

U.S. Sentencing Commission Public Meeting Minutes
April 5, 2006

Chair Ricardo H. Hinojosa called the meeting to order at 2:07 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Chair
- Judge Ruben Castillo, Vice Chair
- Judge William K. Sessions, III, Vice Chair
- John R. Steer, Vice Chair
- Michael E. Horowitz, Commissioner
- Beryl Howell, Commissioner
- Michael Elston, Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Pamela Barron, Deputy General Counsel, Office of the General Counsel

Chair Hinojosa announced that he had no report to make and called on the Staff Director, Ms. Sheon, for her report. The Staff Director reported that a Guidelines Manual supplement incorporating the emergency amendment on steroids will be sent to the courts within the next two weeks. The emergency amendment also is available on the Commission's website. Ms. Sheon thanked staff for their work during the current amendment cycle.

The Chair recognized that Lisa Klem, Assistant General Counsel, Office of the General Counsel, is leaving the Commission, and thanked her for her service to the Commission. Commissioner Howell also expressed her appreciation for Ms. Klem's contributions.

The Chair reserved the vote to adopt the prior meetings' minutes for a future meeting.

The Chair called on Deputy General Counsel Barron to advise the Commissioners on the first of several possible votes to promulgate guideline amendments.

Ms. Barron stated that a motion to promulgate the proposed amendment on anabolic steroids was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment that implemented the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, and is without change.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit A. Vice Chair Castillo made such a motion,

with Commissioner Howell seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Castillo expressed his belief that there are two concerns driving the proposed amendment: safety, as laid out by the Anabolic Steroid Policy Team's report, and the integrity of sports at all levels.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment to implement a number of provisions of the Intelligence Reform and Terrorism Act of 2004. Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit B.

Vice Chair Steer made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the amendment. Vice Chair Castillo stated that he was pleased to support this proposed amendment and that the amendment was necessary to protect the country's national borders and to protect the lives of aliens who are transported in dangerous situations.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed five-part amendment to implement provisions of several miscellaneous enacted laws, notably (1) section 2 of the Veterans' Memorial Preservation and Recognition Act of 2003, creating a new offense at 18 U.S.C. § 1369 prohibiting the destruction of veterans' memorials, (2) the Plant Protection Act of 2002, which created a new offense under 7 U.S.C. § 7734, for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale, (3) the Clean Diamond Trade Act of 2003, creating a new offense at 19 U.S.C. § 3907, relating to the importation and exportation of uncertified rough diamonds, and (4) the Unborn Victims of Violence Act of 2004 ("Laci & Conner" Law), creating a new offense at 18 U.S.C. § 1841 for causing a death or serious bodily injury to a child in utero while engaging in conduct violative of any of the offenses enumerated at 18 U.S.C. § 1841(b). In addition, to address a number of Class A misdemeanors offenses, the fifth part of the proposed amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise referenced to a more specific Chapter Two guideline.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming

changes, if needed.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit C. Commissioner Howell made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Steer observed that the fifth part of the proposed amendment created a catch-all guideline for Class A misdemeanors not covered by other guidelines. The Vice Chair believes that this is a good innovation and hopes that the Commission will use it as a model when responding to similar statutes in the future. Vice Chair Steer also suggested that the Commission could, at a later date, examine other guidelines that currently target other Class A misdemeanor offenses.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment relating to guideline application issues. The proposed amendment addresses several issues of guideline application identified through inquiries made at guideline seminars and through the Commission's helpline. Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit D. Vice Chair Steer made such a motion, with Commissioner Horowitz seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Steer noted that the proposed amendment illustrates the Commission's efforts to use feedback it receives from the field to make the guidelines operate in better ways.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning a circuit conflict.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment addresses a circuit conflict regarding whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The proposed amendment permits application of the guideline to obstructive conduct that occurs prior to the start of the investigation of the instant offense of conviction by allowing the court to consider such conduct if it was purposefully

calculated and likely to thwart the investigation or prosecution of the offense of conviction. The proposed amendment also changes language in §3C1.1(A) from “during the course of” to “with respect to.”

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit E. Vice Chair Steer made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Steer proposed offsetting with commas the phrase “and likely” in §3C1.1, Application Note 1, to make clear the connection between the conduct and its purpose to thwart the investigation. This proposal was accepted by the two Commissioners who made and seconded the motion.

Vice Chair Sessions expressed his objection to the proposed amendment based on his concern that it will significantly expand the reach of §3C1.1. Vice Chair Sessions asserted that it will require courts to determine what was in the defendant’s mind at a given moment, what the purpose was for his conduct, and whether that conduct would likely thwart an investigation. Vice Chair Sessions believes that the current bright line rule, which allows the enhancement to apply to conduct that takes place only after an investigation starts, is preferable.

Vice Chair Castillo responded by stating that the proposed changes can be accommodated by courts around the nation and added that he supported the proposed amendment.

Hearing no further discussion, the Chair called for a vote on the motion. The motion was adopted with Vice Chair Sessions voting no.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning the obstruction of justice during a terrorism investigation.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment, effective on October 24, 2005, that responded to section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004, and is without change.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit F. Vice Chair Castillo made such a motion, with Commissioner Horowitz seconding the motion.

The Chair asked if there was any discussion on the amendment. Hearing no discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning intellectual property.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment, effective on October 24, 2005, that implemented the directive in section 105 of the Family Entertainment and Copyright Act of 2005, and is without change.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit G. Commissioner Horowitz made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the amendment. Hearing no discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning false domain names and CAN-SPAM.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, and implements the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") (15 U.S.C. § 7704(d)).

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit H. Vice Chair Sessions made such a motion, with Vice Chair Steer seconding the motion. The Chair asked if there was any discussion on the amendment. Hearing no discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning crime victims' rights.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment amends Chapter Six (Sentencing Procedures and Plea Agreements) to provide a policy statement regarding crime victims' rights. As part of the Justice for All Act of 2004, Congress provided crime victims various rights, set forth at 18 U.S.C. § 3771, during the criminal justice process.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit I. Vice Chair Castillo made such a motion, with Commissioner Howell seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Castillo stated that he believes that this proposed amendment is a start to the

Commission's work in the area of crime victims' rights. He noted that the Commission has decided to wait for the Federal Judicial Conference's Rules Committee to complete its restructuring of the rules governing criminal procedure. He expressed his appreciation for the suggestions the Commission has received on this topic, specifically noting the contributions of District Judge Paul Cassell.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning reductions in terms of imprisonment based on a Bureau of Prisons motion and a motion to publish an issue for comment regarding this subject.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment provides a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit J. Vice Chair Castillo made such a motion, with Vice Chair Steer seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Castillo remarked that this was the starting point for the Commission on this issue. The Vice Chair observed that the amendment language proposed by the American Bar Association was received late in the amendment cycle. Vice Chair Steer added that this was one provision of the Commission's organic statute at 28 U.S.C. § 994 that has not been fulfilled and that the proposed amendment is a step toward fulfilling the Commission's statutory obligations.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair asked if there was a motion to publish an issue for public comment, and as attached hereto as Exhibit K, concerning reductions in terms of imprisonment based on a Bureau of Prisons motion. Vice Chair Castillo made such a motion, with Commissioner Horowitz seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Steer expressed his appreciation for the public comment received by the Commission on this topic and proposed adding a sentence to the proposed issue for public comment. Vice Chair Steer's proposed change solicits any additional guidance the public may wish to offer regarding the extent of reduction or modifications to the term of supervised release. Vice Chair Steer's proposal was accepted as a friendly amendment to the motion.

