9)(B).—For purposes of this subdivision, "convicted"—

(i) means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere, without regard to the applicable time periods set forth in §4A1.2(e);

[(ii) includes a juvenile adjudication other than an adjudication for a juvenile status offense or truancy;] and

(iii) does not include an expunged conviction or a conviction for any offense set forth in §4A1.2(c)(2).

Background: * * *

The minimum offense level applicable to subsection (b)(3)(C) and (D) implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.

~~Specific Offense Characteristic (b)(2)~~ Subsection (b)(4) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

* * *

Subsection ~~(b)(5)(A)~~(b)(7)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections ~~(b)(5)(B)~~(b)(7)(B) and (b)(7)(C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

~~**§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**~~

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

~~(1) **2** plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or~~

~~(2) **1** plus the offense level from §2D1.1 applicable to the total quantity of~~

controlled substances involved in the offense; or

(3) **26**, if the offense involved a person less than eighteen years of age; or

(4) **13**, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).

Application Note:

1. This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).

Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.

* * *

§2D1.8. Renting or Managing a Drug Establishment; Attempt or Conspiracy

(a) Base Offense Level:

(1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.

(2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be **4** levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level **16**.

(b) Special Instruction

(1) If the offense level is determined under subsection (a)(2), do not apply an adjustment under §3B1.2 (Mitigating Role).

~~*Commentary*~~

~~*Statutory Provision: 21 U.S.C. § 856.*~~

~~*Application Note:*~~

~~*1. Subsection (a)(2) does not apply unless the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises. For example, subsection (a)(2) would not apply to a defendant who possessed a dangerous weapon in connection with the offense, a defendant who guarded the cache of controlled substances, a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction, a defendant who allowed the use of more than one premises, a defendant who made telephone calls to facilitate the underlying controlled substance offense, or a defendant who otherwise assisted in the commission of the underlying controlled substance offense. Furthermore, subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose. Finally, subsection (a)(2) does not apply if the defendant had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction.*~~

~~*Background: This section covers the offense of knowingly opening, maintaining, managing, or controlling any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law (e.g., a "crack house").*~~

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

* * *

(b) Cross References~~s~~

~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~

~~(2)~~(1) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

* * *

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note,

however, that 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).

~~*Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).*~~

* * *

* * *

APPENDIX A - STATUTORY INDEX

~~21 U.S.C. § 845~~	~~2D1.2~~
~~21 U.S.C. § 845a~~	~~2D1.2~~
~~21 U.S.C. § 845b~~	~~2D1.2~~
21 U.S.C. § 846	2D1.1, ~~2D1.2,~~ 2D1.5, 2D1.6, 2D1.7, ~~2D1.8,~~ 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2
	* * *
21 U.S.C. § 849	~~2D1.2~~2D1.1
	* * *
21 U.S.C. § 856	~~2D1.8~~2D1.1
	* * *
21 U.S.C. § 859	~~2D1.2~~2D1.1
21 U.S.C. § 860	~~2D1.2~~2D1.1
21 U.S.C. § 861	~~2D1.2~~2D1.1
	* * *
21 U.S.C. § 963	2D1.1, ~~2D1.2,~~ 2D1.5, 2D1.6, 2D1.7, ~~2D1.8,~~ 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2

Issues for Comment:

(1) The Commission requests comment concerning the sentencing of defendants convicted of cocaine base ("crack cocaine") offenses under the sentencing guidelines. Currently, five grams of crack cocaine triggers a five year mandatory minimum sentence and is assigned a base offense level of 26 under the guidelines, and 50 grams of crack cocaine triggers a ten year mandatory minimum sentence and is assigned a base offense level of 32. This penalty structure has raised several concerns. First, concern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who

engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes associated with crack cocaine (e.g., violence). Building these aggravating factors into the Drug Quantity Table essentially penalizes all crack cocaine offenders to some degree for aggravating conduct, even though a minority of crack cocaine offenses may involve such aggravating conduct. As a result, the penalty structure does not provide adequate differentiation in penalties among crack cocaine offenders and often results in penalties too severe for those offenders who do not engage in aggravating conduct. It has been suggested by some that proportionality could be better served (i) by providing sentencing enhancements that target offenders who engage in aggravating conduct such as violence or distribution in protected locations or to minors or pregnant individuals; and (ii) by reducing the penalties based solely on the quantity of crack cocaine to the extent that the Drug Quantity Table takes into account aggravating conduct. Such an approach may better provide proportionate sentencing because it will enable the court to punish more severely the defendant who actually engages in aggravating conduct.

Second, concerns have been expressed that the current penalty structure for crack cocaine offenses overstates the drug trafficking function of crack cocaine offenders. In general, the statutory penalty structure for most, but not all, drug offenses was designed to provide a five year sentence for a serious drug trafficker (often a manager and supervisor of retail level trafficking) and a ten year sentence for a major drug trafficker (often the head of the organization that is responsible for creating and delivering very large quantities). The guidelines have incorporated this structure in §2D1.1 by linking the Drug Quantity Table to statutory mandatory minimums. The drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker, respectively. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers.

Third, concerns have been expressed that these problems may result in an unwarranted disparate impact on minority populations, particularly African-Americans, as they comprise the majority of offenders sentenced for crack cocaine offenses.

The Commission requests comment regarding whether the current penalty structure for crack cocaine offenses is appropriate, or whether some other penalty structure is more appropriate for guideline purposes. In deciding how these various concerns might be addressed, the Commission is reviewing Pub. L. 104–38, the legislation enacted in 1995 disapproving the prior Commission's submitted amendment, which among other things equalized the penalties based on drug quantity for crack cocaine and powder cocaine. Any proposed change might contain enhancements that address a number of the considerations contained in that legislation, especially violence associated with drug trafficking. Other considerations set forth in Pub. L. 104–38 already may be adequately accounted for in the guidelines (e.g., obstruction of justice).

The Commission also requests comment regarding the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses. Under the current penalty structure of the sentencing guidelines and 21 U.S.C. § 841, 100 times as much powder cocaine as crack cocaine is required to trigger the same five and ten year penalties based on drug quantity. The Commission requests comment regarding whether the 100:1 drug quantity ratio is appropriate, or whether some alternative ratio is more appropriate for guideline purposes. If so, how should the alternative ratio be achieved (i.e., by decreasing the penalties for crack cocaine, increasing the penalties for powder cocaine, or a combination of both) and why? How would any such change to the penalty structure for crack cocaine effect crime rates and deterrence? How would such change impact minority populations? Additionally, the Commission requests comment regarding whether the penalties for crack cocaine offenses should be more severe, less severe, or equal to the penalties for heroin or methamphetamine offenses. In particular, how do the addictiveness of crack cocaine, short term and long term physiological and

psychological effects on the user, the violence associated with its use or distribution, its distribution trafficking pattern, and any secondary health consequences of its use (e.g., its effect on an infant who has been exposed prenatally to crack cocaine) compare to those associated with heroin or methamphetamine?

(2) The proposed amendment provides enhancements that address harms caused by violence often associated with drug trafficking offenses. Specifically, the proposed weapon enhancement in subsection (b)(1) provides graduated penalties for weapon involvement, depending on the use, type, and number of weapons involved. Similarly, the proposed bodily injury enhancement in subsection (b)(2) provides graduated penalties depending on the degree of injury involved in the offense. The Commission requests comment regarding whether either or both of these two enhancements also should provide minimum offense levels. If so, what is the appropriate minimum offense level for the conduct described in each subdivision? For example, should the Commission provide a minimum offense level of 27 in the case of a defendant who discharges a firearm (subdivision (b)(1)(A)), on the basis that the discharge of a firearm creates a risk of harm similar to that which is accounted for by the minimum offense level currently provided in subsection (b)(5)? Should the Commission provide a minimum offense level of 27 for offenses involving permanent or life threatening injury for similar reasons?

