UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

SUMMARY: The Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. The proposed amendments and a synopsis of issues to be addressed are set forth below. The Commission may report amendments to the Congress on or before May 1, 1995. Comment is sought on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary.

DATES: The Commission has scheduled a public hearing on these proposed amendments for March 14, 1995, at 9:30 a.m. in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002–8002.

Persons interested in attending the public hearing should contact the Commission at a later date to learn the room in which the hearing will take place. Anyone wishing to testify at the public hearing should notify Michael Courlander, Public Information Specialist, at (202) 273–4590 by February 28, 1995.

Public comment, including written testimony for the hearing, should be received by the Commission no later than March 7, 1995, to be considered by the Commission in the promulgation of amendments due to the Congress by May 1, 1995.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273–4590.

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

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

The proposed amendments are presented in one of three formats. First, a number of the amendments are proposed as specific revisions of a guideline, policy statement, or commentary. Second, for some amendments, the Commission has published alternative methods of addressing an issue, shown in brackets. Commentators are encouraged to state their preference among listed alternatives or to suggest a new alternative. Third, the Commission has highlighted certain issues for comment and invites suggestions for specific amendment language.

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

Although the amendments below are specifically proposed for public comment and possible submission to the Congress by May 1, 1995, the Commission emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment.

Publication of a proposed amendment or issue for comment signifies only that at least three Commissioners consider the amendment or issue worthy of comment by interested groups and individuals. Publication should not be regarded as an indication that the Commission or any individual Commissioner has formed a view on the merits of the proposed amendment or issue.

Authority: 28 U.S.C. § 994(a), (o), (p), (x).

Phyllis J. Newton,

Staff Director.

I. Amendments Relating to Congressional Directives to the Commission and Other Statutory Changes

Chapter One, Part B (General Application Principles)

1. Issue for Comment: Section 40503 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate guideline amendments relating to offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her HIV infection status and with the intent through such sexual activity to expose another to HIV. A report is to be submitted to Congress by March 13, 1995. The Commission invites comment on any aspect of this issue. In addition, the Commission invites comment on whether the infectious bodily fluid of a person should be defined expressly as a ''dangerous weapon.'' The Commission further invites comment on whether the definitions relating to serious bodily injury and permanent or life-threatening bodily injury should be amended to expressly include infection by HIV-infected bodily fluid. The Commission also invites comment on whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing behavior.

Chapter Two, Part A (Offenses Against the Person)

2. Issue for Comment: Section 170201 of the Violent Crime Control and Law Enforcement Act of 1994 establishes a new offense with a five-year statutory maximum for an assault against a person under the age of 16 years that results in substantial bodily injury (18 U.S.C. § 113(a)(7)). Substantial bodily injury is defined as ''bodily injury that involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental facility.'' The Commission invites comment as to whether § 2A2.3 provides an adequate penalty for a violation of 18 U.S.C. § 113(a)(7). If not, how and to what extent should § 2A2.3 be amended? For example, should the Commission amend § 2A2.3(a)(1) by deleting ''physical contact'' and inserting ''bodily injury,'' thus providing a base offense level of six for bodily injury or weapon possession with a threat of use and a base offense level of three for other cases? Should the

Commission instead add a specific offense characteristic for bodily injury or a specific offense characteristic if the defendant is convicted of a violation of 18 U.S.C. § 113(a)(7)? Should § 2A2.3 be amended by providing a cross reference to § 2A2.2 (Aggravated Assault) to account for cases in which the underlying conduct involves serious bodily injury or use of a weapon with intent to cause bodily harm although the offense of conviction does not qualify as aggravated assault?

3. Issue for Comment: Section 320102 of the Violent Crime Control and Law Enforcement Act of 1994 increases the maximum imprisonment penalty for involuntary manslaughter from three years to six years. The proposed amendment responds to the Commission's recommendation that Congress raise the penalty in order to achieve parity with the sentencing practices of the majority of the states and to allow the guideline sentence for this offense to operate without undue constraint. Guideline 2A1.4 (Involuntary Manslaughter) applies a base offense level of level 10 (if the conduct was criminally negligent) or level 14 (if the conduct was reckless) to offenses under 18 U.S.C. § 1112. These offense levels may have reflected, in part, the previous relatively low maximum term of imprisonment authorized for this offense. The Commission invites comment on whether the base offense levels under § 2A1.4 (Involuntary Manslaughter) provide adequate punishment and, if not, to what extent they should be increased.

4. Synopsis of Proposed Amendment: The International Parental Kidnapping Crime Act of 1993 (Public Law 103–73, codified at 18 U.S.C. § 1204) makes it unlawful to remove a child from the United States with intent to obstruct the lawful exercise of parental rights. The statutorily authorized maximum term of imprisonment for this offense is three years. In contrast, other kidnapping offenses (e.g., 18 U.S.C. § 1201) have a statutory maximum sentence of life or death. Two options are shown. Option 1 references this statute to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) with a separate base offense level for a conviction under this statute. Option 2 references this statute to § 2J1.2 (Obstruction of Justice) because the underlying conduct involves interference with a court's child-custody order.

Proposed Amendment: [Option 1: Section § 2A4.1(a) is amended by deleting ''24'' and inserting in lieu thereof:

''(1) 24, except as provided below;

(2) 12, if the defendant was convicted under 18 U.S.C. § 1204.'';

and by inserting the following additional subsection:

''(d) Special Instruction

(1) If the base offense level is determined under subsection (a)(2), do not apply subsection (b)(4).''.

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

''18 U.S.C. § 1204 2A4.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''18 U.S.C. § 1204 2J1.2''.]

5. Issue for Comment: Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate amendments to §§ 2A3.1 (Aggravated Sexual Abuse) and 2A3.2 (Sexual Abuse) to address four concerns: (1) enhancing the sentence if more than one defendant is involved in the offense; (2) reducing unwarranted disparity between defendants who are known by the victim and those who are unknown by the victim; (3) making federal penalties commensurate with state penalties; and (4) considering the general problem of recidivism, severity of the offense, and devastating effects on survivors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts on: (1) comparative federal sentences between assailants who were known vs. unknown to their victims; (2) comparative federal sentences with those of states; and (3) the effect of rape sentences on Native American and U.S. military populations relative to the impact of sentences for other federal offenses on these populations. This report is to be submitted to Congress by March 13, 1995.

The Commission invites comment on any aspect of this directive or any amendment to the guidelines appropriate to address this directive. Specifically, comment is requested on whether § 2A3.1 (Criminal Sexual Abuse) should be amended to include an enhancement for more than one assailant. If such a factor is added, comment is requested as to the weight to be given to that factor and how its inclusion should affect the application of an adjustment for the defendant's role in the offense under Chapter Three, Part B. Comment is further invited as to whether the guidelines adequately account for the seriousness of the sexual abuse offense (including the effects on the victim of sexual abuse) and how any suggested changes should be applied. Currently, through specific offense characteristics and other instructions in § 2A3.1, the guidelines consider the degree of bodily injury, age of victim, sexual abuse of a person held within a correctional facility, use of a dangerous weapon, circumstances in which the defendant holds a supervisory or custodial role, circumstances in which the victim was abducted, and death of the victim. The Commission invites comment on additional factors that might appropriately be considered and the weights such factors should be given.

Chapter Two, Parts A (Offenses Against the Person); G (Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity); J (Offenses Involving the Administration of Justice); and L (Offenses Involving Immigration, Naturalization, and Passports)

6. Synopsis of Proposed Amendment: Sections 60010, 60011, 60016, 60017, and 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increase the penalty for various offenses resulting in the death of a victim. It is not clear whether imposition of the penalties in the new law will require proof of the conduct by a preponderance of the evidence or beyond a reasonable doubt. For example, the ''beyond a reasonable doubt standard'' contemplated in some instances by McMillan v. United States, 477 U.S. 79 (1986), might be triggered by section 60010, which increases the six-month maximum imprisonment penalty for abusive sexual contact of a ward to a maximum sentence of death or imprisonment for any term of years or life if death results from that contact.

Two options are shown. Option 1 amends the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense. Under § 1B1.2 (Applicable Guidelines), this reference will apply only if it is found beyond a reasonable doubt that death resulted from the offense. Option 2 amends the guidelines for the underlying offenses to include a cross reference to Chapter Two, Part A, if death results from the offense. Under Option 2, it need only be found by a preponderance of the evidence that death resulted from the offense for the cross reference to apply, consistent with § 1B1.3 (Relevant Conduct).

Proposed Amendment: [Option 1: Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1324(a) by inserting ''2A1.1,

2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2,'' immediately before ''2L1.1'';

In the line referenced to 18 U.S.C. § 1503 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A2.1,'' immediately before ''2J1.2'';

In the line referenced to 18 U.S.C. § 1513 by inserting ''(b)'' immediately following ''1513'';

By inserting the following at the appropriate place by title and section:

''18 U.S.C. § 1513(a) 2A1.1, 2A1.2, 2A1.3, 2A2.1 (2J1.2 for offenses committed prior to September 13, 1994)'';

In the line referenced to 18 U.S.C. § 2243(a) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.2'';

In the line referenced to 18 U.S.C. § 2243(b) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.3'';

In the line referenced to 18 U.S.C. § 2244 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.4''; and

In the lines referenced to 18 U.S.C. § 2251(a), (b) and to 18 U.S.C. § 2251(c)(1)(B) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2G2.1''.]

[Option 2: Section 2A3.2(c) is amended by inserting the following additional subdivision:

''(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2A3.3 is amended by inserting the following additional subsection:

''(b) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2A3.4(c) is amended by inserting the following additional subdivision:

''(3) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

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

''(c) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2J1.2(c) is amended by deleting ''Reference'' and inserting in lieu thereof ''References''; and by inserting the following additional subdivision:

''(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2L1.1 is amended by inserting the following additional subsection:

''(c) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Chapter Two, Part A (Offenses Against the Person)

Chapter Four, Part A (Criminal History)

7. Synopsis of Proposed Amendment: Section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 adds a new section 2247 to title 18 that doubles the statutory maximum term of imprisonment for defendants convicted of offenses under chapter 109A (Sexual Abuse) of title 18 who have been convicted previously in federal or state court of aggravated sexual abuse, sexual abuse, or aggravated sexual contact. The section also directs the Sentencing Commission to implement this provision ''by promulgating amendments, if appropriate, in the sentencing guidelines applicable to chapter 109A offenses.''

None of the Chapter Two sexual abuse guidelines currently provides for enhancement for repeat sex offenses. However, Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant's criminal record based upon prior convictions (§ 4A1.1). Guideline 4B1.1 (Career Offender) also provides enhanced penalties for offenders who engage in a crime of violence or controlled substance offense, having been sentenced previously for two or more crimes of either type. Crimes of violence include sexual abuse offenses committed with violence or force or threat of force (§ 4B1.2(1)). For cases in which a defendant is sentenced for a current sexual offense, has only one prior sexual offense, and no other prior crimes of violence or controlled substance offenses, the prior sexual offense is accounted for within the calculation of Criminal History Score. The Criminal History Score classifies prior convictions based upon type and length of prior sentence. Consequently, the sexual nature of the prior offense is not considered specifically although it may be related to the type and length of prior sentence.

Although, as noted above, the guidelines currently do not enhance specifically for one prior repeat sex crime, § 4A1.3 (Adequacy of Criminal History Category) generally provides that an upward departure may be considered ''[i]f reliable information indicates that the criminal history category does not reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.'' The proposed amendment builds on § 4A1.3 by specifically listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense. This approach implements the directive to the Commission in a broader but more flexible form.

Proposed Amendment: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''6. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by inserting the following additional note:

''4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by inserting the following additional note:

''2. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

Section 4A1.3 is amended by inserting the following new paragraph as the third paragraph:

''An upward departure under this provision, to reflect a defendant's demonstrated pattern of particularly egregious criminal conduct, also may be warranted if all of the following apply: (A) the instant offense involves death, serious bodily injury, the attempted

infliction of death or serious bodily injury, or a forcible sexual offense; (B) the defendant's prior criminal history includes one or more sentences for conduct that is similar to the instant offense; and (C) the provisions of §§ 4A1.1 (Career Offender) or 4A1.4 (Armed Career Criminal) do not apply.''.

Additional Issue for Comment: The Commission invites comment on whether, as an alternative to the proposed amendment, it should amend the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) to provide higher offense levels if the defendant has a prior conviction in federal or state court for aggravated sexual abuse, sexual abuse, or aggravated sexual contact, and, if so, how such a provision might best be drafted to account for the wide variations in offenses of conviction that may involve such underlying conduct. The Commission also invites comment on the appropriate amount of any such increase in offense levels. Note that in circumstances in which the defendant has two or more prior felony convictions of either a crime of violence (which includes forcible sex offenses) or a controlled substance offense, § 4B1.1 (Career Offender) will provide a sentence at or near the statutory maximum for the current offense.

Chapter Two, Part B (Offenses Involving Property)

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

8. Synopsis of Proposed Amendment: Section 110512 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ''amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of a felony under chapter 25 (Counterfeiting and Forgery) of title 18, United States Code (sections 471–513), if the defendant used or carried a firearm (as defined in section 921(a)(3) of title 18, United States Code) during and in relation to the felony.'' The vast majority of offenses in chapter 25 are covered by §§ 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) and 2F1.1 (Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Neither § 2B5.1 nor § 2F1.1 provides an adjustment for possession of a firearm during and in relation to a felony. Commission data suggest that the frequency of firearm possession in such cases is very low.

Two options are shown. Option 1 amends §§ 2B5.1 and 2F1.1 to provide an adjustment for using or carrying a weapon in connection with the offense. Option 2 amends §§ 2B5.1 and 2F1.1 to recommend an upward departure in such circumstances.

Proposed Amendment: [Option 1: Section 2B5.1(b) is amended by inserting the following additional subdivision:

''(3) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.''

The Commentary to § 2B5.1 captioned ''Background'' is amended by inserting the following additional paragraph as the second paragraph:

''Subsection (b)(3) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.''.

Section 2F1.1(b)(4) is amended by inserting ''(A)'' immediately after ''involved'' and by inserting ''or (B) possession of a dangerous weapon (including a firearm) in connection with the offense,'' immediately after ''injury,''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting the following additional paragraph as the next to the last paragraph:

''Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.''.]

[Option 2: The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''4. If a dangerous weapon (including a firearm) was possessed in connection with the offense, an upward departure may be warranted.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''19. If a dangerous weapon (including a firearm) was possessed in connection with the offense, an upward departure may be warranted.''.]

Additional Issue for Comment: The Commission, at the request of the Department of Justice, invites comment on whether the form of any enhancement for a dangerous weapon should be that used in § 2B3.1 (Robbery) or that used in Chapter Two, Part D (Offenses Involving Drugs).

Chapter Two, Part D (Offenses Involving Drugs)

9. *Synopsis of Proposed Amendment:* Section 60008 of the Violent Crime Control and Law Enforcement Act of 1994 creates a new offense codified at 18 U.S.C. § 36 that makes it unlawful to fire a weapon into a group of two or more persons in furtherance of, or to escape detection of, a major drug offense with intent to intimidate, harass, injure, or maim, and in the course of such conduct cause grave risk to any human life or kill any person. A ''major drug offense'' is defined to mean a continuing criminal enterprise, 21 U.S.C. § 848(c), a drug distribution conspiracy under 21 U.S.C. § 846 or § 963, or an offense involving large quantities of drugs that is punishable under 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1).

Two options are shown. Option 1 references this offense to § 2D1.1 in the Statutory Index. Option 2, in addition, references the applicable Chapter Two, Part A, offenses.

Proposed Amendment: [Option 1: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 36 2D1.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 36 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2D1.1''.]

Additional Issue for Comment: The Commission, at the request of the Department of Justice, invites comment as to whether there should be an enhancement under § 2D1.1 for reckless endangerment by firing a weapon into a group of two or more persons in a circumstance set forth in section 60008 when no injury occurs.

10(A). Issue for Comment: Section 90101 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 1791 (providing or possessing contraband in prison) to provide four different maximum penalties depending on the type of controlled substance. The Commission invites comment on the appropriate treatment of offenses under 18 U.S.C. § 1791 involving drug trafficking in correctional facilities. Specifically, should the enhanced offense level in the cross reference in § 2P1.2 (two levels plus the offense level from § 2D1.1) be expanded to apply to all drug trafficking offenses under 18 U.S.C. § 1791? Should the minimum offense level of 26 in this cross reference be applied to methamphetamine offenses to reflect that such offenses now have the same 20-year statutory maximum penalty as the other controlled substance distribution offenses to which this cross reference applies? The Commission also invites comment on the appropriate offense levels under § 2P1.2 for offenses involving the simple possession of controlled substances that occur in correctional facilities.

(B). Issue for Comment: Section 90103 of the Violent Crime and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide an adequate enhancement for (1) an offense of simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility, and (2) an offense under 21 U.S.C. § 841 that involves distributing a controlled substance in a federal prison or detention facility. The Commission invites comment as to the best methods of implementing this directive. With respect to distribution offenses, the Commission specifically invites comment as to whether such offenses should be referenced to § 2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations. With respect to simple possession offenses, the Commission specifically invites comment as to whether an enhancement of two levels would be an appropriate enhancement, or whether a higher or lower enhancement should be used. In addition, the Commission invites comment on how the offense levels for simple possession offenses in a correctional facility under §§ 2D2.1 and 2P1.2 might better be coordinated.

11. Issue for Comment: Section 90102 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide ''an appropriate enhancement'' for a defendant convicted of violating 21 U.S.C. § 860. This statute prohibits drug trafficking in protected locations (e.g., near schools, playgrounds, video arcades). Guideline 2D1.2 currently contains an enhanced penalty for such offenses based on a congressional directive to the Commission in section 6454 of Public Law 100–690 (pertaining to drug offenses involving persons less than 18 years of age). The Commission seeks comment on whether the enhancement for these offenses in § 2D1.2 is adequate to account for the directive set forth in section 90102 or, if the current enhancement is not adequate, how and to what extent § 2D1.2 should be amended to provide an appropriate enhancement.

Additional Issue for Comment: The Commission, at the request of the Federal and Community Defenders, invites comment as to whether the guidelines should be amended to provide a lower base offense level if an offense is committed in a protected location selected by law enforcement or its agents. The Commission specifically invites comment on the following proposal.

Section 2D1.2(a)(4) is amended by deleting ''otherwise'' and inserting in lieu thereof:

''(A) if the offense involved a protected location and the protected location was selected by law enforcement personnel, or someone acting under the direction or control of law enforcement personnel, or (B) in any case not covered by subdivisions 1 through 3 of this subsection.''.

12. Synopsis of Proposed Amendment: Section Two of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200) changes the designations of the listed chemicals from ''listed precursor chemicals'' and ''listed essential chemicals'' to ''list I chemicals'' and ''list II chemicals,'' respectively. Guideline 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) currently refers to ''listed precursor chemicals'' and ''listed essential chemicals.'' This amendment conforms § 2D1.11 to the new terminology to avoid confusion.

Section Two of the Act also adds pills containing ephedrine as a list I chemical. Ephedrine is a list I chemical under 21 U.S.C. § 802(34). Pills containing ephedrine previously were not covered by the statute and thus legally could be purchased ''over the counter.'' Purchases of these pills were sometimes made in large quantities and the pills crushed and processed to extract the ephedrine (which could be used to make methamphetamine). Unlike ephedrine, which is purchased from a chemical company and is virtually 100 percent pure, these tablets contain about 25 percent ephedrine. To avoid unwarranted disparity, this amendment adds a note to § 2D1.11 providing that only the amount of actual ephedrine contained in the pill is to be used in determining the offense level.

Section Eight of the Act removes three chemicals from the listed chemicals controlled under the Controlled Substances Act and adds two chemicals. Two of the chemicals removed from the list are not currently listed in § 2D1.11 because the Commission was aware that they were erroneously included in the statute (they are not used in the manufacture of any controlled substance). The third chemical removed from the list, d-lysergic acid, was listed both as a listed chemical in § 2D1.11 and as a controlled substance in § 2D1.1. To conform § 2D1.11 to this change, the proposed amendment deletes all references to d-lysergic acid. The two chemicals added as listed chemicals are benzaldehyde and nitroethane. Both of these chemicals are used to make methamphetamine. Base offense levels for listed chemicals in § 2D1.11 are determined by their relationship to the most common controlled substance they are used to manufacture. The proposed amendment adds these chemicals to the Chemical Quantity Table in § 2D1.11 based on information provided by the Drug Enforcement Administration regarding their use in the production of methamphetamine.

Several of the chemicals in the Chemical Quantity Table are used in the same process to make a controlled substance, such as hydriodic acid and ephedrine as well the two chemicals added above. The current note at the end of the Precursor Chemical Equivalency Table states ''[i]n cases involving both hydriodic acid and ephedrine, calculate the offense level for each separately and use the quantity that results in the greatest offense level.'' The proposed amendment expands this note to cover other chemicals that may be used together, including the two chemicals added by the statute.

Proposed Amendment: Section 2D1.11 and the commentary thereto is amended by deleting ''listed precursor'' wherever it appears and inserting in lieu thereof ''list I''; by deleting ''listed essential'' wherever it appears and inserting in lieu thereof ''list II''; and by deleting ''Precursor Chemical Equivalency Table'' wherever it appears and inserting in lieu thereof ''List I Chemical Equivalency Table''.

Section 2D1.11(d) is amended by deleting all lines referencing d-lysergic acid.