Hearing no further discussion, the Chair called for a vote on the proposal to publish the issue for public comment, and the motion was adopted unanimously. The Chair asked if there was a

motion to establish a 60-day period for public comment for the issue for comment. The motion was made by Commissioner Howell, seconded by Vice Chair Steer, and was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment regarding the waiver of attorney-client privilege and work product protection in Application Note 12 of §8C2.5 (Culpability Score).

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment deletes commentary in Application Note 12 of §8C2.5 regarding the waiver of attorney-client privilege and work product protection.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit L. Vice Chair Steer made such a motion, with Commissioner Horowitz seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Castillo recalled that the language was added when the Commission was showing leadership with respect to the difficult issue of when organizations might need to waive their attorney-client privilege. The amendment language and commentary indicated that waivers would rarely be used. However, Vice Chair Castillo concluded there was enough evidence to satisfy reconsideration of this language because it appears that many waiver requests are currently being requested. In light of the current situation, the best course of action is to withdraw the language because the Commission never intended to undermine the attorney-client privilege.

Observing that she was not on the Commission at the time the language was adopted, Commissioner Howell nevertheless believes the commentary language was intended to be protective of, rather than undermining, the privilege by making a clear statement that a waiver was not required in order to get credit for cooperation. Commissioner Howell echoed Vice Chair Castillo's reasons for removing the language and observed that despite its removal the ongoing debate about when privilege waiver is required for cooperation will persist.

Ex officio Commissioner Elston noted that the Department of Justice is pleased that its original position on this language is now being adopted. The Department will continue to follow the standards set forth in the memorandum issued by former Deputy Attorney General Larry Thompson in January 2003. Ex officio Commissioner Elston stated that, while the Department respects the attorney-client privilege, the privilege was not absolute and can be waived by a client when it is in the client's interest to do so and that it is often in the best interest of justice and a firm's shareholders to waive the attorney-client privilege and fully cooperate with the government. Expressing his appreciation for the Commission's deliberations in this matter, ex officio Commissioner Elston stated that the Department will use all the tools at its disposal to prosecute corporate fraud and implement the will of Congress.

Vice Chair Steer reminded the Commission that the original amendment of 2004 was intended to give guidance to the courts on how the privilege waiver may be treated during its deliberations. Vice Chair Steer believes the Commission's words and intentions were misperceived and it will not be helpful to try to rewrite the language.

Hearing no further discussion, the Chair called for a vote on the motion, which was adopted unanimously.

The Chair called on Ms. Barron to advise the Commissioners on a proposed amendment concerning firearms.

Ms. Barron stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed. The proposed amendment addresses various issues pertaining to the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and to other firearm provisions in the guidelines.

The first part of the proposed amendment addresses offenses involving a weapon described in 18 U.S.C. § 921(a)(30), which expired on September 13, 2004. Under the proposed amendment, the references to 18 U.S.C. § 921(a)(30) in subsections (a)(1), (a)(3), and (a)(4) are replaced with the phrase "a semiautomatic firearm capable of accepting a large capacity magazine." The proposed amendment defines "semiautomatic firearm capable of accepting a large capacity magazine" as "a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (i) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (ii) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm." The proposed amendment also amends §5K2.17 (High-Capacity, Semiautomatic Firearms) in a manner consistent with §2K2.1.

The second part of the proposed amendment provides an enhancement of four levels for trafficking in firearms in new subsection (b)(5). The proposed amendment also provides that an upward departure may be warranted in a case in which the defendant trafficked substantially more than 25 firearms. The proposed definition of trafficking would encompass transporting, transferring, or otherwise disposing of two or more firearms, or receipt of two or more firearms with the intent to transport, transfer, or dispose of the firearm to another individual. The definition also requires that the defendant know or have reason to believe that such conduct would result in the transport, transfer, or disposal to an individual whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Additionally, the proposed definition provides that the enhancement applies regardless of whether anything of value was exchanged.

The third part of the proposed amendment modifies current §2K2.1(b)(4) to increase the penalties for offenses involving altered or obliterated serial numbers. A two-level enhancement would continue to apply to offenses involving a stolen firearm under this section, and the

specific offense characteristic would provide a four-level enhancement for offenses involving altered or obliterated serial numbers.

The fourth part of the proposed amendment addresses a circuit conflict pertaining to application of current §§2K2.1(b)(5) and (c)(1), specifically with respect to the meaning of use of a firearm “in connection with” another offense in the context of burglary and drug offenses. The proposed amendment provides that §§2K2.1(b)(5) and (c)(1) apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

The Chair asked if there was a motion to promulgate the proposed amendment as provided in the meeting materials and as attached hereto as Exhibit M. Vice Chair Castillo made such a motion, with Commissioner Horowitz seconding the motion. The Chair asked if there was any discussion on the amendment.

Vice Chair Castillo said he believes that the proposed amendment is aimed at addressing gun violence and is not meant to impinge upon the Second Amendment’s Right to Bear Arms. The Vice Chair acknowledged the concerns of Vice Chair Sessions that the proposed amendment may be overly broad, particularly where it may be applied in rural areas. However, in Vice Chair Castillo’s opinion, the genesis of this proposal is in the concerns about firearm violence in large urban areas. He informed the Commissioners that, in the last ten days, two young girls were killed while in their own homes by automatic firearms in his home district of Chicago. The Vice Chair stated that he strongly supports the proposed amendment to attempt to end trafficking.

Commissioner Howell stated that she supported the proposed amendment with one exception. She expressed her concern over the number of firearms used in the definition of gun trafficking, suggesting that the number should be three, not two, firearms. She said she did not believe that the difference between two or three would affect the number of cases prosecuted as the majority of firearms trafficking cases involved five or more firearms. The Commissioner observed that because the Commission has used three firearms as the threshold to apply other enhancements, it should be consistent in the gun trafficking enhancement provision.