The Commission also requests comment regarding whether, in addition to the proposed enhancements pertaining to violence, it also should provide a enhancement that would apply if the offense involved an express or implied threat of death or bodily injury. (Note that 18 U.S.C. § 3553 and §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases) preclude a "safety valve" reduction for any defendant who uses violence or credible threats of violence in connection with the offense.) If so, what would be an appropriate increase and should the enhancement be applied cumulatively to the proposed enhancements in subsections (b)(1) and (b)(2)?

(3) The proposed amendment consolidates §§2D1.2 (Drug Offense Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) and 2D1.1 and also provides a new enhancement in §2D1.1(b)(3) to cover the conduct previously covered by §2D1.2. That enhancement provides a minimum offense level of 26 for offenses in which the defendant distributed a controlled substance to a minor or used a minor to commit the offense or to assist in avoiding detection or apprehension for the offense. This minimum offense level complies with the directive to the Commission in section 6454 of the Anti-Drug Abuse Act of 1988 and maintains the penalties that currently exist for such offenses under §2D1.2. The Commission requests comment regarding whether it should extend this minimum offense level to the other conduct contained in proposed §2D1.1(b)(3).

(4) Subsection (b)(8) of the proposed amendment provides a [two][four] level enhancement if the defendant committed any part of the instant offense after sustaining one felony conviction for either a crime of violence or a controlled substance offense. The Commission requests comment regarding whether proposed subsection (b)(8) also should provide a minimum offense level. If so, what offense level would be appropriate?

(5) Subsection (a)(3) of the proposed amendment provides a maximum base offense level of [24-32] for a defendant who qualifies for an adjustment under §3B1.2 (Mitigating Role). The Commission requests comment regarding whether application of this maximum base offense level should be limited to only defendants who receive an adjustment for minimal role in the offense (as opposed to an adjustment for either minimal role or minor role in the offense). Additionally, should application of the maximum base offense level be predicated on the absence of certain aggravating factors, such as bodily injury or dangerous weapon possession? Should any other limitation apply?

(6) The Commission recently amended §3B1.2 (Mitigating Role) to resolve a circuit conflict regarding

whether a defendant who is accountable under §1B1.3 (Relevant Conduct) only for conduct in which the defendant was personally involved, and who performs a limited function in concerted criminal activity, is precluded from consideration of a mitigating role adjustment under §3B1.2. See USSG Appendix C (Amendment 635, effective November 1, 2001). Under the approach adopted by the Commission, even in a case in which a defendant is liable under §1B1.3 only for conduct in which the defendant was personally involved (e.g., drug quantities personally handled by the defendant), the court can apply the traditional §3B1.2 analysis to determine whether the defendant should receive a reduction for mitigating role.

The amendment, however, did not address three additional circuit conflicts pertaining to mitigating role:

> *(A) Whether, in determining if the defendant is substantially less culpable than the "average participant", the court should assess the defendant's conduct in relation not only to the conduct of co-conspirators, but also to the conduct of a hypothetical defendant who performs similar functions in similar offenses involving multiple participants. Compare United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995) (holding that defendant only played a minor role in the offense if he was less culpable than his co-conspirators as well as the average participant in such a crime); United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991) (holding that defendant was not entitled to minor role adjustment because his role "as greater than the minimal participation exercised by the defendant to whom we have previously allowed a downward adjustment"); United States v. Caruth, 930 F.2d 811, 815 (10th Cir. 1991) ("The Guidelines permit courts not only to compare a defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime."); United States v. Daughtrey, 874 F.2d 213, 216 (4th Cir. 1989) (holding that the court should measure both the relative culpability of each participant in relation to the relevant conduct and the defendant's acts and relative culpability against an objective standard): United States v. Rotolo, 950 F.2d 70, 71 (1st Cir. 1991) (distinguishing between aggravating and mitigating roles and suggesting that "substantially less culpable than the average participant" means an objective comparison between the defendant and average person engaged in such conduct); United States v. Owusu, 199 F.3d 329, 337 (6th Cir. 2000) (to qualify for a minor role reduction, "a defendant must be less culpable than most other participants and substantially less culpable than the average participant"); United States v. Westerman, 973 F.2d 1422 (8th Cir.1992) (whether role in the offense adjustments are warranted is to be determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable, §1B1.3, but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction) with United States v. Rojas-Millan, 234 F.3d 464, 473 (9th Cir. 2000) (rejected the consideration of comparisons against the hypothetical "average participant" in the type of crime involved); United States v. Scroggins, 939 F.2d 416 (7th Cir. 1991) (ruled that a mitigating role assessment must include a comparison of the acts of each participant in relation to the relevant conduct for which the participant is held accountable under §1B1.3); United States v. Valencia, 907 F.2d 671 (7th Cir. 1990) (the §3B1.2 adjustment requires us to focus on the defendant's "role in the offense," rather than unspecified criminal conduct that is not part of the offense).*
>
> *(B) Whether, in determining if a mitigating role adjustment is warranted, the court may consider only the relevant conduct for the which the defendant is held accountable at sentencing, or whether it may also consider "expanded" relevant conduct (additional conduct that would appear to be properly includable under §1B1.3 but was not considered in determining the defendant's offense level). Compare United States v. James, 157 F.3d 1218, 1220 (10th Cir.1998) (holding that defendant's role in the offense is determined on the basis of the relevant conduct attributed to him in calculating his base offense level); United States v. Burnett, 66 F.3d 137, 140 (7th Cir.1995) (same); United States v.*

Atanda, 60 F.3d 196, 199 (5th Cir.1995) (per curiam) (same); United States v. Lampkins, 47 F.3d 175, 180 (7th Cir.1995) (same); United States v. Gomez, 31 F.3d 28, 31 (2d Cir.1994) (per curiam) (same); United States v. Lucht, 18 F.3d 541, 555-56 (8th Cir.1994) (same); United States v. Olibrices, 979 F.2d 1557, 1560 (D.C. Cir.1992) ("To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.") with United States v. Assisi-Zapata, 148 F.3d 236, 240-41 (3d Cir.1998) (relying on this Court's panel opinion in De Varan and holding that a court must examine all relevant conduct even if defendant is sentenced only for own acts); United States v. Rails, 106 F.3d 1416, 1419 (9th Cir.) (recognizing that "[the defendant's role in relevant conduct may provide a basis for an adjustment even if that conduct is not used to calculate the defendant's base offense level" but holding that defendant was "not entitled to a reduction in his sentence simply because he was tied to a larger drug trafficking scheme"), cert. denied, 520 U.S. 1282 (1997); United States v. Demers, 13 F.3d 1381, 1383 (9th Cir.1994) (declining "to restrict the scope of relevant conduct on which a downward adjustment may be based to the relevant conduct that is included in the defendant's base offense level.").

(C) Whether the court may depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2. Compare United States v. Speenburgh, 990 F.2d 72, 75 (2d Cir. 1993) (if a district court would have decreased the defendant's offense level under section 3B1.2 had the other person involved in the offense been criminally responsible, it should likewise have the discretion to depart downward between two and four levels, based on the defendant's culpability relative to that of the Government agent); United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990) ("when an adjustment for Role in the Offense is not available by strict application of the Guideline language, the court has power to use analogic reasoning to depart from the guidelines when the basis for departure is conduct similar to that encompassed in the Role in the Offense Guideline."); United States v. Valdez-Gonzalez, 957 F.2d 643, 648 (9th Cir. 1992), ("[I]n view of the limited application of §3B1.2 minimal participant adjustment, the Sentencing Commission had failed to consider adequately the role of the defendants in conduct surrounding the offense of conviction") with United States v. Costales, 5 F.3d 480 (11th Cir. 1993) (held that a defendant was not entitled to an adjustment or "analogous" downward departure from the applicable guideline range where the defendant was the only "criminally responsible" participant in a crime).