The Chemical Quantity Table in § 2D1.11(d) is amended in subdivisions (1)–(9) by adding the following list I chemicals (formerly Listed Precursor Chemicals) in the appropriate place in alphabetical order by subdivision as follows:

(1) ''17.8 KG or more of Benzaldehyde;'', ''12.56 KG or more of Nitroethane;'',

(2) ''At least 5.34 KG but less than 17.8 KG of Benzaldehyde;'', ''At least 3.768 KG but less than 12.56 KG of Nitroethane;'',

(3) ''At least 1.78 KG but less than 5.34 KG of Benzaldehyde;'', ''At least 1.256 KG but less than 3.768 KG of Nitroethane;'',

(4) ''At least 1.25 KG but less than 5.34 KG of Benzaldehyde;'', ''At least 879 G but less than 1.256 KG of Nitroethane;'',

(5) ''At least 712 G but less than 1.25 KG of Benzaldehyde;'', ''At least 502 G but less than 879 G of Nitroethane;'',

(6) ''At least 178 G but less than 712 G of Benzaldehyde;'', ''At least 126 G but less than 879 G of Nitroethane;'',

(7) ''At least 142 G but less than 178 G of Benzaldehyde;'', ''At least 100 G but less than 126 G of Nitroethane;'',

(8) ''At least 107 G but less than 142 G of Benzaldehyde;'', ''At least 75 G but less than 100 G of Nitroethane;'',

(9) ''Less than 107 G of Benzaldehyde;'', ''Less than 75 G of Nitroethane;'';

And by adding the following chemicals, in the appropriate place in alphabetical order, to the List I Chemical Equivalency Table:

''1 gm of Benzaldehyde = 1.121 gm of Ephedrine'',

''1 gm of Nitroethane = 1.6 gm of Ephedrine''.

Section 2D1.11(d) is amended in the notes following the Chemical Quantity Table by deleting Note (A) and inserting in lieu thereof:

''(A) The List I Chemical Equivalency Table provides a means for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.'';

By deleting Note D and inserting in lieu thereof:

''(D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

Section 2D1.11(d) is amended in the note following the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) designated by two asterisks by deleting ''both hydriodic acid and ephedrine'' and inserting in lieu thereof ''two or more list I chemicals used together in the same manufacturing process''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by deleting Note 4 in its entirety and inserting in lieu thereof:

''4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purposes of calculating the base offense level.

Examples:

(a) The defendant was in possession of five kilograms of ephedrine and three kilograms of hydriodic acid. Both of these list I chemicals are typically used together to manufacture methamphetamine. Therefore, the base offense level for each listed chemical would be calculated separately and the list I chemical with the highest base offense level would be used. Five kilograms of ephedrine result in a base offense level of 24; 300 grams of hydriodic acid result in base offense level of 14. In this case, the base offense level would be 24.

(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are used in two different manufacturing processes and thus would not be used together. In this case, the two kilograms of phenylacetic acid would convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.''.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the second sentence by deleting ''Listed precursor'' and inserting in lieu thereof ''List I''; by deleting ''critical to the formation'' and inserting in lieu thereof ''important to the manufacture''; and by inserting ''usually'' immediately before ''become''.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the last sentence by deleting ''Listed essential'' and inserting in lieu thereof ''List II''; by inserting ''used as'' immediately following ''generally''; and by deleting ''and do not become part of the finished product''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 14 in its entirety, and by renumbering the remaining notes accordingly.

13. Synopsis of Proposed Amendment: Section Three of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200) broadens the prohibition in 21 U.S.C. § 843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Guideline 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) applies to this conduct. Consistent with the treatment of similar conduct under §§ 2D1.11(b)(2) and 2D1.13(b)(2), this amendment revises § 2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

Proposed Amendment: Section 2D1.12 is amended by inserting ''(Apply the greatest)'' immediately after ''Base Offense Level''; and by deleting ''12'' and inserting in lieu thereof:

''(1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or

(2) 9, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance.''.

Chapter Two, Part H (Offenses Involving Individual Rights)

Chapter Three, Part A (Victim-Related Adjustments)

14. Synopsis of Proposed Amendment: This is a three-part amendment. First, the amendment adds an additional subsection to § 3A1.1 to implement the directive contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994. Second, the amendment consolidates §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5, and adjusts the offense levels in these guidelines to harmonize them with each other, better reflect the seriousness of the underlying conduct, and reflect the revision of § 3A1.1. Third, the amendment references violations of 18 U.S.C. § 248 (the Freedom of Access to Clinic Entrances Act of 1994, Public Law 103–259) to the consolidated guideline.

Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide a minimum enhancement of three levels for offenses that the finder of fact at trial determines are hate crimes. This directive also instructs the Commission to ensure that there is reasonable consistency with other guidelines and that duplicative punishments for the same offense are avoided. The Freedom of Access to Clinic Entrances Act of 1994 makes it a crime to interfere with access to reproductive services or to interfere with certain religious activities.

Since their inception, the guidelines have provided enhanced penalties for

offenses involving individual rights (hate crimes or other offenses committed under color of law). These enhanced penalties reflect that, in such offenses, the harm includes both the underlying criminal conduct and an added civil rights component. Under the current civil rights offense guidelines, there is a two-level enhancement for hate crimes committed by a person other than a public official. There is a six-level enhancement for all offenses committed under color of law, including both hate and non-hate crimes.

The existing civil rights offense guidelines provide alternative base offense levels: (1) the offense level applicable to the underlying offense plus the additional levels for the civil rights component; and (2) a minimum or ''default'' offense level. The enhanced offense levels for civil rights offenses do not apply to hate crimes prosecuted under other statutes. Official misconduct offenses (offenses committed under color of law) prosecuted under other statutes generally receive an enhanced penalty of two levels under § 3B1.3 (Abuse of Position of Special Trust) rather than the six levels applicable under the civil rights offense guidelines.

The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where ''the finder of fact at trial determines beyond a reasonable doubt'' that the offense of conviction was a hate crime. The proposed amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing, determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, the Commission will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's authority, pursuant to 28 U.S.C. § 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline.

Proposed § 2H1.1 provides alternative offense levels using the greatest of the following: (1) the base offense level for the underlying offense; (2) level 10, for offenses involving the use or threatened use of force or the actual or threatened destruction of property; or (3) level 6, otherwise. In addition, two options for setting the default offense level for conspiracies involving individual rights are shown. One option sets a default level of 12 for offenses involving two or more participants. This option is two levels higher than the default offense level for substantive offenses involving force or the threat of force and six levels higher than the default offense level for substantive offenses not involving force or the threat of force. A second option sets the default offense level of 10, which is consistent with the default offense level for substantive civil rights offenses involving force or the threat of force and four levels higher than the offense level for substantive civil rights offenses not involving force or the threat of force.

Proposed § 2H1.1, working together with the proposed § 3A1.1, provides enhanced penalties for civil rights offenses. For hate crimes committed by persons who are not public officials, the enhancement is three levels under proposed § 3A1.1, one level greater than under the current guidelines. Unlike the current guidelines, however, the proposed guideline differentiates between hate crimes and non-hate crimes committed under color of law, punishing hate crimes committed by public officials more severely than non-hate crimes. Proposed § 2H1.1 provides an enhancement for non-hate crimes committed under color of law of either two, three, or four levels above the offense level for the underlying offense. A two-level enhancement would be consistent with the generally applicable enhancement under § 3B1.3 (Abuse of Position of Special Trust). A three- or four-level enhancement would be higher than the generally applicable enhancement under § 3B1.3 and arguably would reflect the greater harm done by those in positions of authority when the harm involves violations of individual rights. Because of the additional three-level hate crime enhancement under § 3A1.1, the proposed amendment would provide a combined enhancement for hate crimes committed by public officials of five, six, or seven levels.

The clinic access law, like the other criminal civil rights statutes, criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The proposed amendment treats these violations in the same way as other offenses involving individual rights.

Two options are shown. Option 1 sets forth an amendment consistent with the preceding discussion. An alternative to this proposed amendment, published at the request of the Department of Justice, is set forth as Option 2.

Proposed Amendment: [Option 1: Section 3A1.1 and accompanying commentary is deleted in its entirety and the following inserted in lieu thereof:

''§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels; or

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Commentary

Application Notes:

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

2. Subsection (b) applies to offenses in which an unusually vulnerable victim is made a target of criminal activity by the defendant and the defendant knew or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

3. Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline.

4. Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

5. If subsection (a) applies, do not apply subsection (b). In the case of an offense that both is a ''hate'' crime and involves an unusually vulnerable

victim, a sentence at or near the upper limit of the applicable guideline range (which will include a 3-level enhancement from subsection (a)) typically will be appropriate.

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.''.

The Introductory Commentary to Chapter Two, Part H, Subpart I and §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted in their entirety and the following inserted in lieu thereof:

''§ 2H1.1. Offenses Involving Individual Rights

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

(1) the offense level from the offense guideline applicable to any underlying offense;

[(2) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or (C) two or more participants; or

(3) 6, otherwise.]

[(2) 12, if the offense involved two or more participants; or

(3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) 6, otherwise.]

(b) Specific Offense Characteristics

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by [2][3][4] levels. If the resulting offense level is less than level 10, increase to level 10.

Commentary

Statutory Provisions: 18 U.S.C. § 241, 242, 245(b), 246, 247, 248, 1091; 42 U.S.C. § 3631.

Application Notes:

1. 'Offense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the number and nature of underlying offenses by applying the procedure set forth in Application Note 5 of § 1B1.2 (Applicable Guidelines). If the Chapter Two offense level for any of the underlying offenses under subsection (a)(1) is the same as, or greater than, the alternative base offense level under subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, use subsection (a)(1) and treat each underlying offense as if contained in a separate count of conviction. Otherwise, use subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, to determine the base offense level.

2. 'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)[(2)][(3)](A).

4. If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, an additional 3-level enhancement from § 3A1.1(a) will apply.

5. If subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.]

[Option 2: Section 2H1.1(b) is amended by inserting the following additional subdivision:

''(2) If proof of the conspiracy requires a showing that a defendant acted for an improper purpose as defined in 18 U.S.C. §§ 245, or 247, or 42 U.S.C. § 3631, increase by [1] level.''.

Section 2H1.3(a) is amended—

(1) in subdivision (1) by deleting ''10'' and inserting in lieu thereof ''[11]'';

(2) in subdivision (2) by deleting ''15'' and inserting in lieu thereof ''[16]''; and

(3) in subdivision (3) by deleting ''2'' and inserting in lieu thereof ''[3]''.

Chapter Three, Part A, is amended by adding the following additional section:

§ 3A1.4. Hate Crime Motivation

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by [3] levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, do not apply this adjustment if § 2H1.1(b)(2) or § 2H1.3 applies. Similarly, do not apply this adjustment on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level established by the Chapter Two offense guideline.

2. Note that special evidentiary requirements govern the application of this subsection.

Background: This section reflects the directive to the Commission in section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., that the defendant intentionally selected a victim or property as the object of the offense because of a factor listed in this section). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.''.

Additional Issue for Comment: If Option 2 is adopted, the Commission seeks comment on how it should implement the penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994.]

Chapter Two, Part K (Offenses Involving Public Safety)

15. Synopsis of Proposed Amendment: Section 110102 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 922 to add subsection (v), making it unlawful to manufacture, transfer, or possess ''semiautomatic assault weapons.'' Previously, only importation and possession (pursuant to 18 U.S.C. § 925(d)(3)) and assembly of imported parts (pursuant to 18 U.S.C. § 922(r)) of semiautomatic assault rifles

and shotguns (but not pistols) were prohibited. Section 110102 also increases the penalty for using or carrying a semiautomatic assault weapon ''during and in relation to any crime of violence or drug trafficking crime'' to a fixed, mandatory consecutive term of 10 years or, in the case of a second or subsequent conviction, 20 years. The term ''semiautomatic assault weapon'' is defined at new 18 U.S.C. § 921(a)(30).

Guideline 2K2.1 covers other firearm offenses involving semiautomatic assault weapons. For example, the base offense level for possession of an unlawfully imported semiautomatic assault weapon is level 12. Additional adjustments may apply and an upward departure is recommended if the offense involved multiple military-style assault rifles.

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

''18 U.S.C. § 922(v) 2K2.1''.

Additional Issue for Comment: At the request of the Department of Justice, the Commission invites comment as to whether there should be an enhanced offense level under § 2K2.1 for a conviction under 18 U.S.C. § 922(v).

16. Synopsis of Proposed Amendment: Section 110201 of the Violent Crime Control and Law Enforcement Act of 1994 adds a new provision at 18 U.S.C. § 922(x) making it unlawful, with some exceptions, to sell or transfer a handgun, or ammunition that is suitable for use only in a handgun, to a juvenile. The provision also prohibits, with some exceptions, a juvenile from possessing a handgun or ammunition. A juvenile is defined as a person who is less than eighteen years of age. The maximum imprisonment penalty for a person who violates this section is one year. However, if an adult defendant transfers a handgun or ammunition to a juvenile ''knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence,'' the maximum authorized term of imprisonment is ten years.

In addition, section 110401 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 922(d) to make it unlawful to sell or otherwise dispose of any firearm or ammunition to any person, knowing or having reasonable grounds to believe that such person ''is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.'' This section also amends 18 U.S.C. § 922(g) to make it unlawful for a person who is subject to such a court order to possess or receive any firearm or ammunition in or affecting commerce.

Guideline 1B1.12 provides that the guidelines do not apply to a juvenile sentenced under the Juvenile Delinquency Act, 18 U.S.C. § 5031–5042. Guideline 2K2.1 typically applies a base offense level of 6 to a misdemeanor offense or to a felony recordkeeping offense. Guideline 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a juvenile or to a person prohibited under 18 U.S.C. § 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant. A specific offense characteristic may apply in the case of multiple firearms. A defendant who transfers a firearm knowing or having reason to believe that it may be used in connection with another felony offense is subject to the greater of a four-level adjustment with a minimum offense level of 18, or a cross reference to the guideline for the other offense.

The proposed amendment adds a person under the court order described in section 110401 to the definition of a ''prohibited person.'' In addition, three amendment options are shown regarding the offense level for transfer of a firearm to a juvenile. Option 1 would result in a base offense level of 6; Option 2 would result in a base offense level of 12; Option 3, published at the request of the Department of Justice, would result in a base offense level of 14 if the defendant transferred a firearm to an underage person or to another prohibited person. Such a defendant currently would receive a base offense level of 12 under § 2K2.1.

Proposed Amendment: The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by deleting ''or (v)'' and inserting ''(v)'' in lieu thereof; and by inserting ''; or (vi) is subject to a court order that restrains the defendant from harassing, stalking, or threatening an intimate partner or child or from engaging in related conduct.'' immediately following ''States''.

[Option 1: Section § 2K2.1(a)(8) is amended by deleting ''or'' and by inserting '', or (x)'' immediately following ''(m)''.

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

''18 U.S.C. § 922(x) 2K2.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(x) 2K2.1''.]

[Option 3: Section 2K2.1(a)(6) is amended by inserting ''or if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage'' immediately following ''prohibited person''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by inserting the following at the end thereof: '''Underage,' as used in subsection (a)(6), means under the ages set forth in 18 U.S.C. § 922(b)(1).

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

''18 U.S.C. § 922(x) 2K2.1''.]

17. Issue for Comment: Section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved. The Commission requests comment on the most appropriate way to implement this directive. Information available to the Commission indicates that 50 to 70 percent of offenses involving a firearm involve a semiautomatic firearm; thus, offenses involving semiautomatic firearms represent the typical or ''heartland'' cases. Specifically, the Commission requests comment on how the offense level for an offense involving a semiautomatic firearm should be modified to address the directive. The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or whether the Commission should focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with a large magazine capacity). In addition, the Commission requests comment on whether any such enhancement should apply only to crimes of violence and drug trafficking offenses as specified in the directive or whether it should apply to other offenses such as firearms offenses covered by § 2K2.1 or to all offenses.

18. Issue for Comment: Section 110502 of the Violent Crime Control and

Law Enforcement Act of 1994 directs the Commission to ''appropriately enhance penalties for cases in which a defendant convicted under 18 U.S.C. § 844(h) has previously been convicted under that section.'' Section 320106 revises the previous fixed, mandatory consecutive 5-year penalty for a first offense under 18 U.S.C. § 844(h) to provide a range of 5 to 15 years, and changes the previous fixed, mandatory consecutive penalty for a second offense from 10 years to a range of 10 to 25 years. The Commission requests comment as to how § 2K2.4 can be amended appropriately to address this directive and statutory change. Possible approaches might include: (1) an amendment to § 2K2.4 to increase the sentence by a specific amount if the defendant previously has been convicted under 18 U.S.C. § 844(h); (2) application under § 2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment; or (3) an amendment to § 2K2.4 to reference the underlying offense plus an appropriate enhancement for the weapon or explosive, and a provision for apportioning the sentence imposed to avoid double counting.

19. Issue for Comment: Section 110513 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ''appropriately enhance'' penalties (1) for cases in which a defendant convicted under 18 U.S.C. § 922(g) has one prior conviction for a violent felony (as defined in 18 U.S.C. § 924(e)(2)(B)) or a serious drug offense (as defined in 18 U.S.C. § 924(e)(2)(A)); and (2) for cases in which a defendant has two such prior convictions. The statutory maximum for the offense remains at ten years.

Guideline 2K2.1 covers violations of 18 U.S.C. § 922(g). Alternative base offense level apply depending on the number of prior convictions of one or more ''crime[s] of violence'' or ''controlled substance offense[s].'' For example, a defendant with one such prior conviction would receive a base offense level of at least 20. A defendant with two or more such prior convictions would receive a base offense level of at least 24. In addition, a four-level enhancement or a cross reference may apply if the weapon was to be used in another felony. Other enhancements may apply depending on the type and number of weapons, and whether the weapon was stolen.

The Commission's definitions of ''crime of violence'' and ''controlled substance offense'' are similar but not identical to those referenced in the directive. Guideline 2K2.1 draws its definition of ''crime of violence'' from 18 U.S.C. § 924(e) with a minor modification. Whereas the section 924(e) definition of ''violent felony'' includes any burglary, including a burglary of an abandoned commercial building, Taylor v. United States, 495 U.S. 575, 602 (1990), the definition of ''crime of violence'' in § 2K2.1 includes only burglary of a dwelling, consistent with the career offender provisions of the guidelines. United States v. Talbott, 902 F.2d 1129, 1133 (4th Cir. 1990).

Further, the § 2K2.1 definition of ''controlled substance offense,'' drawn from 18 U.S.C. § 924(c) and the career offender provisions of the guidelines, is slightly different from that in 18 U.S.C. § 924(e). The section 924(e) definition of ''serious drug offense'' requires that the drug offense (whether federal or state) have a maximum term of imprisonment of ten years or more. This narrower definition precludes, for example, counting a federal conviction under 21 U.S.C. § 843(b) (four year statutory maximum for using a communication facility to facilitate drug distribution). By contrast, the definition of ''controlled substance offense'' in § 2K2.1 includes such ''telephone counts.'' United States v. Vea-Gonzales, 999 F.2d 1326, 1329–30 (9th Cir. 1993). Moreover, where one state imposes a five-year maximum for certain drug conduct while another state imposes a ten-year maximum for the identical conduct, the section 924(e) definition would not count a defendant's conviction in the first state but would count the defendant's conviction in the second state.

The Commission invites comment on whether the current offense levels in these guidelines should be increased and, if so, by what amount. The Commission also invites comment on whether, for consistency, the definitions and counting of prior conviction of crime of violence and drug trafficking offense used in these guidelines should be the same as those used in § 4B1.1 (Career Offender).

20. Synopsis of Proposed Amendment: Section 110504 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 924 to add subsection (k) making it unlawful to steal any firearm that is moving or has moved in interstate commerce. Likewise, 18 U.S.C. § 844 is amended to add subsection (k) making it unlawful to steal any explosive that is moving or has moved in interstate commerce.

Section 110511 amends 18 U.S.C. § 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce regardless of whether the movement occurred ''before or after it [the firearm] was stolen.''

Section 110515 amends 18 U.S.C. § 924 to add a new subsection (l) making it a federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector. The section also amends 18 U.S.C. § 844 to add a new subsection (l) with regard to stealing explosives from licensees.

Current law also proscribes shipping a stolen firearm (18 U.S.C. § 922(i)), stealing from the person or premises of a licensee any firearm in the business inventory (18 U.S.C. § 922(u)), and shipping stolen explosives (18 U.S.C. § 842(h)). Further, the general theft statute, 18 U.S.C. § 659, provides a maximum imprisonment penalty of ten years for stealing ''goods or chattels,'' including a firearm, ''moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property.'' Other theft and receipt of stolen property statutes may also apply to a theft of a firearm.

Guideline 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. Additional adjustments may also apply. A two-level enhancement applies if a firearm is stolen unless the only count of conviction is a stolen firearm offense. This conditional adjustment has resulted in several calls to the Commission's hotline regarding cases involving a felon in possession of a stolen firearm who may be charged either under 18 U.S.C. § 922(g) (felon in possession) or with 18 U.S.C. § 922(j) (receipt of stolen firearm). A conviction under section 922(g) will result in a total offense level of 16 (base offense level of 14 plus two-level adjustment for stolen firearm). A conviction under section 922(j) will result in a total offense level of 14 (base offense level of 14 but, per application note 12, no two-level adjustment for stolen firearm because the only offense of conviction is a stolen firearm offense). Further, the list of stolen firearm statutes has not been updated to reflect recent amendments to the code. Indeed, 18 U.S.C. § 922(u) (theft from dealer) as well as 18 U.S.C. §§ 922(s) and 922(t) (Brady bill provisions) are not listed in the Statutory Index.