Vice Chair Sessions expressed his concern regarding the number of firearms used in the proposed firearm trafficking definition. He cautioned that the proposal will have a wide, sweeping impact across the country. The Vice Chair predicted that rural areas will be greatly affected and will result in exposing individuals committing relatively minor infractions to substantially higher penalties. Vice Chair Sessions expressed his respect for his fellow Commissioners’ views, but objected to the proposed amendment’s firearms trafficking provision.

The Chair asked if there was a motion to amend the proposed amendment’s gun trafficking provision. Vice Chair Sessions made a motion to change the number of firearms used in the amendment’s trafficking provision from two to three. Commissioner Howell seconded the motion. Vice Chair Castillo noted his appreciation of the differing opinions of two of his colleagues, but stressed that the trafficking provision targeted the realities of large urban areas. Ex officio Commissioner Elston agreed with Vice Chair Castillo’s position, and said that the

amendment as proposed best addressed the harms posed by firearm trafficking.

The Chair called on the Staff Director to perform a roll call vote on the amendment to the proposed amendment. The Chair, Vice Chairs Castillo and Steer, and Commissioner Horowitz voted against the change, with Vice Chair Sessions and Commissioner Howell voting in favor. Returning to the amendment as originally proposed, the Chair asked if there was any further discussion. Hearing none, the Chair called for a vote on the motion. The motion was adopted, with the Chair, Vice Chairs Castillo and Steer, and Commissioner Horowitz voting for it and Vice Chair Sessions and Commissioner Howell voting against it.

The Chair asked if there was a motion to allow the staff to make technical and conforming changes, if needed, for all of the amendments adopted by the Commission and that all of the adopted amendments will have an effective date of November 1, 2006. Vice Chair Steer made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the motion. Hearing no discussion, the Chair called for a vote and the motion was adopted unanimously.

The Chair announced that a Commission meeting will be held before the end of April for a possible vote to promulgate other proposed amendments.

The Chair asked if there was any further business before the Commission and hearing none, called for a motion to adjourn the meeting. Vice Chair Castillo made such a motion, with Vice Chair Sessions seconding the motion. The Chair called for a vote and the motion was adopted unanimously, and the meeting was adjourned at 3:07 p.m.

SUPPLEMENT TO MINUTES: As referenced in the April 28, 2006, public meeting minutes, the following additional comments of Commissioner Beryl Howell and Vice Chair William Sessions are hereby appended:

Commissioner Howell and Vice Chair Sessions expressed support for all parts, except one, of the firearms amendment, including the increases in offense level for possession of weapons of the

type previously banned by 18 U.S.C. § 921(a)(30) and for offenses involving firearms with altered or obliterated serial numbers, and clarification of a circuit split on application of enhancements under §§2K2.1(b)(5) and (c)(1) for use or possession of a firearm in connection with another felony offense of burglary or a narcotics offense. Nevertheless, she voted against the firearms amendment due to her view that the definition of “firearms trafficking” adopted in the amendment as part of the commentary to §2K2.1 was overbroad and may have the unfortunate effect of distorting the proportionality of sentences under this guideline and the concomitant result of increasing the number of court-initiated downward departures or variances under the advisory guidelines.

The final definition of “firearms trafficking” eliminates from the proposed amendment any requirement that the illegal transfer be part of an unlawful scheme, that the illegal transfer was made for anything of value, or that the number of guns involved be at least three, the minimum number of guns previously recognized by the Commission to be significant and the basis for an enhancement under §2K2.1(b)(1) (“if the offense involved three or more firearms, increase as follows:...”). The minimum number of firearms to trigger the additional, new 4-level increase for firearms trafficking is, as the Justice Department witness, Richard Hertling, acknowledged “a tough line-drawing question, and ... I don't have more to tell you than that we think two or above is the accurate number, because we've seen plenty of cases in which individuals just come out with two guns.” (Testimony on March 15, 2006).

The Commission staff report discusses the number of guns involved in trafficking offenses based upon a review of the literature and 2005 data. An ATF report issued in 2000 indicates that only 23.1 percent of investigations involved fewer than 5 firearms, without a breakdown of the even smaller percentage involving fewer than 3 firearms. The 2005 data indicates that firearms trafficking offenders possessed, on average, 29.8 weapons, with a median of 3.5 weapons, and that while 68.4% of these offenders were sentenced within the guidelines range, 10.5% received a court-initiated downward departure.

For consistency and proportionality with extant Specific Offense Characteristics (“SOCs”) enhancements under §2K2.1(b) predicated on the number of firearms involved, Commissioner Howell and Vice Chair Sessions would have required that three firearms be involved in the offense to support a firearms trafficking enhancement, particularly in light of the fact that other proposed elements were eliminated in the final version of the definition of “firearms trafficking.”

EXHIBIT A

PROPOSED AMENDMENT: ANABOLIC STEROIDS

Synopsis of Proposed Amendment: *This proposed amendment would re-promulgate as a permanent amendment the temporary, emergency amendment that implemented the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76. That Act requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"), which directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use..." The emergency amendment became effective on March 27, 2006.*

The proposed amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Currently, one unit of an anabolic steroid "means a 10 cc vial of an injectable steroid or fifty tablets." The proposed amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. Accordingly, if an anabolic steroid is in a pill, tablet, capsule, or liquid form, the court would sentence as it would in any other case involving a Schedule III substance. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the proposed amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

The proposed amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Proposed subsection (b)(6) would provide a two-level enhancement if the offense involved the distribution of an anabolic steroid and a masking agent. A masking agent is defined as "a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body." Proposed subsection (b)(7) would provide a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. This proposed subsection addresses congressional concern with distribution of anabolic steroids to athletes.

The proposed amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(7) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

~~(6)~~(8) * * *

~~(7)~~(9) * * *

(c) DRUG QUANTITY TABLE

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*Notes to Drug Quantity Table:

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(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances (~~except anabolic steroids~~), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

~~(G) In the case of anabolic steroids, one "unit" means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).]~~

* * *

Commentary

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Application Notes:

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8. *Interaction with §3B1.3.*—A defendant who used special skills in the commission of the offense may be subject to an **enhancement adjustment** 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. **Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.**

* * *

19. *Hazardous or Toxic Substances.*—Subsection ~~(b)(6)(A)~~ **(b)(8)(A)** applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material).

* * *

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

(A) *Factors to Consider.*—In determining, for purposes of subsection ~~(b)(6)(B)~~ **(b)(8)(B)** or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

* * *

(B) *Definitions.*—For purposes of subsection ~~(b)(6)(C)~~ **(b)(8)(C)**:

* * *

21. *Applicability of Subsection ~~(b)(7)~~ **(b)(9)**.*—The applicability of subsection ~~(b)(7)~~ **(b)(9)** shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection ~~(b)(7)~~ **(b)(9)** applies.

* * *

24. *Application of Subsection (b)(6).*—For purposes of subsection (b)(6), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.