The proposed amendment's inclusion of a maximum base offense level in §2D1.1 for a defendant who qualifies for an adjustment under §3B1.2 raises the issue of whether the Commission also should address some or all of these remaining circuit conflicts. The Commission therefore requests comment regarding whether, in conjunction with the proposed maximum base offense level for mitigating role defendants, it should resolve any of these circuit conflicts and, if so, how should the Commission resolve them. If the Commission does address these issues of circuit conflict, should the Commission also amend §3B1.2 to provide guidance on whether particular drug offenders who perform certain drug trafficking functions (e.g., courier or mule) should or should not receive a mitigating role adjustment?

9. Proposed Amendment: Alternatives to Imprisonment

Synopsis of Proposed Amendment: *This amendment provides three options to increase sentencing alternatives in Zone C of the Sentencing Table (Chapter Five, Part A).*

Currently, under §§5B1.1 and 5C1.1, the court has three options when sentencing a defendant whose offense level is in Zone B. The court may impose (A) a sentence of imprisonment; (B) a sentence of probation with a condition of confinement sufficient to satisfy the minimum of the applicable guideline range; or (C) a "split-sentence" in which the defendant must serve at least one month of imprisonment followed by a term of supervised release with a condition of confinement sufficient to satisfy the remainder of the minimum of the applicable guideline range.

When the defendant's offense level is in Zone C, the court may impose either (A) a sentence of imprisonment; or (B) a "split-sentence" in which the defendant must serve at least one-half of the minimum of the applicable guideline range followed by a term of supervised release with a condition of confinement sufficient to satisfy the remainder of the minimum of the applicable guideline range.

Option One amends the Sentencing Table by combining Zones B and C, thereby providing offenders at offense levels 11 and 12 with the sentencing options currently available in Zone B: (A) a probation sentence with a condition of confinement sufficient to satisfy the minimum of the applicable guideline range; and (B) one month imprisonment followed by a term of supervised release with a condition of confinement sufficient to satisfy the remainder of the minimum of the applicable guideline range (a "split-sentence"). This option reduces the amount of imprisonment required for the "split-sentence" from four or five (at offense levels 11 and 12, respectively) months to one month.

Option Two also increases sentencing alternatives in Zone C of the Sentencing Table by combining Zones B and C, thereby providing offenders at offense levels 11 and 12 with additional sentencing options similar to Option One. This option differs from Option One in that it limits the use of home detention for defendants in which the minimum of the guideline range is at least eight months (i.e., current Zone C). In such cases, the defendant must satisfy the minimum of the applicable guideline range by some form of confinement, but, unlike Option I, the defendant must serve at least half of that minimum in a form of confinement other than home detention. This ensures that these more serious offenders will serve at least eight or ten (at offense levels 11 and 12, respectively) months in some form of confinement, of which at least four or five (at offense levels 11 and 12, respectively) months shall be served in some form of confinement other than home detention.

Option Three also increases sentencing alternatives in Zone C of the Sentencing Table. However, it differs from Option One and Option Two in that it limits the expansion of the sentencing options available in Zone B to offenders in criminal history Category I of Zone C of the Sentencing Table. This option provides these less serious offenders with the same sentencing options available to offenders in Zone B. Under this option, offenders in Categories II through VI will not benefit from additional sentencing alternatives.

Proposed Amendment:

Option 1:

The Sentencing Table in Chapter Five, Part A, is amended by striking the lines between Zones B and C; by redesignating Zones B and C as Zone B; and by redesignating Zone D as Zone C.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	**5**	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	**10**	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone C	**28**	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

§5B1.1. Imposition of a Term of Probation

* * *

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

* * *

(~~a~~A) Where the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~. In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(~~b~~B) Where the applicable guideline range is in Zone B of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~. In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~where~~in a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. ~~Where~~In a case in which the applicable guideline range is in Zone C ~~or D~~ of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)~~, the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

* * *

§5C1.1. Imposition of a Term of Imprisonment

* * *

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; ~~or~~

~~(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --~~

~~(1) a sentence of imprisonment; or~~

~~(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

* * *

(~~e~~d) Schedule of Substitute Punishments:

* * *

(~~f~~e) If the applicable guideline range is in Zone ~~D~~C of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

* * *

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~, the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. ~~Where~~In a case in which imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~, the court has three options:

(A) It may impose a sentence of imprisonment.