Guideline 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce and offenses within the special federal maritime or territorial jurisdiction or within Indian territory. Guideline

2B1.1(b)(2)(A) provides for a one-level increase (to no less than level 7) if a firearm or destructive device was taken, compared with a base offense level 12 under § 2K2.1.

Two options are proposed to address the disparity in § 2B1.1 and § 2K2.1 penalties. Option 1 amends § 2B1.1 to include a cross reference to § 2K2.1. Option 2 amends § 2B1.1 to recommend an upward departure. The amendment also specifies a base offense level of 6 for convictions under 18 U.S.C. § 922 (s) or (t) and clarifies application of Note 6 only to cases in which the base offense level is determined under § 2K2.1(a)(7).

Proposed Amendment: Section 2K2.1(a)(8) is amended by deleting ''or'' and inserting in lieu thereof ''(s), or (t)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 12 by deleting ''or (k),'' and inserting in lieu thereof ''(u), or § 924 (j) or (k),''; and by inserting ''and the base offense level is determined under § 2K2.1(a)(7),'' immediately following ''guideline,''.

[Option 1: Section 2B1.1(b) is amended by deleting subdivision (2).

Section 2B1.1 is amended by inserting the following additional subsection:

''(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, if the resulting offense level is greater than that determined above.''.]

[Option 2: Section 2B1.1(b) is amended by deleting subdivision (2).

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''15. If the offense involved the unlawful taking, receipt, transportation, transfer, transmittal, or possession of a firearm, destructive device, explosive material, or controlled substance, an upward departure to an offense level comparable to that provided under § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, may be warranted.''.]

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

''18 U.S.C. § 922(s)-(u) 2K2.1'',

''18 U.S.C. § 924(k),(l) 2K2.1''.

21. Synopsis of Proposed Amendment: Section 110518 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 924 to add a new subsection (n) to provide that ''[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.'' This section also amends 18 U.S.C. § 844 to add a new subsection (m) increasing to 20 years the maximum imprisonment penalty for a conspiracy to violate 18 U.S.C. § 844(h). This section does not alter the fixed, mandatory consecutive penalty for the underlying substantive offenses of using or carrying a firearm or explosive during and in relation to a crime of violence or drug trafficking crime. Thus, identical offense conduct covered by these statutes may be subject, for example, to a fixed, mandatory five-year term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 924(c), a 5-year mandatory minimum term and 15-year maximum term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 844(h), a 5-year maximum term under 18 U.S.C. § 371, or a 20-year maximum term under 18 U.S.C. § 924(n).

Guideline 2K2.4 provides for the term of imprisonment required by 18 U.S.C. § 924(c). Guideline 2K2.1 applies to an offense under 18 U.S.C. § 371 involving conspiracy to violate 18 U.S.C. § 924(c) and provides for an offense level of at least 18 (base offense level 12 plus increase to an offense level of at least 18 if the firearm or ammunition was used or intended to be used in connection with another offense). Additional adjustments may apply. The explosives guideline, § 2K1.3, also provides an offense level of at least 18 for a conviction under 18 U.S.C. § 371 for conspiracy to violate 18 U.S.C. § 844(h).

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 371 by inserting ''2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c)),'' immediately before ''2X1.1''.

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

''18 U.S.C. § 844(m) 2K1.3

18 U.S.C. § 924(n) 2K2.1''.

Additional Issue for Comment: At the request of the Department of Justice, the Commission invites comment as to whether a conviction for a conspiracy to violate section 924(c) should be more closely referenced to the penalty in 18 U.S.C. § 924(c) or to the guideline for the underlying offense.

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

22(A). Issue for Comment: Section 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory penalty for bringing in or harboring an alien from five to ten years, establishes a penalty of up to 20 years imprisonment if serious bodily injury results, and establishes a penalty of imprisonment for any term of years or life, if death results. In view of these statutory penalty changes, the Commission invites comment on whether the offense levels under the applicable guideline, § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), should be increased, and if so, by what amount.

(B). Issue for Comment: Section 130001 of the Violent Crime Control and Law Enforcement Act of 1994 alters the penalties for failing to depart and for reentering the United States in violation of 8 U.S.C. §§ 1252(e) and 1326(b), respectively. This provision reduces the statutory maximum penalties for some offenses from ten years to four years, and increases the statutory maximum penalties for reentry after commission of a felony or an aggravated felony from five to ten years, and from 15 to 20 years, respectively. This provision also establishes the offense of reentry after conviction for three or more misdemeanors involving drugs, crimes against the person, or both. The Commission invites comment on whether amendment of the applicable guideline is appropriate. Specifically, are the current offense levels provided for reentry after conviction of a felony or aggravated felony appropriate, and if not, how should the guidelines be amended? Should the offense level currently applicable for reentry after deportation for a felony also be applied to deportation after conviction of three or more misdemeanors involving drugs, crimes against the person, or both?

(C). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, increases the base offense level for immigration offenses committed by certain means and increases the offense level if any person sustained bodily injury.

Proposed Amendment: Section 2L1.1(a) is amended by redesignating subdivision (2) as subdivision (3) and inserting the following new subdivision:

''(2) 13, if the offense was committed by means set forth in 8 U.S.C. § 1324(a)(1)(A)(i) or 1324(a)(2)(B).''.

Section 2L1.1(b) is amended by inserting the following additional subdivision:

''(4) If any person sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily Injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.
(D) If the degree of injury is between that specified in subdivisions (A) and (B).	Add 3.
(E) If the degree of injury is between that specified in subdivisions (B) and (C).	Add 5.''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 5 by deleting ''dangerous or inhumane treatment, death or bodily injury,''.

(D). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, suggests an additional ground for an upward departure for certain cases under § 2L1.2.

Proposed Amendment: The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 2 by deleting ''a sentence at or near the maximum of the applicable guideline range'' and inserting ''an upward departure'' in lieu thereof.

23(A). Issue for Comment: Section 130009 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory maximum penalties for passport and visa offenses to ten years. Previously, these offenses had statutory maximum penalties of one year or five years. It also provides an increased statutory maximum penalty of 15 years if the offense is committed to facilitate a drug trafficking crime, and 20 years if the offense is committed to facilitate an act of international terrorism. Considering the existing policy statements at §§ 5K2.9 and 5K2.15 suggesting an upward departure in cases where the offense was committed to facilitate another offense or in furtherance of a terroristic action, the Commission invites comment on whether, and if so, how, the guidelines should be amended with respect to passport and visa offenses.

(B). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, consolidates §§ 2L2.1 and 2L2.2 and provides additional enhancements if the offense was committed to facilitate certain unlawful conduct.

Proposed Amendment: Sections 2L2.1 and 2L2.2 are deleted in their entirety and the following is inserted in lieu thereof.

''§ 2L2.1. Fraudulently Issuing, Acquiring or Improperly Using Passports or Visas; False Statements in Respect to Passports and Visas; Forging, Counterfeiting or Altering Passports or Visas; Trafficking in International Travel Documents, or Birth Certificates, Driver Licenses or Other Documents to Fraudulently Obtain Issuance of Passports or Visas; Use of Passports or Visas to Facilitate Narcotics Trafficking or International Terrorism.

(a) Base Offense Level:

(1) 26, if the offense was committed to facilitate an act of international terrorism.

(2) 20, if the offense was committed to facilitate a drug trafficking crime;

(3) 13, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involves six or more documents or passports, increase as follows:

Number of documents	Passports increase in level
(A) 6–24	Add 2.
(B) 25–99	Add 4.
(C) 100 or more	Add 6.

(2) If the defendant is an unlawful alien who has been previously deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

(3) If the offense was committed to facilitate racketeering activity, increase by 3 levels.

(4) If the offense was committed to facilitate unlawful flight from justice, increase by 3 levels.

(5) If the defendant committed the offense other than for profit (except as provided in paragraph (3) or (4)), decrease by 3 levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423–1427, 1541–1544, 1546, 1547.

Application Notes:

1. Where it is established that multiple documents are part of a set intended for use by one person, treat the documents in the set as one document for the purposes of subsection (b).

2. If the offense involved possession of a dangerous weapon, an upward departure may be warranted.

3. 'Racketeering activity' is defined at 18 U.S.C. § 1961.

4. 'Drug trafficking crime' is defined at 18 U.S.C. § 929(a).

5. 'International terrorism' is defined at 18 U.S.C. § 2331.

6. If two or more factors warranting an upward departure as enumerated in subsection (b) apply, only the paragraph specifying the highest level will be used.

7. 'For profit' means for financial gain or commercial advantage.

8. If the offense was committed only for the purpose of concealing age, a downward departure may be warranted.

9. For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§ 2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.''.

Chapter Three (Adjustments)

Chapter Five, Part K (Departures)

24. Issue for Comment: Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism (unless such involvement or intent is itself an element of the crime). Considering the existing policy statement in § 5K2.15 recommending an upward departure in such cases, the Commission invites comment on whether, and if so how, the guidelines should be amended to address this directive appropriately. For example, should the Commission add an adjustment to Chapter Three that would apply to all Chapter Two offenses and that would prescribe a specific increase in offense level if the offense involved or was intended to promote terrorism? If so, what level of enhancement would be appropriate? Or, should the Commission amend § 4B1.1 (Career Offender) to enhance the sentences of such defendants under this section as if they were career offenders?

25(A). Issue for Comment: Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an enhancement applicable to a defendant 21 or older who involved a person under 18 in the offense. The directive further specifies that the Commission consider the severity of the crime, the number of minors used, the relevance of the proximity in age between the offender and the minor, and the fact that involving a minor in a crime of violence is often more serious than involving a minor in a drug offense (for which the Commission has already provided a

two-level enhancement). The Commission invites comment as to whether it should implement section 140008 by creating (1) a generally applicable departure policy statement in Chapter Five, Part K (Departures), or (2) a Chapter Three adjustment. The Commission also invites comment as to whether, if a Chapter Three adjustment is appropriate, the adjustment should be two levels, commensurate with the adjustment for abuse of position of trust, or a higher or lower number of levels.

(B). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, sets forth Chapter Three adjustments for using a minor to commit a crime.

Proposed Amendment: Part B of Chapter Three is amended by redesignating § 3B1.4 as § 3B1.5 and by inserting the following new section:

''§ 3B1.4. Using a Minor to Commit a Crime

(a) If a defendant 21 years of age or older used or attempted to use any person less than 18 years of age with the intent that the minor would commit an offense or assist in avoiding detection of or apprehension for an offense, increase by 2 levels.

(b) If the defendant used or attempted to use 5 or more minors, increase by 1 additional level; if the defendant used or attempted to use 15 or more minors, increase by 2 additional levels.

Commentary

Application Notes:

1. To 'use a person less than 18 years of age' includes soliciting, procuring, recruiting, counseling, encouraging, training, directing, commanding, intimidating, or otherwise using such a person.

2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. However, if the adjustment under this section is greater, apply this section in lieu of the adjustment under the offense guideline.''.

26(A). Issue for Comment: Section 150001 of the Violent Crime Control and Law Enforcement Act of 1994 creates a new section, 18 U.S.C. § 521, that provides a statutory sentence enhancement of up to ten years if a person commits a specified felony controlled substance offense or crime of violence and participates in, intends to further the felonious activities of, or seeks to maintain or increase his or her position in, a criminal street gang. Section 150001 defines a ''criminal street gang'' as an ongoing group, club, organization, or association of five or more persons: (A) that has as one of its primary purposes the commission of one or more of the following offenses: a federal felony involving a controlled substance for which the maximum penalty is not less than five years, a federal felony crime of violence that has as an element the use or attempted use of physical force against another, and the corresponding conspiracies; (B) whose members engage (or have engaged during the past five years) in a continuing series of these same offenses; and (C) the activities of which affect interstate or foreign commerce.

The Commission invites comment on whether, and how, it should incorporate into the sentencing guidelines the statutory sentence enhancement described above. Specifically, the Commission invites comment as to whether it should implement section 150001 by creating a generally applicable departure policy statement in Chapter Five, Part K (Departures) providing that if the enhancement contained in 18 U.S.C. § 521 (Criminal Street Gangs) is determined to apply, the court may increase the sentence above the authorized guideline range. Alternatively, the Commission could create a Chapter Three adjustment that would apply to all Chapter Two offenses and that would provide a specific enhancement.

(B). Synopsis of Proposed Amendment: This proposed amendment is published at the request of the Department of Justice. The proposed amendment would increase the offense level provided under §§ 2K2.1 and 2K2.5 by four levels if the defendant committed the offense in connection with a criminal street gang. In addition, the amendment would increase the offense level provided under § 2K2.5 by two to seven levels, depending on the nature of the possession or use of the firearm involved in the offense. With respect to the amendment to § 2K2.1, the enhancement would apply in addition to the existing four-level enhancement for an offense involving a firearm that was used or possessed in connection with another felony offense, or with knowledge or reason to believe it would be used or possessed in such connection. If a Chapter Three adjustment is adopted that provides a general enhancement for offenses related to criminal street gangs, that amendment would replace the portion of this amendment dealing with criminal street gangs.

Proposed Amendment: Section 2K2.1(b) is amended by inserting the following additional subdivision:

''(7) If the defendant committed the offense as a member of, on behalf of, or in association with a criminal street gang, increase by 4 levels.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''20. 'Criminal street gang' is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.

Section 2K2.5(b) is amended by inserting the following additional subdivision:

''(2) If the defendant was convicted of violating 18 U.S.C. § 922(q) and (A) the firearm was discharged, increase by 7 levels; (B) the firearm was otherwise used, increase by 6 levels; (C) the firearm was brandished, increased by 5 levels; (D) the firearm was loaded, increase by 3 levels; (E) an express threat of death was made or ammunition was possessed, increase by 2 levels.

(3) If the defendant was convicted of violating 18 U.S.C. § 922(q) and committed the offense as a member of, on behalf of, or in association with a criminal street gang, increase by 4 levels.''.

The Commentary to § 2K2.5 captioned ''Application Notes'' is amended in Note 4 by deleting ''federal facility, federal court facility, or school zone'' and inserting in lieu thereof ''federal facility or federal court facility.''

The Commentary to § 2K2.5 captioned ''Application Notes'' is amended by inserting the following additional Note:

''5. 'Criminal street gang' is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.

Chapter Three, Part A (Victim-Related Adjustments)

27(A). Issue for Comment: Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent punishment for a defendant convicted of a ''crime of violence'' against an ''elderly victim.'' The directive requires that the guidelines: (1) provide for increasingly severe punishment commensurate with the degree of physical harm caused to the elderly victim; (2) take appropriate account of the vulnerability of the victim; and (3) provide enhanced punishment for a

subsequent conviction for a crime of violence against an elderly victim.

Currently, the guidelines account for victim harm in a number of ways. For federal offenses that are most apt to cause physical harm (e.g., assault, criminal sexual abuse, kidnapping, robbery), the guidelines expressly require a higher sentence, regardless of the victim's age, if the victim sustained bodily injury. Additionally, § 3A1.1 (Vulnerable Victim), provides a two-level upward adjustment if the defendant knew or should have known that a victim was unusually vulnerable due to, among other factors, the victim's age. Furthermore, the guidelines, both generally, through § 5K2.0 (Grounds for Departure), and specifically, through, e.g., § 5K2.8 (Extreme Conduct) (involving unusually heinous, cruel, brutal, or degrading conduct), invite courts to depart upward for circumstances that potentially involve elderly victims. The guidelines also account for the seriousness, recency, and relatedness of a defendant's prior record of criminal conduct. See Chapter Four (Criminal History and Criminal Livelihood).

The Commission invites comment on whether the guidelines provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim. If not, the Commission invites comment on how, and to what extent, existing factors might be modified as well as how, and to what extent, additional factors should be considered.

(B). Synopsis of Proposed Amendment: This proposed amendment implements the third criterion of the directive in section 240002, pertaining to enhanced punishment for a defendant with a prior conviction for a crime of violence against an elderly victim. This amendment recommends a departure under § 3A1.1 (Vulnerable Victim).

Proposed Amendment: The Commentary to § 3A1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''3. If (A) an adjustment applies under this section; and (B) the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.''.

(C). Issue for Comment: Section 250002 of the Violent Crime Control and Law Enforcement Act of 1994 provides enhanced imprisonment penalties of up to five years when certain fraud offenses involve telemarketing conduct and enhanced imprisonment penalties of up to ten years when a telemarketing fraud offense involves victimizing ten or more persons over the age of 55 or targeting persons over the age of 55. Section 250003 directs the Commission to review and, if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims (defined as over the age of 55) are adequate.

Violations of fraud statutes are covered under § 2F1.1 (Fraud and Deceit), which increases penalties proportionately based on a number of factors, including the amount of loss sustained by victims, the sophistication of the offense, and whether particular types of harm occurred. In addition, a two-level increase under § 3A1.1 (Vulnerable Victim) applies if the fraud exploited vulnerable victims, including victims who are vulnerable because of age.

The Commission invites comment on whether the current victim-related adjustments are adequate to address such cases or whether § 2F1.1 or § 3A1.1 should be amended. Focusing on § 3A1.1 as a possible vehicle for remedying any inadequately addressed concerns regarding older victims, the Commission specifically invites comment as to how this adjustment might best be amended. For example, should commentary be added to establish a rebuttable presumption related to age? If so, what threshold victim age should be equated with victim vulnerability (recognizing that section 250002 uses age 55 for fraud offenses while section 240002 uses age 65 for certain violent offenses)? If such a presumption for older victims is established, should there also be a counterpart presumptive age for vulnerability of young victims (e.g., victims under age 16)? In lieu of a rebuttable presumption, should § 3A1.1 be amended to require an upward adjustment in the offense level if the offense involved victim(s) older or younger than the designated threshold ages? The Commission also invites comment on whether the provisions concerning vulnerable victims should be different for telemarketing fraud than other types of fraud offenses.

Chapter Four, Part B (Career Offenders and Criminal Livelihood)

28. Issue for Comment: Section 70001 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 3559 to mandate a sentence of life imprisonment for a defendant convicted of a ''serious violent felony'' if the defendant has been convicted on separate prior occasions in federal or state court of two or more serious violent felonies or one or more serious violent felonies and one or more serious drug offenses. The Commission invites comment on how it should incorporate into the sentencing guidelines the amendments to 18 U.S.C. § 3559. In particular, the Commission invites comment as to whether the career offender guidelines should be replaced with a new guideline incorporating the current career offender provisions and the statutory requirements of section 70001. Alternatively, the Commission could add an application note to § 4B1.1 directing the court to refer to 18 U.S.C. § 3559 for offenses to which this statute applies. The Commission also invites comment as to whether no action need be taken because § 5G1.1 already provides instructions on the application of mandatory statutory penalties that conflict with the guidelines.

Chapter Five, Part C (Imprisonment)

29. Synopsis of Proposed Amendment: Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 (the ''Safety Valve'' provision) authorized and directed the Commission to promulgate guidelines and policy statements to implement section 80001(a), providing an exception to otherwise applicable statutory mandatory minimum sentences for certain defendants convicted of specified drug offenses. Pursuant to this provision, the Commission promulgated § 5C1.2. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100–182, § 21, set forth as an editorial note under 28 U.S.C. § 994.

Proposed Amendment: Pursuant to its ''permanent'' amendment authority under 28 U.S.C. § 994(p), the Commission proposes to repromulgate § 5C1.2, as set forth in the Guidelines Manual effective November 1, 1994. See also 59 Fed. Reg. 52210–13.

Additional Issue for Comment: The Commission also invites comment on any aspect of § 5C1.2 or other guideline that should be modified to effectuate congressional intent regarding the ''safety valve'' provision.

Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures)

30. Synopsis of Proposed Amendment: Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires mandatory restitution for sexual abuse and sexual exploitation of children offenses under 18 U.S.C. §§ 2241–2258. These provisions also require that compliance with a restitution order be a condition of probation or supervised release. When there is more than one

offender, the court can apportion liability for payment of the full amount of restitution. When the court finds that more than one victim has sustained a loss requiring restitution, the court must provide full restitution for each victim, but may provide different payment schedules to the victims. A victim or the offender may petition the court for modification of the restitution order in light of a change in the economic circumstances of the victim. Although the sections are termed ''mandatory restitution,'' the statutes provide for the court to order less than the full amount or no restitution at all if the court finds ''the economic circumstances of the defendant are not sufficient to satisfy the order in the foreseeable future.'' These new mandatory restitution provisions have broader definitions of loss than 18 U.S.C. § 3663, and apply ''notwithstanding section 3663, and in addition to any civil or criminal penalty authorized by law.'' Congress has also added similar mandatory restitution provisions for offenses involving telemarketing fraud (18 U.S.C. § 2327) and domestic violence (18 U.S.C. § 2264). The proposed amendment alerts the courts to the new statutory requirements and directs application of the statutory provisions if there is a conflict between the statutory provisions and the guidelines.

Proposed Amendment: The Commentary to § 5E1.1 is amended by inserting the following immediately before ''Background'':

''Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (pertaining to convictions under 18 U.S.C. §§ 2241–2258 in connection with sexual abuse or exploitation of minors); 18 U.S.C. § 2327 (pertaining to convictions under 18 U.S.C. §§ 1028–1029, 1341–1344 in connection with telemarketing fraud); 18 U.S.C. § 2264 (pertaining to convictions under 18 U.S.C. §§ 2261–2262 in connection with domestic violence). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.''.