25. *Application of Subsection (b)(7).*—For purposes of subsection (b)(7), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

Background:

* * *

Subsection ~~(b)(6)(A)~~(b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections ~~(b)(6)(B)~~(b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

* * *

EXHIBIT B

REVISED PROPOSED AMENDMENT: IMPLEMENTATION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

Synopsis of Proposed Amendment: *This proposed amendment implements a number of provisions of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458. Specifically:*

- (A) *Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to ten years for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(1) aliens were transported in a manner that endangered their lives; or (2) the aliens presented a life-threatening health risk to people in the United States.*

Criminal penalties for violations of 8 U.S.C. § 1324 include fines and terms of imprisonment ranging from 1 year for knowingly bringing in an alien who does not have permission to enter the country, 8 U.S.C. § 1324(a)(2)(A), up to life if a death occurs during a violation, 8 U.S.C. § 1324(a)(1)(B)(iv). Offenses under 18 U.S.C. § 1324 are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

In response to the new offense, the proposed amendment adds a specific offense characteristic to account for offenses of conviction under 8 U.S.C. § 1324(a)(4).

- (B) *Section 6702 of the Act creates a new offense at 18 U.S.C. § 1038 (False Information and Hoaxes), which provides as follows:*

(1) In General - Whoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information may indicate that an activity has taken, is taking, or will take place that would constitute a violation of chapter 2, 10, 11B, 39, 40, 44, 111, or 113B of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284) or section 46502, the second sentence of section 46504, section 46505(b)(3) or (c), section 46506 if homicide or attempted homicide is involved, or section 60123(b) of title 49, shall --

- (A) be fined under this title or imprisoned not more than 5 years, or both;*
(B) if serious bodily injury results, be fined under this title or imprisoned not more than 20 years, or both; and
(C) if death results, be fined under this title or imprisoned for any number of years up to life or both.

(2) Armed Forces - Any person who makes a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces of the United States during a war or armed conflict in which the United States is engaged -

- (A) shall be fined under this title or imprisoned not more than 5 years, or both;*
(B) if serious bodily injury results, shall be fined under this title or imprisoned not more than 20 years, or both; and

(C) if death results, shall be fined under this title or imprisoned for any number of years or for life or both.

The proposed amendment references the new offense to §2A6.1 (Threatening or Harassing Communications) and adds a cross reference to §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction.

(C) Section 6803 creates a new offense at 18 U.S.C. § 832, relating to participation in nuclear, and weapons of mass destruction, threats to the United States. The new offense reads in part as follows:

(a) Whoever, within the United States or subject to the jurisdiction of the United States, willfully participates in or knowingly provides material support or resources (as defined in section 2339A) to a nuclear weapons program or other weapons of mass destruction program of a foreign terrorist power, or attempts or conspires to do so, shall be imprisoned for not more than 20 years.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

(c) Whoever without lawful authority develops, possesses, or attempts or conspires to develop or possess a radiological weapon, or threatens to use or uses a radiological weapon against any person within the United States, or a national of the United States while such national is outside of the United States or against any property that is owned, leased, funded, or used by the United States, whether that property is within or outside of the United States, shall be imprisoned for any term of years or for life.

Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. § 2332b(g)(5)(B)(i) and amends §§ 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. § 2077(b)) to cover the participation of an individual in the development of special nuclear material.

The proposed amendment references 18 U.S.C. § 832 to §2M6.1.

(D) Section 6903 of the Act creates a new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. Specifically, § 2332g reads in part:

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (3), it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use or possess and threaten to use—

(A) an explosive or incendiary rocket or missile that is guided by any system designed to enable the rocket or missile to—

(i) seek or proceed toward energy radiated or reflected from an aircraft

- or toward an image locating an aircraft; or*
- (ii) otherwise direct or guide the rocket or missile an aircraft;*
- (B) any device designed or intended to launch or guide a rocket or missile described in subparagraph (A); or*
- (C) any part or combination of parts designed or redesigned for use in assembling or fabricating a rocket, missile, or device described in subparagraph (A) or (B).*

The new offense conduct provides for multiple criminal penalties. First, any individual who “violates, attempts, or conspires to violate, subsection (a),” will be subject to a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. § 2332g(c)(1). Second, any person who in the course of a violation of subsection (a) who “uses, attempts or conspires to use, or possesses or threatens to use,” any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 2332g(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. § 2332g(c)(3).

The proposed amendment references 18 U.S.C. § 2332g to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapons described in the offense would seem to be covered as destructive devices under 26 U.S.C. § 5845(a).

- (E) Section 6905 of the Act creates a new offense at 18 U.S.C. § 2332h prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. Section 2332h reads in part as follows:*

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use—

- (A) any weapon that is designed or intended to release radiation or radioactivity at a level dangerous to human life; or*
- (B) any device or other object that is capable of and designed or intended to endanger human life through the release of radiation or radioactivity.*

The new offense conduct provides for multiple criminal penalties. First, any individual who “violates, attempts, or conspires to violate, subsection (a),” will be subject to a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. § 2332h(c)(1). Second, any person who in the course of a violation of subsection (a) who “uses, attempts or conspires to use, or possesses or threatens to use,” any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 2332h(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. §

2332h(c)(3).

The proposed amendment references 18 U.S.C. § 2332h to §2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. § 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

(F) *Section 6906 of the Act creates a new offense prohibiting the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. Specifically, 18 U.S.C. § 175c (Variola Virus), reads, in part:*

(a) Unlawful Conduct

(1) In general. Except as provided in paragraph (2), it shall be unlawful for any person to knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use, variola virus.

The new offense conduct provides for multiple criminal penalties. First, any individual who “violates, attempts, or conspires to violate, subsection (a),” will be subject to a fine of no more than two million dollars along with a statutory minimum term of imprisonment of 25 years to life. See 18 U.S.C. § 175c(c)(1). Second, any person who in the course of a violation of subsection (a) who “uses, attempts or conspires to use, or possesses or threatens to use,” any item(s) described in subsection (a) will be fined no more than two million dollars in addition to receiving a statutory minimum sentence of 30 years to life. See 18 U.S.C. § 175c(c)(2). Finally, if the death of another person results from a violation of subsection (a), the offender will be fined no more than two million dollars and will be given a sentence of life imprisonment. See 18 U.S.C. § 175c(c)(3).

The proposed amendment references 18 U.S.C. §175c to §2M6.1. The variola virus may be used as a biological agent or toxin and, therefore, should be covered under this guideline.

Proposed Amendment:

(A) Implementation of Section 5401 of the Act

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

* * *

(b) Specific Offense Characteristics

* * *

(7) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

(B) Implementation of Section 6702 of the Act

6. THREATENING OR HARASSING COMMUNICATIONS, **HOAXES**, STALKING, AND DOMESTIC VIOLENCE

§2A6.1. Threatening or Harassing Communications; Hoaxes

* * *

(c) Cross Reference

- (1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, **1038**, 1993(a)(7), (8), 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), *see* Appendix A (Statutory Index).