(B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, ~~where~~in a case in which the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

(C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month ~~must~~shall be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~where~~in a

case in which the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, ~~where~~in a case in which the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months of imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

~~*4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*~~

~~*(A) It may impose a sentence of imprisonment.*~~

~~*(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*~~

~~*The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.*~~

~~5~~4. Subsection (~~e~~d) sets forth a schedule of imprisonment substitutes.

~~6~~5. * * *

~~7~~6. The use of substitutes for imprisonment as provided in ~~subsections (c) and (d)~~subsection (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.

~~8~~7. Subsection (~~f~~e) provides that, ~~where~~in a case in which the applicable guideline range is in Zone ~~D~~C of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable~~

~~guideline range is twelve months or more)~~, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (~~e~~d).

Option Two:

The Sentencing Table in Chapter Five, Part A, is amendment by striking the lines between Zones B and C; by redesignating Zones B and C as Zone B; and by redesignating Zone D as Zone C.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	**5**	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	**10**	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone C	**28**	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

* * *

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

* * *

~~(a)~~(A) ~~Where~~In a case in the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~. In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

~~(b)~~(B) ~~Where~~In a case in which the applicable guideline range is in Zone B of the Sentencing Table~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~.

(i) Except as provided in subdivision (ii)~~In such cases~~, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~where~~in a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months. The court, of course, may impose a sentence at a point within that 2-7 month range that is higher than the minimum sentence. For example, a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.

(ii) The court may impose probation in a case in which the minimum term of the applicable guideline range is at least eight months, but only if the court imposes a

condition (I) that the defendant shall serve a period of confinement sufficient to satisfy the minimum term of imprisonment specified in the applicable guideline range; except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the offense level is 11 and the criminal history category is I, the guideline range from the Sentencing Table is 8-14 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least eight months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement or intermittent confinement (or a combination of community confinement and intermittent confinement totaling at least four months)). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court may impose a sentence of probation with any combination of community confinement, intermittent confinement, or home detention, as long as at least 4 of those months are served in a form of confinement other than home detention.

2. ~~*Where*~~*In a case in which the applicable guideline range is in Zone C ~~or D~~ of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)~~, the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

* * *

§5C1.1. Imposition of a Term of Imprisonment

* * *

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; ~~or~~

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (~~e~~d), ~~provided~~except that (A) at least one month ~~is~~shall be satisfied by actual imprisonment; (B) the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention, except that if the minimum term of the applicable guideline range is at least eight months, at least one-half of that minimum term shall be served in a form of confinement other than home detention; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (~~e~~d) sufficient to satisfy the minimum term of imprisonment specified in the guideline range, except that if the minimum term of the applicable guideline range is at least eight months, at least one-half of that minimum term shall be

served in a form of confinement other than home detention.

~~(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --~~

~~(1) a sentence of imprisonment; or~~

~~(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

* * *

(~~e~~d) Schedule of Substitute Punishments:

* * *

(~~f~~e) If the applicable guideline range is in Zone ~~D~~C of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

* * *

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~, the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. ~~Where~~In a case in which imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~, the court has three options:

(A) It may impose a sentence of imprisonment.

(B) (i) Except as provided in subdivision (ii)~~In such cases~~, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~where~~in a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a

case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months. The court, of course, may impose a sentence at a point within that 2-7 month range that is higher than the minimum sentence. For example, a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.