Chapter Seven (Violations of Probation and Supervised Release)

31(A). Synopsis of Proposed Amendment: Section 110505 of the Violent Crime Control and Law Enforcement Act of 1994, a version of which was proposed by the Commission, amends 18 U.S.C. § 3583(e)(3) by specifying that a defendant whose supervised release term is revoked may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release is a class A felony. The provision also amends section 3583(g) by eliminating the mandatory re-imprisonment period of at least one-third of the term of supervised release if the defendant possesses a controlled substance or a firearm, or refuses to participate in drug testing. Finally, the provision expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and re-imprisonment. The courts of appeal were split as to whether a sentencing court had authority to reimpose a term of supervised release upon revocation of the original term of supervised release.

Chapter Seven of the Guidelines Manual contains the policy statements that must be considered by courts when determining the sentence to be imposed upon revocation of probation or supervised release. The policy statements were originally drafted under the assumption that reimposition of supervised release was possible. The proposed amendment eliminates outdated statutory references in those policy statements.

Proposed Amendment: Section 7B1.3(g)(2) is amended by deleting '', to the extent permitted by law,''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second sentence and inserting in lieu thereof:

''This statute, as amended by Public Law 103–322, effective September 13, 1994, expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and reimprisonment.'';

By deleting Note 3 in its entirety; and by renumbering the remaining notes accordingly.

(B). Synopsis of Proposed Amendment: Section 20414 of the Violent Crime Control and Law Enforcement Act of 1994 makes mandatory a condition of probation requiring that the defendant refrain from any unlawful use of a controlled substance. 18 U.S.C. § 3563(a)(4). The section also establishes a condition that the defendant, with certain exceptions, submit to periodic drug tests. The existing mandatory condition of probation requiring the defendant not to possess a controlled substance remains unchanged. 18 U.S.C. § 3563(a)(3). Similar requirements are made with respect to conditions of supervised release. 18 U.S.C. § 3583(d).

Section 110506 of the Violent Crime Control and Law Enforcement Act of 1994, a version of which was proposed by the Commission, mandates revocation of probation and a term of imprisonment if the defendant unlawfully possesses a controlled substance (in violation of section 3563(a)(3)), possesses a firearm, or refuses to comply with drug testing (in violation of section 3563(a)(4)). It does not require revocation in the case of use of a controlled substance (although use presumptively may establish possession). No minimum term of imprisonment is required other than a sentence that includes a ''term of imprisonment'' consistent with the sentencing guidelines and revocation policy statements. Similar requirements are made in 18 U.S.C. § 3583(g) with respect to conditions of supervised release. See discussion of section 110505, supra.

Section 20414 permits ''an exception in accordance with United States Sentencing Commission guidelines'' from the mandatory revocation provisions of section 3565(b), ''when considering any action against a defendant who fails a drug test administered in accordance with [section 3563(a)(4)].'' The exception from the mandatory revocation provisions appears limited to a defendant who fails the test and would not cover a defendant who refuses to take the test.

In at least two circuits (the Fourth and Tenth), a defendant who failed a drug test was presumed to have possessed the drugs and consequently was subject to the mandatory revocation provisions. However, in other circuits, failing a drug test was considered no more than evidence of possession and a separate finding of possession was required by the court. The apparent congressional view of the matter is that failure of a drug test may or may not be subject to mandatory revocation, as evidenced by the conditional statement ''if the results [of the drug test] are positive [and] the defendant is subject to possible imprisonment.'' 18 U.S.C. § 3563(a)(4). It is not clear whether the Fourth and Tenth Circuits will consider their view of the issue superseded by this provision.

The proposed amendment adds commentary that expressly reflects the statutory exception from mandatory revocation if the offender fails a drug test and amends the Commentary to Chapter Seven to eliminate outdated statutory references.

Proposed Amendment: The Commentary to § 7B1.4 captioned ''Application Notes'' is amended by deleting Notes 5 and 6 in their entirety

and by inserting in lieu thereof the following new notes:

''5. Under 18 U.S.C. § 3565(b), upon a finding that a defendant violated a condition of probation by being in possession of a controlled substance or firearm, or by refusing to comply with drug testing, the court is required to 'revoke the sentence of probation and resentence the defendant under subchapter A [of title 18, Chapter 227] to a sentence that includes a term of imprisonment.' Under 18 U.S.C. § 3583(g), upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance, the court is required to 'revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under 18 U.S.C. § 3583(e)(3).'

6. Under 18 U.S.C. § 3563(a), '[t]he court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception from the rule of section 3565(b) when considering any action against a defendant who fails a drug test administered in accordance with 18 U.S.C. § 3563(a)(4).' ''.

Appendix A (Statutory Index)

32. Synopsis of Proposed Amendment: This proposed amendment makes Appendix A more comprehensive by adding new offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322). The amendment addresses provisions found in sections 40221, 60005, 60009, 60012, 60013, 60015, 60019, 60021, 60023, 90106, 110103, 110503, 110517, 120003, 160001, 170201, 180201, 320108, 320601, 320602, 320603, 320902, of the Act. In addition, the amendment adds new offenses enacted by section 11 of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (Public Law 103–190), section 202 of the Food Stamp Program Improvements Act of 1994 (Public Law 103–225), sections 312 and 313 of the Social Security Independence and Program Improvements Act of 1994 (Public Law 103–296), and sections 3, 4, and 5 of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200). Furthermore, the amendment conforms Appendix A to revisions in existing statutes made by the above Acts. Finally, the amendment revises the titles of several offense guidelines to better reflect their scope.

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

''7 U.S.C. § 2018(c) § 2N2.1'',
''7 U.S.C. § 6810 § 2N2.1'',
''18 U.S.C. § 37 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4'',
''18 U.S.C. § 113(a)(1) 2A2.1'',
''18 U.S.C. § 113(a)(2) 2A2.2'',
''18 U.S.C. § 113(a)(3) 2A2.2'',
''18 U.S.C. § 113(a)(5) 2A2.3'',
(Class A misdemeanor provisions only)
''18 U.S.C. § 113(a)(6) 2A2.2'',
''18 U.S.C. § 113(a)(7) 2A2.3'',
''18 U.S.C. § 333 2F1.1'',
''18 U.S.C. § 470 2B5.1, 2F1.1'',
''18 U.S.C. § 668 2B1.1'',
''18 U.S.C. § 880 2B1.1'',
''18 U.S.C. § 922(w) 2K2.1'',
''18 U.S.C. § 924(i) 2A1.1, 2A1.2'',
''18 U.S.C. § 924(j) 2K2.1'',
''18 U.S.C. § 924(m) 2K2.1'',
''18 U.S.C. § 1033 2B1.1, 2F1.1, 2J1.2'',
''18 U.S.C. § 1118 2A1.1, 2A1.2'',
''18 U.S.C. § 1119 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1'',
''18 U.S.C. § 1120 2A1.1, 2A1.2, 2A1.3, 2A1.4'',
''18 U.S.C. § 1121 2A1.1, 2A1.2'',
''18 U.S.C. § 1716D 2Q2.1'',
''18 U.S.C. § 2114(b) 2B1.1'',
''18 U.S.C. § 2332a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3, 2K1.4'',
''18 U.S.C. § 2258(a),(b) 2G2.1, 2G2.2'',
''18 U.S.C. § 2261 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2262 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2281 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2423(b) 2A3.1, 2A3.2, 2A3.3 [, 2G1.2],
''21 U.S.C. § 843(a)(9) 2D3.2'',
''21 U.S.C. § 843(c) § 2D3.1'',
''21 U.S.C. § 849 § 2D1.2'',
''21 U.S.C. § 960(d)(3), (4) 2D1.11'',
''21 U.S.C. § 960(d)(5) 2D1.13'',
''21 U.S.C. § 960(d)(6) 2D3.2'',
''42 U.S.C. § 1307(b) 2F1.1''.

In the line referenced to 18 U.S.C. § 113(a) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.1'';

In the line referenced to 18 U.S.C. § 113(b) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 113(c) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 113(f) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 1153 by inserting ''2A2.3,'' immediately before ''2A3.1'';

In the line referenced to 18 U.S.C. § 2114 by deleting ''2114'' and inserting in lieu thereof ''2114(a)'';

And in the line referenced to 18 U.S.C. § 2423 by deleting ''2423'' and by inserting in lieu thereof ''2423(a)''.

Section 2D3.1 is amended in the title by inserting at the end ''; Unlawful Advertising Relating to Schedule I Controlled Substances''.

Section 2D3.2 is amended by inserting ''or Listed Chemicals'' immediately after ''Controlled Substances''.

Section 2Q2.1 is amended by deleting the title and inserting in lieu thereof ''Offenses Involving Fish, Wildlife, and Plants''.

II. Amendments Relating to Drug Offense Guidelines and Role in the Offense

This Part contains two approaches to the revision of the guidelines for controlled substance offenses.

The premise of Approach 1 (proposed amendments 33–42) is that the type and quantity of the controlled substance involved in the offense, as adjusted by the defendant's role in the offense, is an important and appropriate measure of the seriousness of the offense, but that the Commission assigned too much weight to drug quantity in constructing its initial guidelines. Therefore, the proposed amendments in Approach 1 would compress the Drug Quantity Table; limit its impact on lower-level defendants; somewhat increase the weight given to weapons, serious bodily injury, and leadership role; and address anomalies in the offense levels assigned to ''crack'' offenses and marijuana-plant offenses compared to other drug offenses. In addition, Approach 1 contains proposed amendments, addressing narrower issues, that would improve and make fairer the operation of these guidelines. The proposed amendments are set forth separately because they address different issues and, for the most part, operate independently.

The premise of Approach 2 is that the use of drug quantity to measure the seriousness of drug trafficking offenses should be abandoned or severely limited. Amendment 43 displays this approach.

Approach 1

33. Synopsis of Proposed Amendment: In the 1994 amendment cycle, the Commission took a first step in compressing the Drug Quantity Table by eliminating levels 40 and 42 from the table. Three options for compressing the Drug Quantity Table further are shown in Attachment 1. The thrust of this proposed amendment is that although drug quantity (in conjunction with role in the offense) is an appropriate factor in assessing offense seriousness (drug quantity directly measures the scale of the offense and potential for harm) and thus should be retained, the Commission's current guidelines contain too many quantity distinctions. That is, the drug table increases too quickly for small differences in quantity, particularly at certain offense levels. Under this proposal, the Drug Quantity Table would be compressed so that its contribution to the determination of the offense level would be somewhat reduced.

Three options are shown. Although the different options reflect somewhat different rationales, the effect of each option would be to reduce the number of gradations in the Drug Quantity Table, thereby making the guidelines somewhat less sensitive to drug quantity. Note that each one-level increment in offense level changes the final guideline range by about 12 percent above level 19, and increments of more than one level are compounded (e.g., a six-level change roughly doubles or halves the final guideline range). Thus, reductions of 2, 4, or 6 levels, as shown in the various options below, can have a substantial impact on the final guideline range.

For ease of presentation, only the current and proposed offense levels for heroin offenses are shown. Because the controlled substances in the Drug Quantity Table are related by established ratios, the offense levels for the other controlled substances would be conformed accordingly.

Option A. When the Commission initially developed the Drug Quantity Table, it keyed the offense level for 1 KG of heroin (ten-year mandatory minimum) at level 32 (121–151 months for a first offender) and 100 grams of heroin (five-year mandatory minimum) at level 26 (63–78 months for a first offender) because these guideline ranges included, or were close to, the five- and ten-year mandatory minimum sentences. However, offense levels 30 (97–121 months) and 24 (51–63 months) also include the five- and ten-year mandatory minimum sentences, as do offense levels 31 (108–135 months) and 25 (57–71 months). Option A displays how the heroin offense levels would look if the Commission used the offense levels corresponding to the lowest (rather than the highest) guideline ranges that include the statutory minimum sentence. The drug table is compressed because offense levels lower than level 22 are not changed (offense levels 22 and 24 from the current Drug Quantity Table are combined).

Option B. The legislative history of the Anti-Drug Abuse Act of 1986 provides support for the proposition that the heartland of the conduct that the Congress envisioned it was addressing with the ten-year mandatory minimum was the ringleader in large scale drug offenses. Senator Byrd, then the Senate Minority Leader, explained the intent during floor debate:

> For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. * * * Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense. 132 Cong. Rec. S. 14300 (Sept. 30, 1986).

See also 132 Cong. Rec. 22993 (Oct. 11, 1986) (statement of Rep. Lafalce) (''the bill * * * acknowledge[s] that there are differing degrees of culpability in the drug world. Thus, separate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers''); H.R. Rep. No. 9–845, 99th Cong., 2d Sess., pt. 1 at 11–17 (1986) (construing penalty provisions of a comparable bill, H.R. 5394, similarly).

The typical or heartland role adjustment for kingpins in such large scale offenses is four levels. Thus, the Commission's current drug offense levels (when applied in conjunction with the role in the offense enhancements), in effect, result in double counting. That is, although Congress envisioned a level 32 offense for a first offender, large-scale dealer with one kilogram of heroin (or level 30, see Option A), the Commission has provided a level 36 for the heartland case (level 32 from the Drug Quantity Table plus a four-level increase from § 3B1.1). Similarly, the mid-level dealer at whom the five-year mandatory minimum was aimed likely will receive a two-level enhancement for role in the offense. If so, the Commission has assigned an offense level of 28 (26 from the Drug Quantity Table plus two levels from § 3B1.1) to the heartland case for which Congress envisioned an offense level of 26 (or level 24, see discussion at Option A). Option B shows how the heroin offense levels would look if adjusted to avoid this double counting (pegging the reductions to levels 32 and 26, the highest offense levels containing the mandatory minimum penalties).

Option C. This option combines Options A and B, pegging the quantity for the ten-year mandatory minimum at level 26 (level 32 minus two levels from Option A and four levels from Option B) and the quantity for the five-year mandatory minimum at level 22 (level 26 minus two levels from Option A and two levels from Option B). It is to be noted, however, that the resulting offense level for the five-year mandatory minimum quantity minus a four-level adjustment for a minimal role and a three-level adjustment for acceptance of responsibility would produce a guideline range with a minimum of less than 24 months, thus seemingly conflicting with the recent congressional instruction in Section 80001 of the Violent Crime Control and Law Enforcement Act of 1994. In contrast, the lowest offense level provided under Options A and B for such cases has a lower limit (24 months), consistent with this congressional instruction.

Proposed Amendment: Section 2D1.1(c) is amended by revision of the quantities associated with offense level 24 and greater as shown in the following chart. Note: The amounts shown are the minimum quantities associated with each offense level offense (e.g., in the current guidelines, offense level 38 covers 30 KG or more of heroin). For simplicity of presentation, only the offense levels for heroin offenses are shown. The offense levels for other controlled substances would be adjusted accordingly (e.g., under § 2D1.1(c), 5 kg of cocaine has the same offense level as 1 kg of heroin; the proposed guideline offense levels would maintain this relationship).

Offense Levels for Heroin Distribution

OFFENSES (CURRENT GUIDELINES AND OPTIONS A, B, C)

Offense level	Current guidelines	Option A	Option B	Option C
38	30 KG	.....	.....	
36	10 KG	30 KG	.....	
34	3 KG .	10 KG	30 KG	
32	1 KG .	3 KG ..	10 KG	30 KG.

OFFENSES (CURRENT GUIDELINES AND OPTIONS A, B, C)—Continued

Offense level	Current guidelines	Option A	Option B	Option C
30	700 G	1 KG ..	3 KG ..	10 KG.
28	400 G	700 G	1 KG ..	3 KG.
26	100 G	400 G	300 G	1 KG.
24	80 G ..	100 G	100 G	300 G.
22	60 G ..	60 G ..	60 G ..	100 G.
20	40 G ..	40 G ..	40 G ..	40 G.
18	20 G ..	20 G ..	20 G ..	20 G.
16	10 G ..	10 G ..	10 G ..	10 G.
14	5 G	5 G	5 G	5 G.
12	less than 5G.	less than 5G.	less than 5G.	less than 5G.

34. Synopsis of Proposed Amendment: This proposed amendment would limit the impact of drug quantity in the case of defendants who qualify for a mitigating role adjustment under § 3B1.2 (Mitigating Role). A number of commentators have argued that the current guidelines over-punish low-level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. These commentators have recommended that, above a certain level, drug quantity should not further increase the offense level for defendants with minor or minimal roles. That is, for example, the difference between 20,000 kilos and 200,000 kilos of marijuana may be relevant to the offense level for the major actors in the offense but not relevant in determining the culpability and offense level for the deckhands or offloaders involved with that quantity. Historically, the U.S. Parole Commission limited the impact of drug quantity for low-level defendants in its parole release guidelines.

Under this proposed amendment, if the defendant qualified for a minor or minimal role, the base offense level from the Drug Quantity Table would not exceed level [28] even if the drug quantity table otherwise would have called for a higher offense level. In addition, the applicable role adjustment from § 3B1.2 (Mitigating Role) will further reduce the offense level by two or four levels.

The bracketing of offense level 28 in the proposed amendment indicates that the Commission requests comment on whether offense level 28 is the appropriate offense level for use in this amendment or whether the offense level should be higher or lower.

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following additional sentence at the end:

''Provided, that if the defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level determined under subsection (c) below shall not be greater than level [28].''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 16 and Inserting in lieu thereof:

''16. Subsection (a)(3) provides that if a defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level from subsection (c) shall not exceed level [28]. This limitation on the base offense level is in addition to, and not in lieu of, the appropriate adjustment from § 3B1.2 (Mitigating Role).''.

Additional Issue for Comment: The Commission, at the request of the Practitioners' Advisory Group, requests comment on whether this amendment should set different maximum offense levels from the Drug Quantity Table for defendants with a minor or minimal role depending upon the type of controlled substance. Specifically, should offenses involving heroin, cocaine, cocaine base, PCP, LSD, N-phenyl-N-[l-(2 phenylethyl)-4-piperidinyl] propanamide, marihuana, and methamphetamine have a different maximum offense level from the Drug Quantity Table for lower level defendants (e.g., level 28) than other controlled substance (e.g., level 22)?

35(A). Synopsis of Proposed Amendment: This is a three-part amendment to improve the operation of § 3B1.1 (Aggravating Role). First, this amendment revises § 3B1.1(b) to apply when the defendant managed or supervised at least four other participants. This formulation avoids what appears to be an anomaly in the current guideline in that a defendant who supervises only one participant in an offense with a total of five participants receives a higher offense level than a defendant who is the leader or organizer of an offense involving four participants and manages or supervises all of the participants. This formulation also is more consistent with that of 21 U.S.C. § 848 (Continuing Criminal Enterprise) (which requires the supervision of at least five other participants). Second, this amendment revises § 3B1.1(a) and (b) to delete the term ''otherwise extensive,'' a term of uncertain meaning that seems to have been intended to deal with certain non-criminally responsible participants (see current Application Note 3). This issue is addressed more directly by revised Application Note 1. Third, this amendment clarifies the interaction of §§ 3B1.1 and 3B1.2 in the case of a defendant who would qualify for a minor or minimal role but for his/her exercise of supervision over other minor or minimal participants. This interaction has been the subject of inconsistent interpretation and at least one circuit court decision, United States v. Tsai, 945 F2d. 155 (3rd Cir. 1992), has required that §§ 3B1.1 and 3B1.2 be sequentially applied to the same defendant.

Proposed Amendment: Section § 3B1.1 is amended by deleting ''follows:'' and inserting in lieu thereof ''follows (Apply the Greatest):''

Section 3B1.1(a) is amended by deleting ''a criminal activity that involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''the offense and the offense involved at least four other participants''.

Section 3B1.1(b) is amended by deleting ''(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''of at least four other participants in the offense''.

Section 3B1.1(c) is amended by deleting ''in any criminal activity other than described in (a) or (b)'' and inserting in lieu thereof ''of at least one other participant in the offense''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting the following additional paragraph at the end:

''In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminal responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the getaway car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in

Note 2 by inserting the Following additional paragraph at the end:

''A 'manager' or 'supervisor' means a person who managed or supervised another participant, whether directly or indirectly.''.

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

''3. In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor- or minimal-role participants, do not apply an adjustment from § 3B1.1 (Aggravating Role). For example, an increase for an aggravating role would not be appropriate for a defendant whose only function was to offload a large shipment of marihuana and who supervised other offloaders of that shipment. Instead, consider this factor in determining the appropriate reduction, if any, under § 3B1.2 (Mitigating Role). For example, in the case of a defendant who would have merited a reduction for a minimal role but for his or her supervision of other minimal-role participants, a reduction for a minor, rather than minimal, role might be appropriate. In the case of a defendant who would have merited a reduction for a minor role but for his or her supervision of other minimal- or minor-role participants, no reduction for role in the offense might be appropriate.

The interaction of §§ 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from § 3B1.1 is applied, an adjustment from § 3B1.2 may not be applied.''.

(B). Synopsis of Proposed Amendment: This proposed amendment revises § 3B1.2 (Mitigating Role) and the Introductory Commentary to Chapter Three, Part B (Role in the Offense) to provide clearer definitions of the circumstances under which a defendant qualifies for a mitigating role reduction. In addition, § 3B1.4 is deleted as unnecessary. This amendment is derived from the work of two Commission working groups that found significant problems with the clarity of the current definitions of mitigating role.

Proposed Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the second paragraph and inserting the following in lieu thereof:

''For § 3B1.1 (Aggravating Role) or § 3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended. When an offense has only one participant, neither § 3B1.1 nor § 3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under § 3B1.1, other participants may warrant a downward adjustment under § 3B1.2, and still other participants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply to offenses committed by any number of participants.