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18 U.S.C. § 1037 2B1.1
18 U.S.C. § 1038 2A6.1

* * *

(C) Implementation of Section 6803 of the Act

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, **832**, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), *see* Appendix A (Statutory

Index).

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18 U.S.C. § 831 2M6.1
18 U.S.C. § 832 2M6.1

* * *

(D) Implementation of Section 6903 of the Act

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, *see Appendix A (Statutory Index).*

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18 U.S.C. § 2332f 2K1.4, 2M6.1
18 U.S.C. § 2332g 2K2.1

* * *

(E) Implementation of Section 6905 of the Act

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 2332h;

42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

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18 U.S.C. § 2332h	2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1

* * *

(F) Implementation of Section 6906 of the Act

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

* * *

Commentary

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

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

* * *

EXHIBIT C

REVISED PROPOSED AMENDMENT: MISCELLANEOUS LAWS

Synopsis of Proposed Amendment: *This proposed amendments implements miscellaneous enacted laws as follows:*

- (A) *The Veterans' Memorial Preservation and Recognition Act of 2003, section 2, created a new offense at 18 U.S.C. § 1369 that prohibits the destruction of Veterans' Memorials, with a ten-year statutory maximum. Previously, in response to the Veterans' Cemetery Protection Act of 1997, the Commission added a two-level enhancement at §2B1.1(b)(6) for vandalizing a National Cemetery.*

The proposed amendment refers the new offense to both §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources). Reference to both guidelines mirrors the treatment of other offenses involving property damage to veterans' memorials. The proposed amendment also provides an increase of 2 levels at §§2B1.1(b)(6) and 2B1.5(b)(2) if the offense involved a veterans' memorial, consistent with the treatment for national cemeteries.

- (B) *The Plant Protection Act of 2002 increased penalties under 7 U.S.C. § 7734, for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum for the first offense is five years, and for subsequent offenses, ten years.*

Appendix A (Statutory Index) currently references 7 U.S.C. § 7734 to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6. The proposed amendment provides an upward departure provision within this guideline to provide the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis.

- (C) *The Clean Diamond Trade Act of 2003 created a new offense at 19 U.S.C. § 3901, relating to the importation and exportation of rough diamonds or any transaction by a United States citizen anywhere, or any transaction that occurs in whole or in part within the United States. The new offense prohibits an importation or exportation of rough diamonds that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Act. The statutory maximum is ten years.*

This offense involves importing “conflict” diamonds into the United States for profits to be used toward the overthrow or subverting of legitimate governments in Sierra Leone, Angola, Liberia, and the Democratic Republic of Congo. The diamonds, referred to as “blood diamonds” or “conflict diamonds,” are imported or exported without being controlled by a process known as the Kimberley Process Certification Scheme, which legitimizes the quality and original source of the diamond. The violation occurs when the diamonds are imported/exported without first being certified through this process or when a United States citizen enters into a transaction involving these diamonds without the proper certification. The profits from the sale of these rough diamonds are used to fund rebel and military activities in the aforementioned countries.

The proposed amendment references the new offense to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). The proposed amendment also revises the introductory commentary of that guideline to indicate that uncertified diamonds are contraband covered by §2T3.1 even if other types of contraband are covered by other, more specific guidelines.

- (D) *The Unborn Victims of Violence Act of 2004 (“Laci & Conner” Law) created a new offense at 18 U.S.C. § 1841 for causing a death or serious bodily injury to a child in*

utero while engaging in conduct violative of any one of several enumerated offenses. Under 18 U.S.C. § 1841(a)(1) and (a)(2)(A), the statutory maximum for the conduct that “caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother.” Otherwise, under 18 U.S.C. § 1841(a)(2)(C), if the person engaging in the conduct intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111, 1112, and 1113 for intentionally killing or attempting to kill a human being.

The proposed amendment references 18 U.S.C. § 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. §§ 1111, 1112, and 1113.

The proposed amendment references 18 U.S.C. § 1841(a)(1) to §2X5.1 (Other Offenses). Reference is made to §2X5.1 because, under 18 U.S.C. § 1841(a)(2)(A), the punishment for the offender is determined by the penalty for the conduct which caused the death or injury to a child in utero had that injury or death occurred to the unborn child’s mother. For example, if the offender committed aggravated sexual abuse against the unborn child’s mother and it caused the death of a child in utero, the punishment for the offender would be the same as the penalty for aggravated sexual abuse, not the penalty for first or second degree murder. There are approximately 65 other statutes listed under 18 U.S.C. § 1841(b) that require a similar approach. Individually designating guidelines for these offenses would be difficult and potentially confusing.

In order to permit the courts to determine the most analogous guideline on a case-by-case basis, a special instruction is provided in §2X5.1 that the most analogous guideline for these offenses is the guideline that covers the underlying offense conduct.

- (E) *The Farm Security and Rural Investment Act of 2002, created a new offense at 7 U.S.C. § 2156 that prohibits the interstate movement of animals for animal fighting, with a one year statutory maximum.*

The Social Security Administration Act created a new offense under 42 U.S.C. § 1129(a) prohibiting corrupt or forcible interference with the administration of the Social Security Administration Act. The statutory maximum is one year if the offense was committed only by threats of force, otherwise the statutory maximum is three years.

The Consumer Product Protection Act of 2002 created a new offense under 18 U.S.C. § 1365(f) prohibiting the illegal tampering with a consumer product with a statutory maximum of one year for the first offense, and three years for subsequent offenses.

The Justice for All Act of 2004 created a new offense under 42 U.S.C. § 14133 prohibiting the misuse or unauthorized disclosure of DNA analyses. The maximum penalty is one year.

The Video Voyeurism Prevention Act of 2004 created a new offense under 18 U.S.C. §

1801 for prohibiting the knowing capture of an image of an individual's "private area" without that individual's consent, under circumstances in which the individual has a reasonable expectation of privacy. The statutory maximum for this offense is one year.

To address these Class A misdemeanors offenses, the proposed amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise provided for in a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, which is the offense level typically applicable to many Class A misdemeanor and regulatory offenses.