(ii) The court may impose probation in a case in which the minimum term of the applicable guideline range is at least eight months, but only if the court imposes a condition (I) that the defendant shall serve a period of confinement sufficient to satisfy the minimum term of imprisonment specified in the applicable guideline range; except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the offense level is 11 and the criminal history category is I, the guideline range from the Sentencing Table is 8-14 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least eight months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement or intermittent confinement (or a combination of community confinement and intermittent confinement totaling at least four months)). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court may impose a sentence of probation with any combination of community confinement, intermittent confinement, or home detention, as long as at least 4 of those months are served in a form of confinement other than home detention.

(C) (i) Except as provided in subdivision (ii), ~~Or,~~ it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month ~~must~~shall be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~where~~in a case in which the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range. The court, of course, may impose a sentence at a point within that 4-10 month range that is higher than the minimum sentence. For example, a sentence of two months of imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

(ii) If the minimum term of the applicable guideline range is at least eight months, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, (I) at least one month shall be satisfied by actual imprisonment, (II) the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention, except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the applicable guideline range is 8-14 months, the court must impose a sentence of actual imprisonment of one month followed by a term of supervised release requiring a condition or conditions of at least seven months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court must impose a sentence of actual imprisonment of at least one month followed by a term of supervised release requiring a condition or conditions of at least thirteen months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement).

~~*The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example,where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.*~~

~~*4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*~~

~~*(A) It may impose a sentence of imprisonment.*~~

~~*(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*~~

~~*The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six*~~

~~*months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.*~~

~~5~~4. Subsection (~~e~~d) sets forth a schedule of imprisonment substitutes.

~~6~~5. * * *

~~7~~6. The use of substitutes for imprisonment as provided in ~~subsections (c) and (d)~~subsection (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.

~~8~~7. Subsection (~~f~~e) provides that, ~~where~~in a case in which the applicable guideline range is in Zone ~~D~~C of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more)~~, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (~~e~~d).

Option Three:

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

* * *

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

(~~a~~A) ~~Where~~In a case in which the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~. In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(~~b~~B) ~~*Where*~~*In a case in which the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~. In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~where~~ in a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.*

2. ~~*Where*~~*In a case in which the applicable guideline range is in ~~Zone C or~~ criminal history Category II, III, IV, V, or VI of Zone C, or any criminal history category of Zone D of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)~~, the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

* * *

§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; ~~or~~

(2) a sentence of imprisonment that includes a term of supervised release with a

condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in criminal history Category II, III, IV, V, or VI of Zone C of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

* * *

Commentary

Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*

2. *Subsection (b) provides that ~~where~~in a case in which the applicable guideline range is in Zone A of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)~~, the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. ~~Where~~In a case in which imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.*

3. *Subsection (c) provides that ~~where~~in a case in which the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)~~, the court has three options:*

(A) It may impose a sentence of imprisonment.

(B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community

confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, ~~where~~in a case in which the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

(C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~where~~in a case in which the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, ~~where~~in a case in which the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. Subsection (d) provides that ~~where~~in a case in which the applicable guideline range is in criminal history Category II, III, IV, V, or VI of Zone C of the Sentencing Table ~~(i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months)~~, the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~where~~in a case in which the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, ~~where~~in a case in which the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection

(d)) would be within the guideline range.

* * *

6. There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases ~~where~~in which the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.

* * *

8. Subsection (f) provides that, ~~where~~in a case in which the applicable guideline range is in Zone D of the Sentencing Table ~~(i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more)~~, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

10. Proposed Amendment: Discharged Terms of Imprisonment

Issue for Comment: *The Commission requests comment regarding whether subsections (b) and (c) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) should be expanded to apply to discharged terms of imprisonment. If so, how should this be accomplished? Alternatively, should the Commission provide a structured downward departure in cases in which the discharged term of imprisonment resulted from offense conduct that has been taken into account in the determination of the offense level for the instant offense of conviction? If so, how should such a departure be structured? For example, should the extent of the departure be linked to the length of the discharged term of imprisonment?*

The Commission further requests comment regarding any other issue that should be resolved pertaining to the overall application of §5G1.3