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) authorize an increase or decrease in offense level for a defendant who has an aggravating or mitigating role, respectively, in the offense conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with § 1B1.3, which focuses upon the acts and omissions in which the defendant participated (i.e., that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused) and, in the case of a jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were reasonably foreseeable.

For example, in a controlled substance trafficking offense, the Chapter Two offense level for Defendant A, who arranged the importation of 1000 kilograms of marihuana and hired a number of other participants to assist him, is level 32. The same Chapter Two offense level applies to Defendant B, a hired hand whose only role was to assist in unloading the ship upon which the marihuana was imported; Defendant C, a hired hand whose only role was as a deckhand on that ship; and Defendant D, a hired hand whose only role was to act as a lookout for that unloading. Defendant E, who purchased the marihuana from Defendant A and resold it, acting alone, also receives the same Chapter Two offense level. Although the quantity of marihuana involved for each of these defendants (and thus the Chapter Two offense level) is identical, courts traditionally have distinguished among such defendants in imposing sentence to take into account their relative culpabilities (based on their respective roles). Defendant A logically would be seen as having the most culpable role because he organized the importation and recruited and managed others. Defendants B, C, and D logically would be seen as having substantially less culpable roles. Defendant E, who acted alone, would receive no role adjustment. Consistent with these principles, §§ 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) are designed to provide the court with the ability to make appropriate adjustments in offense levels on the basis of the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

The fact that the conduct of one participant warrants an upward adjustment for an aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. For example, Defendant F plans a bank robbery and hires Defendant G, who commits the robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Defendant G may be less culpable than Defendant F, who will receive an upward adjustment under § 3B1.1 for employing Defendant G. Nevertheless, Defendant G does not have a minimal or minor role in the robbery because his role is not substantially less culpable than that of a defendant who committed the same robbery acting alone.''.

Section 3B1.2(a) is amended by deleting ''in any criminal activity''.

Section 3B1.2(b) is amended by deleting ''in any criminal activity''.

Section 3B1.2 is amended by deleting ''In cases falling between (a) and (b), decrease by 3 levels.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by renumbering Note 4 as Note 7; and by deleting Notes 1–3 and inserting in lieu thereof:

''1. (A) Minimal Role. For subsection (a) to apply, the defendant must—

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have all of the characteristics listed in Application Note 2(a)–(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3–7.

(B) Minor Role. For subsection (b) to apply, the defendant must—

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have most of the characteristics listed in Application Note 2(a)–(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3–7.

(C) The difference between a defendant with a minimal role and a minor role is one of degree, and depends upon the presence and intensity of the types of factors described in Application Note 2(a)–(d).

(D) For the purposes of this section, the 'same offense' means the offense conduct (and Chapter Two offense level) for which the defendant is accountable under § 1B1.3 (Relevant Conduct). The determination of whether a defendant is substantially less culpable than a person who committed the same offense without the involvement of any other participant requires a comparative assessment. In a drug trafficking offense, for example, the role and culpability of a defendant who was hired as a lookout for a drug transaction would be compared with the role and culpability of the seller of the same quantity of the controlled substance who acted alone. Similarly, the role and culpability of a defendant who was hired to unload a shipment of marihuana would be compared with that of an importer of the same quantity of marihuana who acted alone. 'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

Examples:

(1) Defendant A was hired by an unindicted participant to assist in unloading a ship carrying 1,000 kilograms of marihuana (having a Chapter Two offense level of Level 32). Defendant A had no decision-making authority, was to be paid $2,000, had no supervisory authority over another participant, and performed only unsophisticated tasks. The appropriate comparison of relative culpability is with a defendant who, acting alone, imported the same quantity of marihuana (such a defendant would receive a Chapter Two offense level of Level 32 and no aggravating or mitigating role adjustment). On the basis of this comparison, Defendant A is a substantially less culpable participant.

(2) Defendant B was hired by Defendant C to commit an assault on Defendant C's former business partner. Defendant B was told when and where to find the victim alone, was instructed how to proceed, was to be paid $3,000 to commit the offense, had no supervisory authority over another participant, and performed only unsophisticated tasks. Although Defendant B may be less culpable than Defendant C, Defendant B is not a substantially less culpable participant than a defendant who, acting alone, committed the same assault offense. Therefore, although Defendant C receives an aggravating role adjustment for employing Defendant B, Defendant B does not receive a mitigating role adjustment.

(E) Defendants who qualify as substantially less culpable participants usually will fall into one of the following categories:

(1) a defendant who facilitates the successful commission of an offense but is not essential to that offense (e.g., a lookout in a drug trafficking offense);

(2) a defendant who provides essentially manual labor that is necessary to the successful completion of an offense (e.g., a loader or unloader of contraband, or a deckhand on a ship carrying contraband); or

(3) a defendant who holds or transports contraband for the owner of the contraband (such defendants provide a buffer that reduces the likelihood of the owner being apprehended in possession of the contraband).

(F) Because the determination of whether a defendant qualifies for a mitigating (minimal or minor) role adjustment requires a comparative judgment, the Commission recognizes that it will be heavily dependent upon the facts of each case.

2. The following is a list of characteristics that ordinarily are associated with a mitigating role:

(A) the defendant had no material decision-making authority or responsibility;

(B) the total compensation or benefit to the defendant was very small in comparison to the total profit typically associated with offenses of the same type and scope;

(C) the defendant did not supervise other participant(s); and

(D) the defendant performed only unsophisticated tasks.

In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity or of the activities of other participants may be indicative of a mitigating role.

3. If the defendant received an adjustment from § 3B1.1 (Aggravating Role), an adjustment for a minimal or minor role is not authorized.

4. With regard to offenses involving contraband (including controlled substances), a defendant who—

(A) sold, or played a substantial part in negotiating the terms of the sale of, the contraband;

(B) had an ownership interest in any portion of the contraband; or

(C) financed any aspect of the offense,

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the offense that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant.

Thus, for example, a defendant who sells 100 grams of cocaine and who is held accountable under § 1B1.3 (Relevant Conduct) for only that quantity is not eligible for a mitigating role adjustment. In contrast, a defendant who sells 100 grams of cocaine, but who is held accountable under § 1B1.3 for a jointly undertaken criminal activity involving five kilograms of cocaine, if otherwise qualified, may be considered for a mitigating role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

[5. A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule) shall not receive a minimal role adjustment for the quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]

[6. A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the offense shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''8. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.''.

The Commentary to § 3B1.2 captioned ''Background'' is amended by deleting:

''This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or (b) involves a determination that is heavily dependent upon the facts of the particular case.'',

And by inserting in lieu thereof:

''This section provides an adjustment for a defendant who has a minor or minimal role in the offense. To qualify for a minor or minimal role adjustment, the defendant must be substantially less culpable than a hypothetical defendant who committed the same offense without the involvement of any other indicted or unindicted participant. In a large scale offense that cannot readily be committed by one person, the above comparison would be made to a small number of equally culpable participants who committed the offense without additional assistance. In an offense involving importing, transporting, or storing contraband (including controlled substances), the defendant's relative culpability is to be assessed by comparison with a participant who owned the same type and quantity of contraband because, in an offense involving contraband that is committed without the involvement of any other participant, the person committing the offense will be the owner of the contraband.''.

Section 3B1.4 is deleted in its entirety.

36. Synopsis of Proposed Amendment: Some commentators have suggested that if the Commission moderates the weight given to drug quantity, it should also amend the guidelines to enhance the weight given to firearm use, serious bodily injury, and organizer and leaders in very large scale offenses.

Currently, under § 2D1.1, possession of a weapon carries a 2-level increase, which adds roughly 25% to the guideline range at higher offense levels but little in absolute time at very low offense levels. This amendment would address this issue by providing a minimum offense level for weapon possession and added enhancements for firearm discharge and serious bodily injury.

In addition, this amendment would provide an enhancement for organizers and leaders of very large scale offenses; e.g., offenses involving at least ten other participants. For consistency, this would apply to all offenses, not just drug offenses. Two options are shown. Option 1 would add an additional specific offense characteristic to address this issue. Option 2 would address this issue by an application note regarding the appropriate placement of the sentence within the applicable guideline range.

Proposed Amendment: Section 2D1.1(b) is amended renumbering subdivision (2) as subdivision (3); and by deleting subdivision (1) and inserting in lieu thereof:

''(1) (Apply the greater):

(A) If the offense involved the discharge of a firearm, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20; or

(B) If the offense involved possession of a dangerous weapon (including a firearm), increase by 2 levels; but if the resulting offense level is less than level 18, increase to level 18.

(2) If a victim sustained serious bodily injury, other than that to which subsection (a)(1) or (2) applies, increase by 2 levels.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 3 and inserting in lieu thereof:

''3. 'Firearm,' 'dangerous weapon,' and 'serious bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). 'Discharge of a firearm' means the discharge of a firearm with intent to injure or intimidate, or in circumstances that pose a risk a risk of death or injury to a person.

The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. If a dangerous weapon is found in the same location as the controlled substance, there shall be a rebuttable presumption that the offense involved the possession of the weapon (i.e., that the possession of the weapon facilitated, or was otherwise related to, the commission of the offense).

The enhancements in subsection (b) also apply 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(b)(1), and 2D2.1(b)(1).''.

Section 2D1.11(b) is amended by renumbering subdivision (2) as (3); and by deleting subdivision (1) and inserting in lieu thereof:

''(1) (Apply the greater):

(A) If the offense involved the discharge of a firearm, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20; or

(B) If the offense involved possession of a dangerous weapon (including a firearm), increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(2) If a victim sustained serious bodily injury, other than that to which subsection (a)(1) or (2) applies, increase by 2 levels.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by deleting Note 1 and inserting in lieu thereof:

''1. 'Firearm,' 'dangerous weapon,' and 'serious bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). 'Discharge of a firearm' refers to the discharge of a firearm with intent to injure or in circumstances that pose a risk a risk of death or injury to a person.

If a dangerous weapon is found in the same location as the controlled substance, there shall be a rebuttable presumption that the offense involved the possession of the weapon (i.e., that the possession of the weapon facilitated, or was otherwise related to, the commission of the offense).''.

[Option 1: Section 3B1.1 is amended by redesignating subsection (a)–(c) as (b)–(d); and by inserting the following as subsection (a):

''(a) If the defendant was an organizer or leader of the offense, and the offense involved at least ten other participants, increase by 5 levels.''.]

[Option 2: The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. If the defendant was an organizer or leader of an offense involving at least ten other participants, a sentence towards the upper limit of the applicable guideline range typically will be appropriate.''.]

Additional Issue for Comment: The Commission, at the request of the Practitioners' Advisory Group, invites comment on an alternative to the weapons portion of this enhancement in the following form:

''(1)(A) If a dangerous weapon (including a firearm) was actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, increase by 2 levels.

(B) If the use of a dangerous weapon (including a firearm) was threatened by the defendant, or the defendant induced or directed another participant to threaten the use of a dangerous weapon, increase by 3 levels.

(C) If a dangerous weapon (including a firearm) was actually brandished or displayed by the defendant, or the defendant induced or directed another participant to brandish or display a dangerous weapon, increase by 4 levels.

(D) If a firearm was actually discharged by the defendant, or the defendant induced or directed another participant to actually discharge a firearm, increase by 5 levels.

2(A) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received bodily injury, or if the defendant induced or directed another participant to actually

use a dangerous weapon and someone other than that participant received bodily injury, increase by 2 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(B) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received serious bodily injury, increase by 3 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(C) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received permanent or life-threatening bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received permanent or life-threatening bodily injury, increase by 4 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.''.

37. Synopsis of Proposed Amendment: For offenses involving 50 or more marihuana plants, the guidelines use an equivalency of one plant = one kilogram of marihuana. This equivalency reflects the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. The one plant = 100 grams of marihuana equivalency was selected as a reasonable approximation of average yield taking into account (1) studies reporting the actual yield of marihuana plants (37.5—412 grams depending on growing conditions), (2) that for guideline purposes all plants regardless of size are to be counted while, in reality, not all plants will actually produce useable marihuana (e.g., some plants may die of disease before maturity; when plants are grown outdoors, some plants may be eaten by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. The one plant to one kilogram ratio used in the statute has been criticized by commentators as unrealistic. Courts have upheld this statutory ratio as a legitimate exercise of legislative authority (although not on the grounds that a marihuana plant actually produces anywhere close to one kilogram of marihuana). This amendment would detach the equivalency used in the guidelines from the one plant-one kilogram ratio used in the statute and substitute the 100 grams per marihuana plant ratio (currently used in the guidelines for cases involving fewer than 50 plants) for all cases.

Proposed Amendment: Section 2D1.1(c) is amended in the fifth note immediately following the drug quantity table by deleting ''if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants,''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the first sentence of the fourth paragraph by deleting ''In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. § 841(b)(1) (A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty'' and inserting in lieu thereof ''For marihuana'', and in the last sentence of the fourth paragraph by deleting '', in the case of fewer than fifty marihuana plants,''.

38. Issue for Comment: The 100 to 1 ratio between crack cocaine base and cocaine used in the guidelines reflects the ratio found in 21 U.S.C. § 841(b) with respect to the amounts that require a five- or ten-year mandatory minimum sentence. This 100 to 1 ratio has been criticized by a number of commentators as unwarranted. Congress has directed the Commission to conduct a study with respect to this issue. The Commission's report to Congress is forthcoming. The Commission requests comment as to whether the guidelines should be amended with respect to the 100 to 1 ratio, and if so, whether a 1 to 1, 2 to 1, 5 to 1, 10 to 1, 20 to 1 ratio, or some other ratio, should be substituted.

39. Synopsis of Proposed Amendment: This proposed amendment would revise § 2D1.1 so that the scale of the offense is based upon the quantity of the controlled substances with which the defendant was involved in a given time period. A number of commentators have suggested that the use of such a ''snapshot'' would provide a more accurate method of distinguishing the scale of the offense than the current procedure of aggregating all the controlled substances regardless of the time period of the offense. See, e.g., proposed amendments submitted by the Practitioners' Advisory Committee and Federal Defenders in the 1993–1994 amendment cycle; see also Judge Martin's opinion in *United States* v. *Genao,* 831 F. Supp. 246 (S.D. N.Y. 1993). Use of a given time frame would reduce the sentencing impact of law enforcement decisions as to the number of ''buys'' to be made before arresting the defendant. Currently, for example, whether the defendant is arrested after two sales or ten sales may have a substantial impact on the guideline range. The legislative history of the mandatory minimum sentencing provisions in the Anti-Drug Abuse Act of 1986 (from which the offense levels in § 2D1.1 were derived) seems consistent with the use of a snapshot approach. The amounts at the ten-year mandatory minimum were chosen to be indicative of ''major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs'' and the amounts at the five-year level were chosen to be indicative of ''the managers of the retail level traffic.'' (Narcotics Penalties and Enforcement Act of 1986, H.R. Rep. No. 845, Part I, 99th Cong., 2nd Sess. 11–12 (1986)). In explaining the weights chosen for major traffickers, the House report states:

> * * * after consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. * * * The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain. (Id.).

The above language suggests that the Congress was focusing on the amount of controlled substances possessed at one time (or within a limited time frame) rather than a cumulative amount of controlled substances possessed over an unlimited time period. Furthermore, it is noted that the Drug Enforcement Administration's investigation/prosecution priority classification scheme in effect at the time this mandatory minimum legislation was being considered graded cases by the amount of controlled substances distributed within a time period of 30 days; e.g., a Class I (major violator) was one who could be expected to distribute four kilograms of cocaine in a 30-day period; a Class II violator (mid-level violator) was one who could be

expected to distribute one kilogram in a 30-day period.

It also is to be noted that the use of a time period to limit consideration of conduct for sentencing purposes is currently contained in at least one statutory provision. Subsection (b)(2)(B) of 21 U.S.C. § 848 (Continuing Criminal Enterprise) requires the consideration of gross receipts be in relation to any 12-month period of the existence of the enterprise.

Consideration of quantity over a specified period would also eliminate cases in which courts are obligated to make extrapolations over long periods of time (with often tenuous information) in order to assess the quantity of controlled substances involved over the course of the entire offense.

Under this amendment, the guideline range would be based upon the largest amount of controlled substances with which the defendant was involved in a specified time period. Bracketed language displays four options. Options include a one-year time frame; a 180-day time frame, a 30-day time frame, and an option using the largest quantity involved at any one time.

Proposed Amendment: Section 2D1.1(c) is amended by designating the notes immediately following the Drug Quantity Table as Notes (B)-(I), respectively; and by inserting the following immediately before those notes:

''Notes to Drug Quantity Table:

[Option 1: (A) If the offense involved a number of transactions over a period of more than [12 months][180 days][30 days], the offense level from the Drug Quantity Table shall be based on the quantity of controlled substances with which the defendant was involved in any continuous [12-month][180-day][30-day] period during the course of the offense, using the quantity from the time period that results in the greatest offense level].

[Option 2: (A) If the offense involved a number of transactions over a period of time, the offense level from the Drug Quantity Table shall be determined by the quantity of controlled substances with which the defendant was involved on any one occasion, using the quantity that results in the greatest offense level].''.

40. Synopsis of Proposed Amendment: Some commentators have argued that the fact that the guidelines do not take into account drug purity can lead to unwarranted disparity in three types of cases. First, with some drugs, the purity of the drug generally increases with quantity (e.g., large quantities of heroin are generally purer than small quantities). With other drugs, purity varies less or does not vary at all (e.g., Percodan does not vary in purity because it is in pill form). The net result is that if the offense levels assigned to various controlled substances are proportional at the lower offense levels, the offense levels for the controlled substances that do not vary in purity will overpunish at the higher offense levels. For example, if Percodan and heroin offenses are aligned correctly at level 12, Percodan offenses will be substantially over-punished at higher offense levels. Second, there are a number of controlled substances that typically use large proportions of filler material in distribution. Methadone and Percodan are examples. Consequently, the offense levels for these substances tend to be inflated grossly by the weight of the filler material. This is similar to the LSD blotter paper/sugar cube issue that the Commission addressed in the 1993 amendment cycle. Third, even with drugs that generally increase in purity as quantity increases (e.g., heroin), there are some points in the distribution scheme (particularly at the lower levels) in which purity may vary substantially and thus have a significant impact on offense level. In addition, when purity is not considered, the offense level can be affected substantially by the timing of the arrest. For example, if a retail drug dealer buys ten grams of heroin at 50 percent purity in order to cut it with 100 grams of quinine and resell it, the offense level if the defendant is arrested before cutting the heroin is level 16 (ten grams). The offense level if the same defendant is arrested after cutting the quinine is level 26 (110 grams) despite the fact that the amount of actual heroin involved has always been five grams (ten grams at 50 percent purity).

Adoption of a drug table that used the actual weight of the controlled substance itself (e.g., 10 grams at 25% purity = 2.5 grams) would address these issues and eliminate inflation of offense levels based on ''filler'' material. Purity information is routinely provided on DEA Form 7 using established sampling procedures. There are, however, two potential practical problems related to drug purity that would have to be addressed satisfactorily before adoption of such a proposal. Both of these practical problems apply primarily to controlled substances that vary in purity (e.g., heroin and cocaine), rather than to legitimately manufactured pharmaceuticals that have been diverted (for which purity can readily be established) and substances that do not vary greatly in purity and thus would continue to be assessed by gross weight (e.g., marijuana). First, there is the possibility of increased litigation over purity assessments. It is noted, however, that (1) courts currently make estimates of drug quantity from information that is clearly less precise; (2) the Parole Commission has not found the use of quantity/purity to be problematic; and (3) quantity/purity currently is used for several controlled substances. For example, the instruction in § 2D1.1 to use ''300 KG of Methamphetamine or 30 KG or more of Methamphetamine (actual)'' directs the court to use the weight/purity of Methamphetamine with a conclusive presumption that the Methamphetamine is at least ten percent pure; the same instruction is contained in § 2D1.1 for PCP. Second, there is the issue of how to handle cases in which no controlled substance is seized (e.g., uncompleted offenses) and cases in which a controlled is seized but for some reason is not tested for purity.

Both of these concerns may be addressed by the adoption of a rebuttable presumption (or a set of rebuttable presumptions). For example, there could be a rebuttable presumption that the actual weight of the controlled substance was 50 percent of the weight of the mixture containing the controlled substance. In such case, the court would use a higher or lower percentage if such could be established by the government or the defense. Or, without much increase in complexity, there could be a set of rebuttable presumptions by drug type and/or gross quantity. The Parole Commission has used a chart with ''fallback'' purities as rebuttable presumptions based on the type and gross quantity of controlled substance for many years. The proposed amendment provides a set of rebuttable presumptions to address these issue.

Proposed Amendment: Section 2D1.1(c)(1) is amended by deleting:

''30 KG or more of PCP, or 3 KG or more of PCP (actual);

30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of 'Ice';'',

And inserting in lieu thereof:

''30 KG or more of PCP;

30 KG or more of Methamphetamine''.

Section 2D1.1(c)(2) is amended by deleting:

''At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);

At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of 'Ice';'',

And inserting in lieu thereof:

''At least 30 KG but less than 100 KG of PCP;

At least 30 KG but less than 100 KG of Methamphetamine;''.

Section 2D1.1(c)(3) is amended by deleting:

''At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);

At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of 'Ice';'',

And inserting in lieu thereof:

''At least 3 KG but less than 10 KG of PCP;

At least 3 KG but less than 10 KG of Methamphetamine;''.

Section 2D1.1(c)(4) is amended by deleting:

''At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);

At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of 'Ice';'',

And inserting in lieu thereof:

''At least 1 KG but less than 3 KG of PCP;

At least 1 KG but less than 3 KG of Methamphetamine;''.