Proposed Amendment:

(A) The Veterans' Memorial Preservation and Recognition Act of 2003

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

* * *

(b) Specific Offense Characteristics

* * *

- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery **or veterans' memorial**, increase by **2** levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, **1369**, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

Commentary

*Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, **1369**, 2232, 2314-2315.*

Application Notes:

* * *

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

- (A) "Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.
- (B) "National cemetery" ~~has~~ **and "veterans' memorial" have** the meaning given ~~that term~~ **those terms** in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

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18 U.S.C. § 1366	2B1.1
18 U.S.C. § 1369	2B1.1, 2B1.5

* * *

(B) **The Plant Protection Act of 2002**

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

* * *

Commentary

* * *

Application Notes:

* * *

3. Upward Departure Provisions.—*The following are circumstances in which an upward departure may be warranted:*

(A) ~~If a~~ *Death or bodily injury, extreme psychological injury, property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

(B) *The defendant was convicted under 7 U.S.C. § 7734.*

* * *

(C) **The Clean Diamond Trade Act of 2003**

3. **CUSTOMS TAXES**

Introductory Commentary

*This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3901, and is designed to address violations involving revenue collection or trade regulation. It is *intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this Subpart would be a reason for referring to another, more specific guideline, if applicable, or for departing upward if there is not another more specific applicable guideline.**

§2T3.1. **Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436,

1464, 1465, 1586(e), 1708(b), 3901. For additional statutory provision(s), see Appendix A (Statutory Index).

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19 U.S.C. § 2401f 2B1.1
19 U.S.C. § 3901 2T3.1

* * *

(D) **The Unborn Victims of Violence Act of 2004**

§2A1.1. **First Degree Murder**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2113(e), 2118(c)(2), 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.2. **Second Degree Murder**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.3. **Voluntary Manslaughter**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.4. Involuntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1993(a)(6), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2X5.1. Other Offenses

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

Commentary

Statutory Provision: 18 U.S.C. § 1841(a)(1).

Application Notes:

1. **In General.**—Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

2. **Convictions under 18 U.S.C. § 1841(a)(1).**—
 - (A) **In General.**—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, i.e., the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of or bodily injury to a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

 - (B) **Upward Departure Provision.**—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.

Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: "~~In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2).~~ In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses

and offenders, and to the applicable policy statements of the Sentencing Commission."

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1832	2B1.1
18 U.S.C. § 1841(a)(1)	2X5.1
18 U.S.C. § 1841(a)(2)(C)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2

* * *

(E) Guideline for Class A Misdemeanors

5. ALL OTHER **FELONY OFFENSES AND CLASS A MISDEMEANORS**

§2X5.1. **Other Felony Offenses**

If the offense is a felony ~~or Class A misdemeanor~~ for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

Commentary

Application Notes:

1. **Sections That Can Be Applied Meaningfully.**—Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).
2. **Application of §2X5.2.**—This guideline applies only to felony offenses not referenced in Appendix A (Statutory Index). For Class A misdemeanor offenses that have not been referenced in Appendix A, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

*Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. ~~Where~~**In a case in which** there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. ~~That statute provides in relevant part as follows: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."~~*

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

(a) Base Offense Level: **6**

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133.

Application Note:

1. ***In General.**—This guideline applies to Class A Misdemeanor offenses that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A Misdemeanor offenses that have not been referenced in Appendix A. Do not apply this guideline to a Class A misdemeanor that has been specifically referenced in Appendix A to another Chapter Two guideline.*

APPENDIX A - STATUTORY INDEX

* * *

7 U.S.C. § 2024(c) 2B1.1
7 U.S.C. § 2156 2X5.2

* * *

18 U.S.C. § 1121 2A1.1, 2A1.2
18 U.S.C. § 1129(a) 2X5.2

		* * *
18 U.S.C. § 1365(e)	2N1.1	
18 U.S.C. § 1365(f)	2X5.2	
		* * *
18 U.S.C. § 1792	2P1.3	
18 U.S.C. § 1801	2X5.2	
		* * *
42 U.S.C. § 9603(d)	2Q1.2	
42 U.S.C. § 14133	2X5.2	
		* * *

EXHIBIT D

REVISED PROPOSED AMENDMENT: APPLICATION ISSUES

Synopsis of Proposed Amendment: *This proposed amendment addresses several issues of guideline application identified through inquiries made on the Commission’s Helpline and at guideline seminars. The proposed amendment would make the following changes:*

- (A) *Modifies the cross reference in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the court to apply §2A1.2 (Second Degree Murder) for cases in which the conduct involved is second degree murder. Currently the cross reference only allows the court to apply §2A1.1 (First Degree Murder) even if the conduct does not constitute first degree murder. The proposed amendment also adds language that the cross reference to §2A1.1 or §2A1.2 should be applied if the offense level is greater than that determined under §2D1.1.*

- (B) *Adds to Chapter Three a new guideline, §3C1.3 (Offenses Committed While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies. Currently, §2J1.7 (Commission of an Offense While on Release) corresponds to*

the statutory enhancement at 18 U.S.C. § 3147 and provides for a three-level enhancement that is added to the offense level for the offense the defendant committed while on release. However, despite its reference in Appendix A (Statutory Index), 18 U.S.C. § 3147 is not a statute of conviction, so there is no basis for requiring application of Appendix A. Accordingly, §2J1.7 may be overlooked. Creating a Chapter Three adjustment for 18 U.S.C. § 3147 cases is consistent with other adjustments currently in Chapter Three, all of which also apply to a broad range of offenses.

- (C) *Deletes from the Drug Quantity Table in §2D1.1 language that indicates the court should apply "the equivalent amount of Schedule I or II Opiates" (in the line referenced to Heroin), "the equivalent amount of Schedule I or II Stimulants" (in the line referenced to Cocaine), and "the equivalent amount of Schedule I or II Hallucinogens" (in the line referenced to LSD). Although Application Note 10 sets forth the marihuana equivalencies for substances not specifically referenced in the Drug Quantity Table, some guideline users erroneously calculate the base offense level without converting the controlled substance to its marihuana equivalency. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marihuana and determining the base offense level on that marihuana equivalency (resulting in a BOL of 34), some guideline users are determining the base offense level on the 10 KG of morphine (resulting in a BOL of 36). The proposed amendment would delete the problematic language and also clarify in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marihuana equivalency for that controlled substance.*

Proposed Amendment:

(A) Cross Reference to Murder Guidelines:

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

* * *

(d) Cross References

- (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) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

* * *

(B) §2J1.7 (Commission of Offense While on Release)

§1B1.1 Application Instructions

* * *

Commentary

Application Notes:

* * *

~~6. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release).~~

~~7.6.~~

* * *

~~§2J1.7. Commission of Offense While on Release~~

~~————— If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.~~

~~————— Commentary~~

~~Statutory Provision: 18 U.S.C. § 3147.~~

~~Application Notes:~~

~~1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.~~

~~2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the~~

~~guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.~~

~~**Background.** An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.~~

~~————— Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. "Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines." (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2, §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.~~

PART C - OBSTRUCTION AND RELATED ADJUSTMENTS

* * *

§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by **3** levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the

court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.

(C) "or Equivalent Amount"

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

* * *

(c) DRUG QUANTITY TABLE

Section 2D1.1(c) (Drug Quantity Table) is amended by striking "(or the equivalent amount of other Schedule I or II Opiates)" each place it appears; by striking "(or the equivalent amount of other Schedule I or II Stimulants)" each place it appears; and by striking "(or the equivalent amount of other Schedule I or II Hallucinogens)" each place it appears.

Commentary

* * *

Application Notes:

* * *

10. *The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marijuana. ~~The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs.~~ In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

- (A) *use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana;*
- (B) *find the equivalent quantity of marihuana in the Drug Quantity Table; and*
- (C) *use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 5.) For example, in the Drug Equivalency Tables, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of converts to an equivalent quantity of five kilograms of marihuana in applying the Drug Quantity Table. In a case involving 100 g of oxymorphone, the equivalent quantity of marihuana would be 5000 KG, which corresponds to a base offense level of 28 in the Drug Quantity Table.

* * *

EXHIBIT E

PROPOSED AMENDMENT: §3C1.1 CIRCUIT CONFLICT

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Second, Seventh, Tenth, and District of Columbia Circuits have held that pre-investigation conduct can be used to support an obstruction adjustment under §3C1.1. See United States v. McGovern, 329 F.3d 247, 252 (1st Cir. 2003)(holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though “the fact that there was no pending federal criminal investigation at the time of the obstruction did not disqualify a defendant from an enhancement where there was a ‘close connection between the obstructive conduct and the offense of conviction.’”(quoting United States v. Emery, 991 F.2d 907, 911(1st Cir. 1992))); United States v. Fiore, 381 F.3d 89, 94 (2nd Cir. 2004)(defendant’s perjury in an SEC civil investigation into defendant’s securities fraud constituted obstruction of justice of the criminal investigation of the same “precise conduct” for which defendant was criminally convicted, even though the perjury occurred before the criminal investigation commenced); United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999)(holding that adjustment was appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus obstructing justice during the course of the investigation); United States v. Mills, 194 F.3d 1108, 1115 (10th Cir. 1999)(holding that destruction of tape that occurred before an investigation began warranted application of the enhancement for obstruction of justice because the defendant knew an investigation would be conducted and understood the importance of the tape in that investigation); United States v. Barry, 938 F.2d 1327, 1333-34 (D.C. Cir. 1991)(“Given the commentary and the case law interpreting §3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction.”).*

The Fifth, Sixth, Eighth, and Ninth Circuits have held that pre-investigation conduct cannot support application of the obstruction of justice adjustment. *United States v. Baggett*, 342 F.3d 536, 542 (6th Cir. 2003) (holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); *United States v. Stolba*, 357 F.3d 850, 852-53 (8th Cir. 2004) (holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); *United States v. DeGeorge*, 380 F.3d 1203, 1222 (9th Cir. 2004) (perjury during a civil trial as part of a scheme to defraud was not an obstruction of justice of a criminal investigation of the fraudulent scheme because the criminal investigation had not yet begun at the time the defendant perjured himself); see also *United States v. Clayton*, 172 F.3d 347, 355 (5th Cir. 1999) (holding that defendant's threats to witnesses warrant the enhancement under §3C1.1, but stating in dicta that the guideline "specifically limits applicable conduct to that which occurs during an investigation....").

The proposed amendment permits application of the guideline to obstructive conduct that occurs prior to the start of the investigation of the instant offense of conviction by allowing the court to consider such conduct if it was purposefully calculated and likely to thwart the investigation or prosecution of the offense of conviction. The proposed amendment also changes language in §3C1.1(A) from "during the course of" to "with respect to".

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

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice ~~during the course of~~ **with respect to** the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred ~~during the course of~~ **with respect to** the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant. **Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated and likely to thwart the investigation or prosecution of the offense of conviction.**
2. **Limitations on Applicability of Adjustment.**—

* * *

3. Covered Conduct Generally.— * * *

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

* * *

(b) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;*

* * *

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

(k) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction;*

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

5. Examples of Conduct Not Covered.— * * *

6. "Material" Evidence Defined.— * * *

7. Inapplicability of Adjustment in Certain Circumstances.—

* * *

8. Grouping.— * * *

9. Accountability for §1B1.3(a)(1)(A) Conduct.—

EXHIBIT F

PROPOSED AMENDMENT: TERRORISM/OBSTRUCTION OF JUSTICE

Synopsis of Proposed Amendment: *This proposed amendment re-promulgates as a permanent amendment the temporary, emergency amendment that responded to section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. That amendment became effective on October 24, 2005.*

The Act directed the Commission "to provide for an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Act also increased the penalties for offenses under 18 U.S.C. § 1001 (false statements) and 1505 (obstruction of proceedings before departments, agencies, and committees of the United States) from not more than 5 years to not more than 8 years if the offense involves international or domestic terrorism. The Commission was subsequently directed by the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005 Pub. L. 109–76 to promulgate an amendment under emergency amendment authority not later than November 27, 2005. See Supplement to Appendix C (Amendment 676).

The proposed amendment provides a 12-level enhancement in §2J1.2 (Obstruction of Justice) if the defendant is convicted under 18 U.S.C. § 1001 or § 1505 and the enhanced statutory sentencing provision pertaining to international or domestic terrorism applies. The proposed amendment also provides an application note that instructs the court not to apply the new enhancement if an adjustment under §3A1.4 (Terrorism) applies.

Proposed Amendment:

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
 - (1) **(Apply the greater):**
 - (A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.
 - (B) If (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by **12** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Domestic terrorism" has the meaning given that term in 18 U.S.C. § 2331(5).

"International terrorism" has the meaning given that term in 18 U.S.C. § 2331(1).

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. Chapter Three Adjustments.—

- (A) ~~Nonapplicability of~~ Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.
- (B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B).

* * *

Appendix A (Statutory Index)

18 U.S.C. § 1001 2B1.1, 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable

EXHIBIT G

PROPOSED AMENDMENT: INTELLECTUAL PROPERTY (FECA)

Synopsis of Proposed Amendment: *This proposed amendment proposes to re-promulgate as a permanent amendment the temporary, emergency amendment that implemented the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9. The emergency amendment became effective on October 24, 2005.*

The directive instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

"In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The proposed amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing

item because of its pre-release status. The proposed amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

*The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing, particularly peer-to-peer models. The Department of Justice has explained that Application Note 3, which expands on the definition of "uploading", may be read to exclude peer-to-peer activity from application of the current enhancement in §2B5.3(b)(2) for offenses that involve the manufacture, importation, or uploading of infringing items. In particular, the concern pertains to the third sentence, which reads, "For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer." The proposed amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item as an openly shared file (*i.e.*, a file that is stored on a peer-to-peer network). The proposed amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the proposed amendment deletes the application note from the guideline.*

Indeterminate Number

The proposed amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The proposed note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items. The Commission's empirical analysis of cases sentenced under this guideline suggests that courts often determine the infringement amount in this manner. This proposed amendment simply codifies into the guideline the practice currently employed by the courts.

New Offense

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is proposed to be referenced to §2B5.3.