Section 2D1.1(c)(5) is amended by deleting:

''At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);

At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of 'Ice';'',

And inserting in lieu thereof:

''At least 700 G but less than 1 KG of PCP;

At least 700 G but less than 1 KG of Methamphetamine;''.

Section 2D1.1(c)(6) is amended by deleting:

''At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of 'Ice';'',

And inserting in lieu thereof:

''At least 400 G but less than 700 G of PCP;

At least 400 G but less than 700 G of Methamphetamine;''.

Section 2D1.1(c)(7) is amended by deleting:

''At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);

At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of 'Ice';'',

And inserting in lieu thereof:

''At least 100 G but less than 400 G of PCP;

At least 100 G but less than 400 G of Methamphetamine;''.

Section 2D1.1(c)(8) is amended by deleting:

''At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);

At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of 'Ice';'',

And inserting in lieu thereof:

''At least 80 G but less than 100 G of PCP;

At least 80 G but less than 100 G of Methamphetamine;''.

Section 2D1.1(c)(9) is amended by deleting:

''At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);

At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than 8 G of Methamphetamine (actual), or at least 6 G but less than 8 G of 'Ice';'',

And inserting in lieu thereof:

''At least 60 G but less than 80 G of PCP;

At least 60 G but less than 80 G of Methamphetamine;''.

Section 2D1.1(c)(10) is amended by deleting:

''At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);

At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Methamphetamine (actual), or at least 4 G but less than 6 G of 'Ice';'',

And inserting in lieu thereof:

''At least 40 G but less than 60 G of PCP;

At least 40 G but less than 60 G of Methamphetamine''.

Section 2D1.1(c)(11) is amended by deleting:

''At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);

At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Methamphetamine (actual), or at least 2 G but less than 4 G of 'Ice';'',

And inserting in lieu thereof:

''At least 20 G but less than 40 G of PCP;

At least 20 G but less than 40 G of Methamphetamine;''.

Section 2D1.1(c)(12) is amended by deleting:

''At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);

At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of 'Ice';'',

And inserting in lieu thereof:

''At least 10 G but less than 20 G of PCP;

At least 10 G but less than 20 G of Methamphetamine;''.

Section 2D1.1(c)(13) is amended by deleting:

''At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);

At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of 'Ice';'',

And inserting in lieu thereof:

''At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);

At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of 'Ice';''.

Section 2D1.1(c)(14) is amended by deleting:

''Less than 5 G of PCP, or less than 500 MG of PCP (actual);

Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of 'Ice';'',

And inserting in lieu thereof:

''Less than 5 G of PCP;

Less than 5 G of Methamphetamine;''.

Section 2D1.1(c) is amended in the notes following the Drug Quantity table by deleting the first, second, third, and seventh paragraphs; and by inserting the following as the first note:

''(A) For offenses measured by the weight of the controlled substance (except marihuana, hashish, and hashish oil), use the weight of the actual controlled substance in the mixture or substance containing the controlled substance. For example, in the case of a 200 gram mixture containing heroin at 20% purity, the weight of the actual heroin is 40 grams (200 grams of mixture x 20% purity = 40 grams of heroin).

For the purposes of this determination:

(1) If the controlled substance is heroin, cocaine, 'crack,' cocaine base, or methamphetamine, and the transaction involved a mixture or substance weighing one kilogram or more, there shall be a rebuttable presumption that the purity is 75% (i.e., that the weight of the actual controlled substance is 75% of the weight of the mixture or substance containing the controlled substance);

(2) In any other case, there shall be a rebuttable presumption that the purity is 50% (i.e., that the weight of the actual controlled substance is 50% of the weight of the mixture or substance containing the controlled substance).

The applicable rebuttable presumption set forth above is to be used unless sufficient case-specific information is available to warrant a more specific determination as to the amount of the actual controlled substance.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 1 and inserting in lieu thereof:

''1. The rebuttable presumptions set forth in Note (A) will apply unless sufficient case-specific information is available to make a more specific determination as to the weight of the actual controlled substance.

''Generally, more specific weight/purity information will be obtained from DEA Form 7. In this form, 'total net weight' (Item 32) refers to the amount of the actual controlled substance. This is the weight to be used in calculation of the base offense level from the Drug Quantity Table.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Notes 9 and 18; and by renumbering the remaining notes accordingly.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 (formerly Note 10) by deleting ''sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)),'' and inserting in lieu thereof ''equivalences derived from the statute (21 U.S.C. § 841(b)(1))''; and by deleting ''of a substance containing''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 (formerly Note 11) by deleting ''total'' wherever it appears.

The Commentary to § 2D1.1 captioned ''Background'' is amended by deleting the first, second, third, seventh, and eighth paragraphs.

Additional Issue for Comment: The Commission invites comment, at the request of Families Against Mandatory Minimums, as to whether the ratio for methamphetamine relative to other controlled substances should be changed and, if so by how much.

41. Synopsis of Proposed Amendment: This proposed amendment simplifies the operation of § 2D1.1 with respect to Schedule I and II Depressants and Schedule II, IV, and V controlled substances by applying the Drug Quantity Table according to the number of pills, capsules, or tablets rather than by the gross weight of the pills, capsules, or tablets. Schedule I and II Depressants and Schedule III, IV, and V substances are almost always in pill, capsule, or tablet form. The current guidelines use the total weight of the pill, tablet, or capsule containing the controlled substance although there is no statutory requirement to do so. This method leads to anomalies because the weight of most pills is determined primarily by the filler rather than the controlled substance. Thus, heavy pills result in higher offense levels even though there is little or no connection between gross weight and the strength of the pill. Moreover, even the weight of the controlled substance in the pill itself has little connection with the strength of the pill for these offenses. Finally, because these categories contain a wide variety of controlled substances, there is little basis on which to compare the strength of different types of pills (unlike, for example, heroin and morphine that can be compared directly).

Because the offense levels for these offenses are generally lower than for other controlled substances, adoption of a more summary measure that references the number of pills, capsules, or tablets, rather than either their gross or net weight or purity, seems the most appropriate solution. Use of this method will simplify guideline application and more clearly show that the purpose of the Drug Quantity Table is as a proxy for the scale of the offense. Historically, this method (counting pills, tablets, capsules) has been used for such substances in the parole guidelines for many years. It is also noted that the sentencing guidelines currently use this method for anabolic steroids.

Proposed Amendment: Section 2D1.1(c)(10) is amended by deleting:

''20 KG or more of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids); 40,000 or more units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''40,000 or more units of Schedule I or II Depressants;

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

Section 2D1.1(c)(11) is amended by deleting:

''At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 20,000 but less than 40,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 20,000 but less than 40,000 units of Schedule I or II Depressants;

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

Section 2D1.1(c)(12) is amended by deleting:

''At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 10,000 but less than 20,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 10,000 but less than 20,000 units of Schedule I or II Depressants;

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

Section 2D1.1(c)(13) is amended by deleting:

''At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 5,000 but less than 10,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 5,000 but less than 10,000 units of Schedule I or II Depressants;

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

Section 2D1.1(c)(14) is amended by deleting:

''At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 2,500 but less than 5,000 units of Anabolic Steroids;

20 KG or more of Schedule IV substances.'',

And inserting in lieu thereof:

''At least 2,500 but less than 5,000 units of Schedule I or II Depressants;

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

40,000 or more units of Schedule IV substances.''.

Section 2D1.1(c)(15) is amended by deleting:

''At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 1,000 but less than 2,500 units of Anabolic Steroids;

At least 8 KG but less than 20 KG of Schedule IV substances.'',

And inserting in lieu thereof:

''At least 1,000 but less than 2,500 units of Schedule I or II Depressants;

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

At least 16,000 but less than 40,000 or more units of Schedule IV substances.''.

Section 2D1.1(c)(16) is amended by deleting:

''At least 125 G but less than 500 G of Secobarbital (or the equivalent

amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 250 but less than 1,000 units of Anabolic Steroids;

At least 2 KG but less than 8 KG of Schedule IV substances;

20 KG or more of Schedule V substances.'',

And inserting in lieu thereof:

''At least 250 but less than 1,000 units of Schedule I or II Depressants;

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

At least 4,000 but less than 16,000 units of Schedule IV substances;

At least 40,000 or more units of Schedule V substances.''.

Section 2D1.1(c)(17) is amended by deleting:

''Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

Less than 250 units of Anabolic Steroids;

Less than 2 KG of Schedule IV substances;

Less than 20 KG of Schedule V substances.'',

And inserting in lieu thereof:

''Less than 250 units of Schedule I or II Depressants;

Less than 250 units of Schedule III substances;

Less than 4,000 units of Schedule IV substances;

Less than 40,000 units of Schedule V substances.''.

Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional note as the fifth note:

''In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one 'unit' means one pill, capsule, or tablet. If the substance is in liquid form, one 'unit' means 0.5 gms.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10d by deleting ''28 kilograms'' and inserting in lieu thereof ''56,000 units''; by deleting ''50 kilograms'' and inserting in lieu thereof ''100,000 units''; and by deleting ''100 kilograms'' and inserting in lieu thereof ''200,000 units''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Secobarbital and Other Schedule I or II Depressants'' by deleting:

''1 gm of Amobarbital = 2 gm of marihuana

1 gm of Glutethimide = 0.4 gm of marihuana

1 gm of Methaqualone = 0.7 gm of marihuana

1 gm of Pentobarbital = 2 gm of marihuana

1 gm of Secobarbital = 2 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 1 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule III Substances'' by deleting:

''1 gm of a Schedule III Substance (except anabolic steroids) = 2 gm of marihuana

1 unit of anabolic steroids = 1 gm of marihuana

1 unit = 1 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule IV Substances'' by deleting:

''1 gm of a Schedule IV Substance = 0.125 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 0.0625 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule V Substances'' by deleting:

''1 gm of a Schedule V Substance = 0.0125 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 0.00625 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11 in the in the ''Typical Weight Per Unit'' by deleting:

'' Depressants

Methaqualone 300 mg''.

42. Synopsis of Proposed Amendment: This is a twelve-part amendment that addresses a number of miscellaneous issues in Chapter Two, Part D (Offenses Involving Drugs).

First, this amendment adds definitions of hashish and hashish oil to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) in the notes following the Drug Quantity Table. Currently, these terms are not defined by statute or in the guidelines, leading to litigation as to which substances are to be classified as hashish or hashish oil (as opposed to marihuana). This issue has arisen in sentencing hearings, see *United States* v. *Schultz*, 810 F. Supp. 230 (S.D. Ohio 1992) and *United States* v. *Gravelle*, 819 F. Supp. 1076 (S.D. Fla. 1993), training presentations, and hotline questions. This amendment adds a note following § 2D1.1(c) to address this issue.

Second, this amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that had not had time to dry). In such cases, including the moisture in the weight of the marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. *United States* v. *Garcia*, 925 F.2d 170 (7th Cir. 1991); *United States* v. *Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992). Although Application Note 1 in the Commentary to § 2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in Application Note 1 to ensure correct application of the guideline.

Third, a frequently recurring issue is that of what constitutes a marihuana plant. Several circuits have confronted the issue of when a cutting from a marihuana plant becomes a ''plant.'' The appellate courts generally have held that the term ''plant'' should be defined by ''its plain and ordinary dictionary meaning * * * [A] marihuana 'plant' includes those cuttings accompanied by root balls.'' *United States* v. *Edge*, 989 F.2d 871, 878 (6th Cir. 1993) (quoting *United States* v. *Eves*, 932 F.2d 856, 860 (10th Cir. 1991)). See also *United States* v. *Malbrough*, 922 F.2d 458, 465 (8th Cir. 1990) (acquiescing in the district court's apparent determination that certain marihuana cuttings that did not have their own ''root system'' should not be counted as plants), cert. denied, 111 S. Ct. 2907; *United States* v. *Angell*, 794 F. Supp. 874, 875 (D. Minn. 1990) (refusing to count as plants marihuana cuttings that have no visible root structure); *United States* v. *Fitol*, 733 F. Supp. 1312 (D. Minn. 1990) (''individual cuttings, planted with the intent of growing full size plants, and which had grown roots, are 'plants' both within common parlance and within Section 841(b)''); United States v. Speltz, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (small marijuana plants, e.g., cuttings with roots, are nonetheless still marijuana plants), aff'd. 938 F.2d 188 (8th Cir. 1991); United States v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990) (finding that cuttings were plants where each cutting had various degrees of root formation not clearly erroneous).

Because (1) this issue arises frequently, (2) not all of the circuits have ruled on this issue, and (3) the definitions necessary for courts and probation officers to apply the guidelines should be included in the Guidelines Manual, this amendment adds an application note (Note 20) to the Commentary of § 2D1.1 setting forth the definition of a plant for guidelines purposes.

Fourth, this amendment provides equivalencies for two additional controlled substances: (1) khat, and (2) levo-alpha-acetylmethadol (LAAM) in Application Note 10 of the Commentary to § 2D1.1.

Fifth, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Table in Application Note 10 of the Commentary to § 2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen. The usual form of methamphetamine is d-methamphetamine. Moreover, l-methamphetamine is not made intentionally, but rather it is the result of a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). This revision will simplify guideline application. Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l-methamphetamine or d-methamphetamine. In addition, there is another form of methamphetamine (dl-methamphetamine) that is composed of 50% d-methamphetamine and 50% l-methamphetamine. Dl-methamphetamine is not listed in the Drug Equivalency Table and has a potency halfway between l-methamphetamine and d-methamphetamine. This has led to litigation as to whether dl-methamphetamine should be treated as if it were all d-methamphetamine because it contains some d-methamphetamine, or whether it should be treated as 50 percent d-methamphetamine and 50 percent l-methamphetamine. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994) a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions clearly point out the complexity engendered by the current distinction between d- and l-methamphetamine.

Sixth, this amendment clarifies Application Note 3 in the Commentary of § 2D1.1 with respect to the weapon possession enhancement in § 2D1.1(b)(1). Currently, this commentary provides ''The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.'' There is a circuit conflict with respect to the burden of persuasion for application of this enhancement. The First, Sixth, Seventh, Ninth, and Tenth circuits require the government to show possession during the commission of the offense; the defense then bears the burden of showing that the weapon was not connected with the offense. United States v. Corcimiglia, 967 F.2d 724 (1st Cir. 1992); United States v. McGhee, 882 F.2d 1095 (6th Cir. 1989); United States v. Durrive, 902 F.2d 1221 (7th Cir. 1990); United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989); United States v. Roberts, 980 F.2d 645 (10th Cir. 1992). In contrast, the Eighth Circuit has placed the burden of both presence and relationship to the offense on the government. United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990), citing United States v. Khang, 904 F.2d 1219 (8th Cir. 1990). In addition, the phrase ''unless it is clearly improbable'' seems inconsistent with the preponderance of evidence standard that applies to other adjustments; i.e., can one find something to be clearly improbable by a preponderance of the evidence? This amendment resolves both issues by revising the Commentary to §§ 2D1.1 and 2D1.11 to state expressly that if a weapon is present, there shall be a rebuttable presumption that it is connected with the offense. Rebuttable presumptions currently are used in §§ 2B1.1 (Application Note 13) and 2T1.1 (Application Note 1).

Seventh, this amendment revises Application Note 12 in the Commentary to § 2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a larger quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes about the interpretation about this application note have produced much litigation in the courts. See, e.g., United States v. Bradley, 917 F.2d 601 (1st Cir. 1990); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Richardson, 939 F.2d 135 (4th Cir. 1991); United States v. Christian, 942 F.2d 363 (6th Cir. 1991); United States v. Ruiz, 932 F.2d 1174 (7th Cir. 1991); United States v. Smiley, 997 F.2d 475 (8th Cir. 1993); United States v. Barnes, 993 F.2d 680 (9th Cir. 1993); United States v. Tillman, Nos. 92–9198, etc. (11th Cir. Nov. 29, 1993).

Eighth, § 1B1.3 (Relevant Conduct) provides that a defendant is liable (1) for his or her own actions; and (2) for the actions of other participants that are both in furtherance of a conspiracy and reasonably forseeable. In an unusual case, the type or quantity of a controlled substance that the defendant personally transported or stored may not have been known or reasonably forseeable to the defendant. Assume, for example, that the defendant convinces the court (1) that he or she believed that he or she was transporting a small quantity of marijuana when, in fact, the substance was a large quantity of heroin and (2) that, in the circumstances, the fact that the substance was a large quantity of heroin was not reasonably forseeable. In United States v. Develasquez, 28 F.3d 2 (2d Cir. 1994), cert. denied, (U.S. Dec. 12, 1994) (No. 94–6793), the Second Circuit held that in determining the offense level under § 1B1.3(a)(1) the defendant is accountable for the controlled substance he or she actually transported even if the type or quantity was not reasonably forseeable. Whether or not a downward departure under the above noted circumstances may be warranted was not discussed. In United States v. Ivonye, No. 93–1720 (2d Cir. July 8, 1994), a similar case, the Second Circuit noted ''It is certainly possible, of course, to imagine a situation where the gap between belief and actuality was so great as to make the guideline grossly unfair in application. In such cases, downward departure may be warranted.'' This amendment adds an application note (Note 21) to provide guidance with respect to this issue.

Ninth, this amendment addresses cases involving a clandestine laboratory in which the manufacture of a controlled substance has not been completed. In such cases, the court must estimate the amount of controlled substance that would have been manufactured in order to calculate the offense level under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). The Drug Enforcement Administration provides an estimate of theoretical yield based on precursor chemicals on hand (Clandestine Laboratory Report—DEA 500). Theoretical yield assumes a complete chemical reaction; i.e., that all molecules that could combine with all other molecules do so. In actuality, the amount that a laboratory can produce

(actual yield) can vary from 0 percent to close to 100 percent of theoretical yield based on many factors, including the type of controlled substance being manufactured, the process used to manufacture the controlled substance, and the skill of the chemist.

The use of theoretical yield frequently will result in a higher offense level for someone who sets up a laboratory and does not produce any controlled substance than for someone who actually produces the controlled substance. This is because the theoretical yield frequently will substantially overestimate the actual (expected) yield. In order to minimize unwarranted disparity and, at the same time, prevent the need for inordinately complex factfinding, this amendment adds an application note (Note 22) to the Commentary to § 2D1.1 providing that 50 percent of the theoretical yield is to be used as a proxy for expected yield unless the government or defendant provides sufficient information to enable a more accurate estimate of the expected yield. In concept, this is similar to the proxy for tax loss used in § 2T1.1 (Tax Evasion). The Commission specifically invites comment on whether the percentage of theoretical yield used for such estimate should be a percentage higher or lower than 50 percent, whether different percentages should be developed for different controlled substances or manufacturing processes, and whether the estimate should be based on the most abundant precursor on hand, the least abundant precursor on hand, or some other method.

Tenth, the question has arisen as to how drug quantity is to be calculated under § 2D1.1 when part of the amount of the controlled substance possessed by the defendant is for sale and part is for the defendant's own use. In United States v. Kipp (9th Cir. No. 92–30302, March 4, 1993), the Ninth Circuit decided ''drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution.'' This issue seems likely to reoccur. Four options to address this issue seem possible: (1) adoption of the approach of the Ninth Circuit without stating a presumption; (2) adoption of the approach of the Ninth Circuit with a rebuttable presumption stating ''when controlled substance is possessed with intent to distribute, there is a rebuttable presumption that all amounts possessed by the defendant are intended for distribution''; (3) requiring the inclusion of all amounts in the guideline calculation, but authorizing a downward departure if the offense level determined overrepresents the seriousness of the offense because part of the amount possessed was intended for personal consumption; or (4) counting all the controlled substance and not authorize a downward departure. This amendment adds an application note (Note 23) that reflects the third option. Given that information pertaining to the intended use of the controlled substance is in the possession of the defendant, placing the burden on the defendant to demonstrate the amount not intended for distribution seems reasonable. It is noted, however, that even when it can be established the defendant possessed some portion for the defendant's own use, the actual amount likely will be somewhat uncertain. Even the defendant, at the time the defendant was arrested, may not have known how much of the controlled substance the defendant would have sold or used personally. Thus, making this factor a departure consideration, the third option, seems the preferable approach.

Eleventh, this amendment adds a departure instruction to the Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy). The issue addressed in this amendment involves the situation in which controlled substances were sold at a ''protected location,'' but the location of the drug transaction was determined by law enforcement authorities, rather than by the defendant, or otherwise does not create the enhanced risk of harm for those the guideline is designed to protect. The purpose of the amendment is to provide that, in such cases, the defendant is not penalized for the location of the sale. This issue has been noted by the Third Circuit in United States v. Rodriguez, 961 F.2d 1089 (3d Cir. 1992) (suggesting downward departure where the defendant technically qualifies for application of this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect).

Twelfth, this amendment revises Application Note 1 of the Commentary to § 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy). The word ''trafficking'' is added in the first sentence to prevent this restriction from applying solely because the defendant was a consumer of the controlled substance. The deletion of the portion of the second sentence pertaining to ''arranging for the use of the premises for the purpose of facilitating a drug transaction'' is because this phrase is unclear and, in any event, unnecessary given the next sentence. The addition of ''at the same time'' prevents this restriction from applying to a defendant who, for example, let her boyfriend use her apartment to make drug transactions during a six month period but changed apartments during that time. The word ''significantly'' is added to modify ''assisted'' to prevent a defendant from being excluded from the application of subsection (a)(2) because the defendant took an occasional telephone message. The last sentence is deleted as inconsistent with the guideline itself as well as inconsistent with the general framework of the Guidelines (prior criminal conduct is addressed in Chapter Four).

Proposed Amendment: Section 2D1.1(c) is amended in the Notes following the Drug Quantity Table by adding the following additional notes at the end:

''Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)) and (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 1 by inserting the following additional paragraph at the end:

''Similarly, in the case of marijuana having a moisture content that renders the marijuana unsuitable for consumption without drying (this might occur, for example with a bale of rain-soaked marijuana or freshly harvested marijuana that had not been dried), an approximation of the weight of the marijuana without such excess moisture content is to be used.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 3 by deleting:

''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.'',

And inserting in lieu thereof:

''This adjustment will apply whenever the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), possessed a dangerous weapon in connection with the offense. If a weapon was present during the offense (e.g., a weapon was found at the same location as the controlled substance), there shall be a rebuttable presumption that it was possessed in connection with the offense.'';

And by deleting ''The enhancement'' and inserting in lieu thereof ''This adjustment''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned ''Schedule I or II Opiates'' by inserting at the end:

''1 gm of levo-alpha-acetylmethadol (LAAM)=3 kg of marijuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants'' by deleting:

''1 gm of L-Methamphetamine/Levo-methamphetamine/L-Desoxyephedrine=40 gm of marijuana'';

And by inserting:

''1 gm of khat=.01 gm of marijuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 12 by deleting:

''In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.'',

And by inserting in lieu thereof:

''In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance—actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the court finds that the defendant did not intend to produce, or was not reasonably capable of producing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that it finds the defendant did not intend to produce or was not reasonably capable of producing.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by inserting the following additional notes:

''20. For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).

21. In an unusual case, the actual quantity or type of a controlled substance that the defendant possessed (and thus for which the defendant is accountable under subsection § 1B1.3(a)(1)) may have neither been known nor reasonably foreseeable to the defendant (e.g., the defendant agreed to store a parcel believing it contained a small quantity of marijuana and, under the circumstances of the particular case, it was not reasonably foreseeable that the parcel, in fact, contained a large quantity of heroin). In such a case, if the gap between the actual amount of the controlled substance and what the defendant could reasonably have foreseen is substantial, a downward departure may be warranted.

22. In a case involving a clandestine laboratory in which the manufacture of a controlled substance has not been completed it is necessary to determine the laboratory's expected yield in order to determine the appropriate offense level. The Drug Enforcement Agency usually provides an estimate of the amount of controlled substance capable of being produced (Clandestine Laboratory Report—DEA 500), based on the precursor chemicals on hand, in terms of theoretical yield. (Theoretical yield is based on the assumption that all of the precursors interact perfectly with each other, a situation that occurs only in theory.) Use [50%] of the theoretical yield for the [most] [least] precursor chemical on hand to determine the expected yield (the amount of the controlled substance actually expected from the precursors chemicals on hand), unless the government or defense provide sufficient information for a more accurate assessment of the expected yield.

23. For the purposes of this guideline, all controlled substances possessed in connection with the offense are to be included. If the defendant establishes that a portion of the amount possessed was intended for personal consumption, rather than distribution, a downward departure may be warranted to the guideline range that would have been applicable had that portion of the controlled substance not been included.''.

The Commentary to § 2D1.2 captioned ''Application Note'' is amended by deleting ''Note'' and inserting in lieu thereof ''Notes''; and by inserting the following additional note:

''2. If the offense was committed at or near a protected location, but (A) the offense did not create any increased risk for those this guideline was intended to protect; or (B) the location was determined by law enforcement agents rather than by the defendant, a downward departure (to the offense level that would have applied if the offense had not involved a protected location) may be warranted.''.

The Commentary to § 2D1.8 captioned ''Application Notes'' is amended in Note 1 by inserting ''trafficking'' immediately following ''controlled substance'' wherever the latter term appears; by deleting ''a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction,''; by inserting ''at the same time'' immediately following ''more than one premises''; by inserting ''significantly'' immediately before ''assisted''; and by deleting the last sentence.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 1 by deleting:

''The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.'',

And by inserting in lieu thereof:

''The adjustment in subsection (b)(1) will apply whenever the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), possessed a dangerous weapon in connection with the offense. If a weapon was present during the offense (e.g., a weapon was found at the same location as the controlled substance), there shall be a rebuttable presumption that it was possessed in connection with the offense.''.

Approach 2

43. Synopsis of Proposed Amendment: When Congress enacted the Anti-Drug Abuse Act of 1986, it targeted the drug kingpins and mid-level managers for stiff penalties. To effect its objective, Congress used drug quantity as a proxy for seriousness of the offense and indicia of large drug organizations. Unintended consequences resulted from such an approach, principally low-level, non-violent drug offenders were snared by the quantity net. The attached proposal attempts to address these unintended consequences by offering an alternative to the present guideline for drug trafficking, § 2D1.1. Under this proposal, sentences for drug traffickers will not be determined on the basis of drug quantity. Instead sentences will be based on the type of drug in conjunction with other important sentencing factors identified by Congress as critical, such as the use and possession of weapons, related violence, and defendant culpability.

This proposed amendment shows two options. Option 1 abandons drug quantity as the measure of offense seriousness and relies instead on an array of factors to determine appropriate sanctions for drug traffickers. Specific offense characteristics for use of a weapon, weapon type, injury, and function and culpability in the offense provide additional sentence distinctions. By removing consideration of drug quantity, this proposed amendment simplifies the application of the drug guideline as there will be no need to determine the amount of drugs trafficked, or to calculate the amount of drugs attributed to each defendant in the drug conspiracy under the provisions of the relevant conduct guideline. Drug amount will no longer be a consideration, except that extremely large or small amounts may be a factor that could warrant departure. Instead, the court will simply determine the type of drug trafficked. Furthermore, this proposal provides greater increases in offense levels for defendants who use or possess firearms or who cause bodily injury. In addition, factors distinguishing defendant culpability on the basis of the function the defendant performed in the offense will become part of the drug guideline, rather than as role consideration in Chapter Three.

The seriousness of the drug trafficking offenses is currently determined primarily on the basis of the quantity of drugs involved. The current drug guideline structure presumes that the quantity of drugs involved in the offense is a reliable indicator of offense seriousness in every case. Although quantity has the appearance of being non-subjective and easily determined, it can be significantly influenced by other factors such as the duration of the investigation, the fortuity of timing, and the plea negotiation process. For example, a distributor of cocaine could have an offense level as low as level 12 if the offense involved just one ''buy-bust,'' or as high as level 38 if the investigation continued and involved repeated distributions. Practitioners report that determining the amount of drugs that each member of a large drug conspiracy is held accountable for at sentencing can be a daunting, speculative, and time-consuming task.

This proposed amendment has three base offense levels, while the current drug guideline has seventeen. The highest base offense level is for the most serious drugs: heroin, cocaine, and cocaine base. Imbedded in the current drug guideline and the mandatory minimum penalty structure is the premise that drugs of varying types pose varying degrees of harm. These three base offense levels reflect this distinction. Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm, and that marijuana and hashish create lesser harms. Ranking of methamphetamine, LSD, and PCP is posited with marijuana and hashish. A third level is reserved for those drugs arguably less harmful, Schedules III, IV, and V controlled substances.

This proposed amendment also provides offense level increases based upon the type and use of weapons involved in the offense: 2, 3, 4, 5, 6, or 7 levels depending on the use and type of weapon. This increase only applies, however, if the defendant committed the act of weapon possession or use, or directed or induced another participant to do so. An additional increase of two levels is provided if the weapon involved was of the type listed in 26 U.S.C. § 5845(a) (e.g., machineguns, sawed-off shotguns, silencers, destructive devices).

The role considerations found in Chapter Three are moved into the drug guideline in this proposed amendment. The size of the drug organization becomes a proxy for drug quantity. The current drug guideline uses quantity as a proxy for role and culpability, and this results in many ''false positives'' when the quantity is great but the defendant's culpability is not. This proposal addresses role and culpability directly and adds a 10- level increase for leaders of drug organizations of 30 or more participants on the premise that this size organization was able to distribute, import, or manufacture large quantities of drugs. This increase, unlike the quantity increases in the current guideline, only results for defendants who are kingpins and mid-level dealers in the offense, as Congress intended. The current aggravating role guideline contains two primary considerations, role and the number of participants in the offense. This proposal separates these factors into two specific offense characteristics for operational simplicity.

This proposed amendment provides a 2-level reduction for peripheral defendants. The term ''peripheral'' was used instead of minimal and minor because the case law interpreting these terms and the mitigating role guideline (§ 3B1.2) is not useful in the context of this guideline configuration. Without quantity to drive offense levels too high, the need to apply the mitigating role adjustment to reduce offense levels is greatly relieved. For example, the current quantity-based guideline frequently produced offense levels for couriers, mules, and street-level dealers well beyond five- and ten-year mandatory minimum sentences. Considerable pressure exists to view these defendants as having a mitigating role so their sentences could be reduced. The desired result seemed to be influencing the interpretation of who received the mitigating role reduction. Without quantity to drive offense levels up, the need to see those who actually import and distribute drugs as minor or minimal participants is eliminated.

Option 2 substitutes a limited quantity measure for the specific offense characteristic in Option 1 pertaining to the size of the organization. It does this by providing four quantity distinctions. The first distinction is built into the base offense level, and will provide for no increase unless the defendant is associated with the type and amount of drug specified in (c)(3) of the proposal's Drug Quantity Table. Two levels are added for drug amounts associated with offense levels 26 through 30 in the current Drug Quantity Table. Four levels are added for amounts associated with levels 32 and 34, and six levels for amounts associated with levels 36 and 38. Specific offense characteristic (b)(1) specifies that the increases for drug amount are based on the greatest amount of drugs that the defendant was associated with on any one occasion. By controlling the time factor, the guideline will screen more effectively for large-scale traffickers. For example, when drug amounts are aggregated over time (as with the current drug guideline) the same offense levels are added for the defendant who imports on one occasion

five kilos of cocaine as for the defendant who distributes five kilos over an extended period in fifty gram amounts. This proposal will add offense level increases for large drug quantities, while limiting the impact of drug amount aggregation over time. This structure is designed to target the mid-level dealers and kingpins associated with large amounts, as Congress intended.

Proposed Amendment: Section 2D1.1 is deleted in its entirety and the following inserted in lieu thereof:

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

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

(1) 20–28, if the substance is heroin or any other Schedule I or II opiate or opium derivative, cocaine, cocaine base, or an analogue of these; or

(2) 18–26, if the substance is marijuana, hashish, methamphetamine, PCP, LSD, or any Schedule I or II substance not described in subsection (a)(1); or

(3) 10–18, if the substance is any substance not described in subsections (a)(1) or (a)(2).

(b) Specific Offense Characteristics

(1) If the offense involved multiple drug transactions and the defendant's involvement continued for a period of more than [60] [90] days, increase by 2 levels.

(2) If the defendant (or another participant that the defendant directed or induced):

(A) discharged a firearm, increase by 7 levels;

(B) otherwise used a firearm, increase by 6 levels;

(C) brandished, displayed, or possessed a firearm, increase by 5 levels;

(D) otherwise used a dangerous weapon, increase by 4 levels;

(E) brandished, displayed, or possessed a dangerous weapon, increase by 3 levels; or

(F) made an express threat of death, increase by 2 levels.

(3) If the weapon involved was a firearm or destructive device of a type listed in 26 U.S.C. § 5845(a), increase by 2 levels.

(4) If the defendant (or another participant that the defendant directed or induced) caused any person to sustain bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.

Provided, that the cumulative adjustments from (2) and (4) shall not exceed 11 levels.

(5) If the defendant functioned in the offense as a (apply the greater):

(A) leader or organizer, increase by 4 levels; or

(B) manager or supervisor, increase by 2 levels.

(6) If the defendant qualifies for the adjustment from subsection (b)(5)(A), and the defendant committed the offense in concert with the number of other participants listed below, increase as follows (apply the greatest):

Number of participants	Increase in level
(A) 30 or more	Add 6.
(B) 15–29	Add 4.
(C) 5–14	Add 2.

(7) If the defendant functioned in the offense as a peripheral, decrease by 2 levels.

(8) 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.

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The base offense level is determined on the basis of the most serious drug type involved in the offense. Accordingly, types of drugs not specified in the count of conviction may be considered in determining the offense level. See § 1B1.3(a)(2) (Relevant Conduct).

2. Do not apply the adjustments for § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) because adjustments for culpability have been incorporated into specific offense characteristics in § 2D1.1.

3. 'Firearm,' 'dangerous weapon,' 'otherwise used,' 'brandished,' 'bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). The term 'participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

4. Firearm or destructive device 'listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.

5. The terms 'leader' or 'organizer' as used in subsection (b)(5)(A), refer to defendants who act as the principal administrator, organizer, or leader of the criminal activity or as one of several such principal administrators, organizers, or leaders. Such defendants are distinguished by their participation in the planning and organization of the offense, the degree of control and authority exercised over others, a claimed right to a larger share of the fruits of the crime, the exercise of decision-making authority, and the recruitment of accomplices. Leaders and organizers typically would include defendants who act as:

a. high-level dealers—defendants who purchase or import drugs and distribute drugs at the wholesale level (to other high-level or mid-level drug dealers);

b. mid-level dealers—defendants who distribute at the wholesale level (to other mid-level and street-level dealers);

c. manufacturers/growers—defendants who grow, cultivate, or manufacture controlled substances for wholesale distribution and have an ownership interest in the controlled substance; and

d. financiers—defendants who provide money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs at the wholesale level.

6. The terms 'manager' and 'supervisor' as used in subsection (b)(5)(B), refer to defendants who provide material supervision or management of other participants. Such defendants have some decision-making authority, but primarily implement the

decisions and directives of the leader(s) or organizer(s). Managers and supervisors typically would include defendants who act as:

a. lieutenants—defendants who implement the decisions and directives of a leader or organizer by directing the activities of other participants.

Note: The terms 'manager' and 'supervisor' are not intended to apply to defendants who exercise limited supervision over participants with equal or lesser roles and whose overall function within the offense is not one of material supervision or management. For example, a defendant whose only function was to off-load a single large shipment of marijuana, and who supervised other off-loaders of that shipment should not be considered a 'supervisor' under this provision.

7. The term 'peripheral' as used in subsection (b)(7), refers to defendants who perform a limited, low-level function in the criminal activity. Such defendants normally are among the least culpable of those involved in the conduct of the group. 'Peripherals' typically do not have any material decision-making authority, do not own the controlled substance or finance any part of the offense, sell the controlled substance or play a substantial part in negotiating the terms of the sale. Defendants who qualify for an adjustment from subsection (b)(5), subsection (b)(8)(B), or § 3B1.3 (Abuse of a Position of Trust or Use of Special Skill) do not qualify as a 'peripheral.' Peripherals typically would include defendants who act as:

a. off-loaders, deck-hands—defendants who perform the physical labor required to put large quantities of drugs onto some form of transportation or into storage or hiding, or who act as crew members on vessels or aircraft used to transport drugs;

b. go-fers—defendants who generally have limited or no contact with drugs. These defendants run errands, answer the telephone, take messages, receive packages, and provide early warnings during meetings or drug exchanges; and

c. enablers—defendants who have a passive role in the offense, such as knowingly permitting unlawful activity to take place without acting affirmatively to further such activity. Enablers may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as a favor with little or no compensation.

8. The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been manufactured or distributed legitimately.

9. Distribution of 'a small amount of marijuana for no remuneration,' 21 U.S.C. § 841(b)(4), is treated as simple possession, to which § 2D2.1 applies.

10. Where a mandatory minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' See § 5K1.1 (Substantial Assistance to Authorities).

11. A defendant who used special skills in the commission of the offense may be subject to an enhancement under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. However, if subsection (b)(8)(B) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

12. In an offense involving negotiation to traffic in a controlled substance, the type of drug under negotiation in an uncompleted distribution shall be used to calculate the applicable base offense level.

13. The base offense level is determined by the type of controlled substance and the schedule of that substance as listed in 21 C.F.R. § 1308.13–15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

14. The quantity of drugs in the offense, when either extremely large or extremely small, may be an appropriate factor warranting departure. When the quantity of the controlled substance is [10] [20] times greater than that listed at Title 21 U.S.C. § 841(b)(1)(A), an upward departure may be warranted. Conversely, when the quantity of controlled substance is [1/10th] [1/20th] of that listed at Title 21 U.S.C. § 841(b)(1)(B), a downward departure may be warranted.''.]

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

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

(1) [20–28], if the substance is heroin or any other Schedule I or II opiate or opium derivative, cocaine, cocaine base, or an analogue of these; or

(2) [18–26], if the substance is marihuana, hashish, methamphetamine, PCP, LSD, or any Schedule I or II substance not described in subsection (a)(1); or

(3) [10–18], if the substance is any substance not described in subsections (a)(1) or (a)(2).

(b) Specific Offense Characteristics

(1) add the offense levels specified in the Drug Quantity table set forth is subsection (c) below based on the greatest amount of drugs that the defendant was associated with on any one occasion.

(2) If the defendant (or another participant that the defendant directed or induced):

(A) discharged a firearm, increase by 7 levels;

(B) otherwise used a firearm, increase by 6 levels;

(C) brandished, displayed, or possessed firearm, increase by 5 levels;

(D) otherwise used a dangerous weapon, increase by 4 levels;

(E) brandished, displayed, or possessed a dangerous weapon, increase by 3 levels; or

(F) made an express threat of death, increase by 2 levels.

(3) If the weapon involved was a firearm or destructive device of a type listed in 26 U.S.C. § 5845(a), increase by 2 levels.

(4) If the defendant (or another participant that the defendant directed or induced) caused any person to sustain bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.

Provided, however, that the cumulative adjustments from (2) and (4) shall not exceed 11 levels.

(5) If the defendant functioned in the offense as a (apply the greater):

(A) leader or organizer, increase by 4 levels; or

(B) manager or supervisor, increase by 2 levels.

(6) If the defendant functioned in the offense as a peripheral, decrease by 2 levels.

(7) 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.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

(c) DRUG QUANTITY TABLE

Controlled substances and quantity*	Offense level increase
(1) 10 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. 50 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X KG]** of Cocaine Base; 100 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 4 KG or more of Fentanyl; 1 KG or more of a Fentanyl Analogue; 10,000 KG or more of Marijuana; 2,000 KG or more of Hashish; 200 KG or more of Hashish Oil.	Add 6.
(2) At least 1 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. At least 5 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X KG**] of Cocaine Base; At least 10 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 400 G but less than 4 KG of Fentanyl; At least 100 G but less than 1 KG of a Fentanyl Analogue; At least 1,000 KG but less than 10,000 KG of Marihuana; At least 200 KG but less than 2,000 KG of Hashish; At least 20 KG but less than 200 KG of Hashish Oil.	Add 4.
(3) At least 100 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. At least 500 G but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X G**] of Cocaine Base; At least 1 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 G but less than 400 G of Fentanyl; At least 10 G but less than 100 G of a Fentanyl Analogue; At least 100 KG but less than 1,000 KG of Marihuana; At least 20 KG but less than 200 KG of Hashish; At least 2 KG but less than 20 KG of Hashish Oil.	Add 2.

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

** Comment is invited on the appropriate ratio of cocaine base to cocaine.

'Cocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

In the case of an offense involving marijuana plants treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marijuana is greater, use the actual weight of the marihuana.

In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The base offense level is determined on the basis of the most serious drug type involved in the offense. Accordingly, types of drugs not specified in the count of conviction may be considered in determining the offense level. See § 1B1.3(a)(2) (Relevant Conduct).

2. Do not apply the adjustments for § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) because adjustments for culpability have been incorporated into specific offense characteristics in § 2D1.1.

3. 'Firearm,' 'dangerous weapon,' 'otherwise used,' 'brandished,' 'bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). The term 'participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

4. Firearm or destructive device 'listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.

5. The terms 'leader' or 'organizer' as used in subsection (b)(5)(A), refer to defendants who act as the principal administrator, organizer, or leader of the criminal activity or as one of several such principal administrators, organizers, or leaders. Such defendants are distinguished by their participation in the planning and organization of the offense, the degree of control and authority exercised over others, a claimed right to a larger share of the fruits of the crime, the exercise of decision-making authority, and the recruitment of accomplices. Leaders and organizers typically would include defendants who act as:

a. high-level dealers—defendants who purchase or import drugs and distribute

drugs at the wholesale level (to other high-level or mid-level drug dealers);

b. mid-level dealers—defendants who distribute at the wholesale level (to other mid-level and street-level dealers);

c. manufacturers/growers—defendants who grow, cultivate, or manufacture controlled substances for wholesale distribution and have an ownership interest in the controlled substance; and

d. financiers—defendants who provide money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs at the wholesale level.

6. The terms 'manager' and 'supervisor' as used in subsection (b)(5)(B), refer to defendants who provide material supervision or management of other participants. Such defendants have some decision-making authority, but primarily implement the decisions and directives of the leader(s) or organizer(s). Managers and supervisors typically would include defendants who act as:

a. lieutenants—defendants who implement the decisions and directives of a leader or organizer by directing the activities of other participants.

Note: The terms 'manager' and 'supervisor' are not intended to apply to defendants who exercise limited supervision over participants with equal or lesser roles and whose overall function within the offense is not one of material supervision or management. For example, a defendant whose only function was to off-load a single large shipment of marijuana, and who supervised other off-loaders of that shipment should not be considered a 'supervisor' under this provision.

7. The term 'peripheral' as used in subsection (b)(6), refers to defendants who perform a limited, low-level function in the criminal activity. Such defendants normally are among the least culpable of those involved in the conduct of the group. 'Peripherals' typically do not have any material decision-making authority, do not own the controlled substance or finance any part of the offense, sell the controlled substance or play a substantial part in negotiating the terms of the sale. Defendants who qualify for an adjustment from subsection (b)(5), subsection (b)(7)(B), or § 3B1.3 (Abuse of a Position of Trust or Use of Special Skill) do not qualify as a 'peripheral.' Peripherals typically would include defendants who act as:

a. off-loaders, deck-hands—defendants who perform the physical labor required to put large quantities of drugs onto some form of transportation or into storage or hiding, or who act as crew members on vessels or aircraft used to transport drugs;

b. go-fers—defendants who generally have limited or no contact with drugs. These defendants run errands, answer the telephone, take messages, receive packages, and provide early warnings during meetings or drug exchanges; and

c. enablers—defendants who have a passive role in the offense, such as knowingly permitting unlawful activity to take place without acting affirmatively to further such activity. Enablers may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as a favor with little or no compensation.

8. The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been manufactured or distributed legitimately.

9. Distribution of 'a small amount of marijuana for no remuneration,' 21 U.S.C. § 841(b)(4), is treated as simple possession, to which § 2D2.1 applies.

10. Where a mandatory minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' See § 5K1.1 (Substantial Assistance to Authorities).

11. A defendant who used special skills in the commission of the offense may be subject to an enhancement under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. However, if subsection (b)(7)(B) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

12. In an offense involving negotiation to traffic in a controlled substance, the type of drug under negotiation in an uncompleted distribution shall be used to calculate the applicable base offense level. However, where the court finds that the defendant did not intend to produce or was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the drug type or amount that it finds the defendant did not intend to produce or was not reasonably capable of producing.

13. The base offense level is determined by the type of controlled substance and the schedule of that substance as listed in 21 CFR § 1308.13–15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR § 1308.13–15 is the appropriate classification.'.]

III. Other Amendments

Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting)

44. Synopsis of Proposed Amendment: This amendment revises the guidelines in Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting). When the Commission promulgated §§ 2S1.1 and 2S1.2 to govern sentencing for the money laundering and monetary transaction offenses found at 18 U.S.C. §§ 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Additionally, court decisions have since construed the elements of these offenses broadly. This amendment consolidates §§ 2Sl.l and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct.

The amendment accomplishes the latter goal chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds. If the defendant committed the underlying offense and the offense level can be determined, subsection (a)(1) sets the base offense level equal to that for the underlying offense. In other instances, the base offense level is keyed to the value of funds involved. The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the

funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

Subsections (a)(2) and (a)(3) provide ''fallback'' offense levels that will apply primarily in cases in which the offense level for the underlying conduct cannot be determined. Subsection (a)(3), designed to apply when the funds were not known or believed to be derived from drug trafficking, provides a minimum base offense level of eight. This number corresponds to the base offense level of six provided in § 2F1.1 plus two levels for more than minimal planning. Guideline 2F1.1 is used as a point of reference because subsection (a)(3) would typically be expected to apply in cases involving funds from economic crimes which are, in turn, typically sentenced by reference to § 2F1.1. The base offense in subsection (a)(3) assumes that heartland cases would involve more than minimal planning. Subsection (a)(2) provides a minimum base offense level of 12 for cases in which the defendant knew or believed the funds were from drug trafficking. This approach is consistent with the current guideline structure which generally treats drug-related offenses as at least four levels more serious than typical economic offenses (e.g., fraud).

The base offense levels provided for in subsections (a)(2) and (a)(3) have been bracketed to signal the Commission's interest in receiving comment on possible modifications to these numbers suggested by representatives of the defense bar and the Department of Justice. Defense bar representatives have recommended that the base offense level in subsection (a)(3) not assume that more than minimal planning was involved in the underlying conduct and, accordingly, that level 6 rather than level 8 should be used. The Justice Department has recommended that the Commission consider setting base offense levels in (a)(2) and (a)(3) four levels higher (i.e., level 16 and 12, respectively). In addition, the bracketed text in subsection (a)(2) reflects a request by the Department of Justice that the Commission invite comment on whether the list of offenses under this subsection should be expanded beyond offenses involving controlled substances.

Proposed Amendment: Sections 2S1.1 and 2S1.2 are deleted in their entirety and the following is inserted in lieu thereof:

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

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

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under § 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) [12] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]; or

(3) [8] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. 'Value of the funds' means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Criminally derived funds are any funds that are derived from a criminal offense; e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for $200,000 that is worth $120,000 and deposits the $200,000 in a bank; the value of the criminally derived funds is $200,000, but the loss is $80,000). If the defendant is able to establish that the loss, as defined in § 2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve actual money laundering, i.e., efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.

5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the 'layering' of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate.

Background: The statutes covered by this guideline were enacted as part of the Anti-Drug Abuse Act of 1986. These statutes cover a wide range of conduct.

For example, they apply to large-scale operations that engage in international laundering of illegal drug proceeds. They also apply to a defendant who deposits $11,000 of fraudulently obtained funds in a bank. In order to achieve proportionality in sentencing, this guideline generally starts from a base offense level equivalent to that which would apply to the specified unlawful activity from which the funds were derived. The specific offense characteristics provide enhancements if the offense was designed to conceal or disguise the proceeds of criminal conduct and if the offense involved sophisticated money laundering.''.

Section 3D1.2(d) is amended in the second paragraph by deleting ''2S1.2,''.

Section 8C2.1(a) is amended by deleting ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by deleting ''§ 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity);''.

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. § 1957 by deleting ''2S1.2'' and inserting in lieu thereof ''2S1.1''.

Additional Issue for Comment: The Commission, at the recommendation of the Practitioners' Advisory Group, invites comment on the following issues. First, should proposed § 2S1.1, rather than referencing the table in § 2F1.1, use the following monetary table:

''Value (apply the greatest)	Increase in level
(A) $100,000 or less	No increase.
(B) More than $100,000	Add 1.
(C) More than $200,000	Add 2.
(D) More than $350,000	Add 3.
(E) More than $600,000	Add 4.
(F) More than $1,000,000	Add 5.
(G) More than $2,000,000	Add 6.
(H) More than $3,500,000	Add 7.
(I) More than $6,000,000	Add 8.
(J) More than $10,000,000	Add 9.
(K) More than $20,000,000	Add 10.
(L) More than $35,000,000	Add 11.
(M) More than $60,000,000	Add 12.
(N) More than $100,000,000	Add 13.''?

Second, should proposed § 2S1.1(a)(2) and (3) apply only when the offense level under subsection (a)(1) cannot be determined, rather than if the offense level under subsection (a) (2) or (3) is greater than under subsection (a)(1)?

Third, should an application note be added providing that if the offense involved an undercover sting and the court finds that the government agent influenced the value of the funds involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted?

Chapter Five, Part D (Supervised Release)

45. Issue for Comment: The Commission, at the request of the Committee on Criminal Law of the Judicial Conference of the United States, invites comment on whether the supervised release guidelines should be amended to permit greater consideration of the individual defendant's need for supervision after imprisonment, to permit greater judicial flexibility in the imposition of supervised release, or to relieve the growing burden on judicial resources devoted to supervising defendants. Specifically, should § 5D1.1 be amended to eliminate the current requirement that supervised release be imposed in a case in which a defendant is sentenced to a term of imprisonment exceeding one year? Should § 5D1.2 be amended to reduce the terms of supervised release required to be imposed? If so, what should be the minimum term required, if any?

Chapter Five, Part G (Implementing the Total Sentence of Imprisonment)

46. Synopsis of Proposed Amendment: This amendment addresses the operation of § 5G1.3. Two options are shown. These options set forth different ways of providing additional guidance addressing this inherently complex area.

Proposed Amendment: [Option 1: Section 5G1.3(c) is deleted and the following inserted in lieu thereof:

''(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed consecutively, concurrently, or partially concurrently to the prior unexpired term of imprisonment in order to achieve an appropriate total punishment. In determining the appropriate total punishment, the court shall consider the guideline range that would have been applicable had the instant offense and the offense for which the defendant is serving the undischarged term of imprisonment both been federal offenses for which sentences were being imposed at the same time under § 5G1.2 (Sentencing on Multiple Counts of Conviction), provided sufficient information is available to make a reasonable estimate of that guideline range. If sufficient information is not available for such estimate, the court may use any reasonable method to determine the appropriate total punishment.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second paragraph and inserting in lieu thereof:

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

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by deleting Notes 3 and 4 and inserting in lieu thereof:

''3. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under subsection (c), the court shall, to the extent practicable, impose a sentence for the instant offense that results in a combined sentence that approximates the total (aggregate) punishment that would have been imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. This determination frequently may require an

approximation because the information available about the previously sentenced offense may be limited. For example, if the undischarged term of imprisonment resulted from a state offense, the information available may permit only a rough estimate of the total punishment guideline range. If the undischarged term of imprisonment resulted from a federal offense to which the guidelines applied, the task will be somewhat more straightforward, although a precise determination may not be possible even in these cases. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. If a reasonable estimate of the applicable total punishment guideline range under § 5G1.2 cannot be made from the information available, the court may use any reasonable method to determine an appropriate total punishment.

The purpose of this provision is illustrated by the following examples. Example (1): A defendant with no prior convictions robs two banks in different federal judicial districts. The first offense is a level 27 offense; the second offense is a level 24 offense. The charges are consolidated and the defendant pleads guilty and accepts responsibility for his conduct. The final offense level is 27 (the two offenses result in a level 29 under the multiple count rules, reduced by two levels for acceptance of responsibility). The defendant is in Criminal History Category I. The applicable guideline range is 70–87 months. There are no aggravating or mitigating factors sufficient to warrant a guideline departure. Example (2): The same circumstances exist as in Example (1) except that the charges are not consolidated. The defendant first pleads guilty and accepts responsibility for the level 27 offense. The guideline range is 57–71 months (final offense level 25, Criminal History Category I). The defendant is sentenced to 65 months. Shortly thereafter, the defendant pleads guilty and accepts responsibility for the level 24 offense. The guideline range is 46–57 months (final offense level 22, Criminal History Category II). The defendant has served 2 months on the first sentence at the time of sentencing on the second offense. If, in Example 2, the sentencing court imposed a sentence within the applicable guideline range for the second offense, and ordered that sentence to run consecutively to the first sentence, the aggregate term of imprisonment (between 111 and 122 months) would be substantially higher than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. On the other hand, if such sentence were imposed to run concurrently, the aggregate term of imprisonment (65 months) would provide no additional punishment for the second offense and would be lower than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. Subsection (c) is designed to provide a methodology to allow the court, to the extent practicable, to impose a total punishment that approximates the total punishment that would have been imposed had the sentences both been federal sentences imposed at the same time under § 5G1.2 (Sentencing on Multiple Counts of Conviction).

4. The application of subsection (c) has the following steps:

(1) the court determines the guideline range for the instant offense (as in any case);

(2) the court determines, to the extent feasible, the total punishment that it would have imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all the offenses (the instant offense and any offense resulting in the undischarged term of imprisonment) been federal offenses for which sentences were being imposed at the same time. If a reasonable estimate of the total punishment guideline range cannot be made using this method, the court may use any reasonable method for determining an appropriate total punishment;

(3) the court then determines the specific sentence for the instant offense, and whether that sentence will run concurrently, partially concurrently, or consecutively to the remainder of the undischarged term of imprisonment. The objective is to impose a sentence that (i) is consistent with the guideline range for the instant offense (assuming no aggravating or mitigating factors warranting a departure), and (ii) is structured in such a way that the resulting aggregate term of imprisonment will reflect the appropriate total punishment.

The form of the sentence that will best accomplish the objectives of this provision will depend upon the length and type of the undischarged term of imprisonment and the amount of time the defendant has served on that sentence. The following examples show the application of this provision to a variety of typical cases.

Examples:

(A) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant offense, the defendant has served 10 months on that sentence. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate total punishment.

(B) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant offense, the defendant has served 3 months on that sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate incremental penalty.

(C) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 2 months on that sentence. In this case, a sentence of 30 months' imprisonment to commence upon the defendant's release from imprisonment on the undischarged term of imprisonment, or on August 1, 1994,

whichever is earlier, would (1) be within the guideline range for the instant offense and (2) achieve the appropriate total penalty. Note that if the defendant was released from state custody prior to August 1, 1994, the sentence for the instant offense will be fully consecutive to the state sentence. If the defendant is still in state custody as of August 1, 1994, the sentence for the instant offense will be concurrent with the remainder of the state sentence beginning on that date. See Application Note 5 below for the procedure to use in imposing a partially concurrent sentence.

(D) The applicable guideline range for the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate state sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 24 months on the state sentence. In this case, a downward departure to a sentence of 12 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would be appropriate to achieve the appropriate total punishment.

(E) The guideline range applicable to the instant offense is 24–30 months. Because of a lack of information, the combined guideline range (had both the instant offense and the offense resulting in the undischarged term of imprisonment offenses been federal offenses that were being sentenced at the same time) cannot reasonably be determined from the information available. Only a rough estimate of from 30 to 63 months can be made. The court may use any reasonable method to determine the appropriate total punishment and then impose sentence using the methods set forth in Examples (A), (B), (C), or (D) above, as appropriate.

5. To impose a partially concurrent sentence, the court may provide in the Judgment and Commitment Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date. See Background Commentary.

6. If a defendant is serving an unexpired term of imprisonment in connection with a probation, parole, or supervised release violation, the revocation policy statements in Chapter Seven (Violations of Probation and Supervised Release) shall be used in determining the appropriate total punishment as if the defendant had been on federal probation or supervised release at the time of the violation (i.e., the guideline range applicable to the violation of probation, parole, or supervised release is to be added to the guideline range for the instant offense to determine the total punishment guideline range). Note that the conduct resulting in the revocation of probation, parole, or supervised release (rather than the offense that resulted in the period of probation, parole, or supervised release) is considered in determining the total punishment range. The sentence for the offense that resulted in the period of probation, parole, or supervised release is treated as prior criminal history.

7. In an unusual case, the instant offense may include a count to which subsection (a) applies and a count to which subsection (b) or (c) applies. For example, a defendant subject to an unexpired federal term of imprisonment for a drug offense may be sentenced for two additional federal offenses—one count pertaining to a drug offense committed about the same time as the drug offense for which the defendant is currently serving the unexpired term of imprisonment and one count for possession of contraband in prison during the unexpired term of imprisonment. In this case, subsection (a) will apply to the second count, and subsection (b) or (c) (depending on the specifics of the case) will apply to the first count. In such a case, in order to achieve an appropriate total punishment, the determinations under this section will need to be made separately for the counts to which subsection (a) applies and the counts to which subsections (b) and (c) apply. In the above example, subsection (a) will require that any term of imprisonment on the first count run consecutively to the unexpired term of imprisonment. Subsections (b) and (c) may call for a different result (e.g., a concurrent or partially concurrent sentence) on the second count.

8. Occasionally, a defendant may receive a sentence of imprisonment on another offense after the completion of the instant offense, yet be released from imprisonment on that sentence before sentencing on the instant offense. For example, after the completion of the instant federal offense, the defendant receives an eighteen-month term of imprisonment for a state offense. While in state custody, the defendant is convicted of the instant offense, but sentencing is not scheduled until after the defendant is released from imprisonment on the state offense. If subsection (b) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (b) shall continue to apply; i.e., the defendant is to be given credit for guideline purposes for the time imprisoned on the prior sentence. If subsection (c) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (c) shall continue to apply to guide the determination of an appropriate total punishment.''.

The Commentary to § 5G1.3 captioned ''Background'' is amended by inserting the following additional paragraphs at the end:

''Overlapping sentences, as described in Application Note 5, were not authorized in the federal system prior to the Sentencing Reform Act of 1984. The Congress, however, in enacting 28 U.S.C. § 994(l)(1), clearly contemplated that the new 18 U.S.C. § 3584 would allow the imposition of overlapping (partially concurrent) sentences in addition to fully concurrent or consecutive sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 177 (1983) ('It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified.'). Without the ability to fashion such a sentence, the instruction to the Commission to provide a reasonable incremental penalty for additional offenses in 28 U.S.C. § 994(l)(1) could not be successfully implemented, particularly if the defendant's release date on the undischarged term of imprisonment cannot readily be determined in advance (e.g., in the case of an indeterminate sentence subject to parole release).

Prior to the Sentencing Reform Act of 1984 (SRA), only the Bureau of Prisons had the authority to commence a federal sentence before the defendant's release from imprisonment on a state sentence. See, e.g., United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977).

Legislative history pertaining to the new 18 U.S.C. § 3584 indicates that this section was intended to allow the sentencing court the authority to determine whether the federal sentence was to run concurrently or consecutively to a state sentence of imprisonment. 'This * * * [section 3584] changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a state offense.' S. Rep. No. 225, supra at 127. 'Thus, it is intended that this provision be construed contrary to the holding in United States v. Segal.' Id. at 127 (n.314). See United States v. Hardesty, 958 F.2d 910, 914 (stating that, under section 3584, 'Congress has expressly granted federal judges the discretion to impose a sentence concurrent to a state prison term'), aff'd. en banc, 977 F.2d 1347 (9th Cir. 1992).''.]

[Option 2: Section 5G1.3(c) is deleted and the following inserted in lieu thereof:

''(c) If—

(1) neither subsection (a) nor subsection (b) applies;

(2) the prior undischarged term of imprisonment resulted from a federal sentence imposed pursuant to the Sentencing Reform Act; and

(3) such sentence was not a departure from the guidelines,

the applicable range shall be determined by application of the guidelines to the instant offense(s) and the federal offense(s) for which the defendant is serving an undischarged term of imprisonment as if the sentences were being imposed at the same time. A sentence under this subsection shall be imposed to run concurrently to the undischarged term of imprisonment, except to the extent a consecutive sentence is necessary to achieve the appropriate total punishment.

(d) In any other case, the court may use any reasonable method to determine whether the sentence for the instant offense should be imposed to run concurrently or consecutively to the undischarged term of imprisonment.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second paragraph and inserting in lieu thereof:

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

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by renumbering Note 4 as Note 6; and by deleting Note 3 and inserting in lieu thereof:

''3. If neither subsection (a) nor (b) applies, and the defendant is subject to an undischarged term of imprisonment resulting from a non-departure sentence for a federal offense imposed pursuant to the Sentencing Reform Act, subsection (c) applies.

Under subsection (c), the court determines the guideline range that would have been applicable had all the offenses (the instant offense and the offense(s) resulting in the undischarged term of imprisonment) been offenses for which sentences were being imposed at the same time.

The purpose of subsection (c) is illustrated by the following examples. Example (1): A defendant with no prior convictions robs two banks in different federal judicial districts. The first offense is a level 27 offense; the second offense is a level 24 offense. The charges are consolidated and the defendant pleads guilty and accepts responsibility for his conduct. The final offense level is 27 (the two offenses result in a level 29 under the multiple count rules, reduced by two levels for acceptance of responsibility). The defendant is in Criminal History Category I. The applicable guideline range is 70–87 months. There are no aggravating or mitigating factors sufficient to warrant a guideline departure. Example (2): The same circumstances exist as in Example (1) except that the charges are not consolidated. The defendant first pleads guilty and accepts responsibility for the level 27 offense. The guideline range is 57–71 months (final offense level 25, Criminal History Category I). The defendant is sentenced to 65 months. Shortly thereafter, the defendant pleads guilty and accepts responsibility for the level 24 offense. The guideline range is 46–57 months (final offense level 22, Criminal History Category II). The defendant has served 2 months on the first sentence at the time of sentencing on the second offense. If, in Example 2, the sentencing court imposed a sentence within the applicable guideline range for the second offense, and ordered that sentence to run consecutively to the first sentence, the aggregate term of imprisonment (between 111 and 122 months) would be substantially higher than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. On the other hand, if such sentence were imposed to run concurrently, the aggregate term of imprisonment (65 months) would provide no additional punishment for the second offense and would be lower than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. Subsection (c) is designed to provide a methodology to allow the court, to the extent practicable, to impose a total punishment that approximates the total punishment that would have been imposed had the sentences both been federal sentences imposed at the same time.

4. When determining the applicable guideline range under subsection (c), use the offense level determinations previously established for the offense resulting in the undischarged term of imprisonment. That is, this provision does not contemplate a re-examination of the offense level determinations for the offense resulting in the undischarged term of imprisonment. Note also that no criminal history points for the offense resulting in the undischarged term of imprisonment are added in determining the criminal history category under this subsection.

In the unusual case in which there is insufficient information for the court to

determine the combined guideline range (the guideline range that would have applied if all the offenses were being sentenced at the same time), it will not be possible to use subsection (c); therefore, subsection (d) will apply instead.

5. Under subsection (d), the court shall use any reasonable method to determine whether the sentence for the instant offense should be imposed to run concurrently or consecutively to the undischarged term of imprisonment. Where the court has sufficient information about the offense conduct that resulted in the undischarged term of imprisonment, the court should, to the extent practicable, impose a sentence for the instant offense that results in a combined sentence that approximates the total (aggregate) punishment that would have been imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. If a reasonable estimate of the applicable total punishment guideline range under § 5G1.2 cannot be made from the information available, the court may use any reasonable method to determine an appropriate total punishment.''.

The Commentary to § 5G1.3 captioned Application Notes is amended in Note 6 (formerly Note 4) by deleting ''§ 7B1.3 and 7B1.4'' and inserting in lieu thereof ''Chapter Seven''.]

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