Proposed Amendment:

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics

* * *

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels.

(23) If the offense involved the manufacture, importation, or uploading of infringing items, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(3)(4) * * *

(4)(5) * * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

* * *

(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case

involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.

* * *

(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.

* * *

~~3. *Uploading.*—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.~~

~~4.3.~~

* * *

~~5.4.~~

* * *

* * *

Appendix A (Statutory Index)

18 U.S.C. § 2319A 2B5.3

18 U.S.C. § 2319B 2B5.3

EXHIBIT H

PROPOSED AMENDMENT FALSE DOMAIN NAMES & CAN-SPAM

Synopsis of Proposed Amendment: *This proposed amendment (A) implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004; and (B) implements the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") (15 U.S.C. § 7704(d)).*

False Registration of Domain Name

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directs the Commission—

to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts... In carrying out this [directive], the Sentencing Commission shall provide sentencing enhancements for anyone convicted of any felony offense furthered through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name use in connection with the offense.

The proposed amendment implements this directive by providing a new guideline in Chapter Three (Adjustments) for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive.

CAN-SPAM

Section 5(d)(1) of the CAN-SPAM Act prohibits the transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain marks, notices, and information. Specifically, the statute requires that the sender of a commercial email message containing sexually oriented material:

- (a) include in the subject heading of the email the "marks and notices" prescribed by the Federal Trade Commission; and*

- (b) *include in the message initially viewable to the recipient (i) the FTC's marks and notices; (ii) clear and conspicuous identification that the message is an advertisement or solicitation; (iii) clear notice of the recipient's option to decline to receive further messages from the sender; and (iv) the sender's valid physical postal address.*

The sender of a commercial email message that contains sexually oriented material within the meaning of the statute is exempted from these notice and labeling requirements only "if the recipient has given prior affirmative consent to the receipt of the message." Otherwise, a sender who "knowingly" transmits sexually oriented commercial messages email without including the required marks and information shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

The proposed amendment references the new offense, found at 15 U.S.C. § 7704(d), to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Currently, §2G2.5 applies to violations of 18 U.S.C. § 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. § 7704(d) do not involve the recording and reporting functions at issue in cases currently sentenced under §2G2.5, section 7704(d) offenses are essentially regulatory in nature and in this manner are similar to other offenses sentenced under §2G2.5. In addition to the statutory reference changes, the proposed amendment also expands the heading of §2G2.5 specifically to cover offenses under 15 U.S.C. § 7704(d).

Proposed Amendment:

(A) False Registration of Domain Name

PART C - OBSTRUCTION AND RELATED ADJUSTMENTS

* * *

§3C1.3. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, increase by 2 levels.

Commentary

Background: *This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108-482.*

(B) CAN-SPAM

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials:

Failure to Provide Required Marks in Commercial Electronic Email

* * *

Commentary

Statutory Provisions: 15 U.S.C. § 7704(d); 18 U.S.C. § 2257.

* * *

APPENDIX A

* * *

15 U.S.C. § 6821 2B1.1

15 U.S.C. § 7704(d) 2G2.5

EXHIBIT I

PROPOSED AMENDMENT CRIME VICTIMS' RIGHTS

Synopsis of Proposed Amendment: *As part of the Justice for All Act of 2004, Pub. L. 108–405, Congress provided crime victims various rights during the criminal justice process. These rights are set forth at 18 U.S.C. § 3771. Included is the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). This proposed amendment amends Chapter Six (Sentencing Procedures and Plea Agreements) to provide a policy statement regarding crime victims' rights.*

Proposed Amendment:

**CHAPTER SIX - SENTENCING PROCEDURES,
~~AND~~ PLEA AGREEMENTS, **AND CRIME VICTIMS' RIGHTS****

* * *

§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. Definition.—*For purposes of this policy statement, "crime victim" has the meaning given that term in 18 U.S.C. § 3771(e).*

EXHIBIT J

PROPOSED AMENDMENT: REDUCTIONS IN TERM OF IMPRISONMENT BASED ON BUREAU OF PRISONS MOTION

Synopsis of Proposed Amendment: *This proposed amendment is a first step toward implementing the directive in 28 U.S.C. § 994(t) that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."*

The proposed amendment provides a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant no longer is a danger to the community. The proposed amendment also provides background commentary that explains that promulgation of §1B1.13 is an initial step toward implementing 28 U.S.C. § 994(t) and that the Commission intends to further refine the policy statement to provide criteria and examples for "extraordinary and compelling reasons".

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant is (i) at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—

(A) Extraordinary and Compelling Reasons.—A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement is an initial step toward implementing 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute.

EXHIBIT K

BAC2210-40/2211-01

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of request for comment.

SUMMARY: The Commission requests public comment pertaining to an amendment submitted to the Congress on May 1, 2006, that creates a policy statement governing a reduction in term of imprisonment as a result of a motion by the Director of the Bureau of Prisons (published elsewhere in this issue of the Federal Register).

DATE: Written public comment regarding the issue for comment set forth in this notice should be received by the Commission not later than July 14, 2006.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202-502-4590. The amendment to which this issue for comment pertains may be accessed through the Commission's website at www.ussc.gov (see Amendment 1 of the document entitled "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (May 1, 2006)").

SUPPLEMENTARY INFORMATION: On May 1, 2006, the Commission submitted to the Congress an amendment to the federal sentencing guidelines that created a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This policy statement is a first step toward fulfilling the congressional directive at 28 U.S.C. § 994(t). In the 2006-2007 amendment cycle, the Commission will consider developing further criteria and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute. The Commission requests comment and specific suggestions for appropriate criteria and examples, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.

AUTHORITY: 28 U.S.C. § 994(a), (o), and (p); USSC Rule of Practice and Procedure 4.4.

Ricardo H. Hinojosa,

Chair

EXHIBIT L

REVISED PROPOSED AMENDMENT: PRIVILEGE WAIVER

Synopsis of Proposed Amendment: *This proposed amendment addresses concerns regarding the waiver of attorney-client privilege in Application Note 12 of §8C2.5 (Culpability Score). This language states that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission stated in its Reason*

for Amendment that it expects such waivers will be required on a limited basis, consistent with the statements of the Department of Justice in the United States Attorneys' Bulletin (November 2003, Volume 51, Number 6, pp 1 and 8). *See* Supplement to Appendix C (Amendment 673, effective November 1, 2004). However, the Commission subsequently heard testimony at its public hearings on November 15, 2005, and March 15, 2006, that this language could be misinterpreted.

The proposed amendment deletes the language concerning waiver from Application Note 12 of §8C2.5.

Proposed Amendment:

§8C2.5. Culpability Score

* * *

Commentary

Application Notes:

* * *

12. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. ~~Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.~~*

EXHIBIT M

REVISED PROPOSED AMENDMENT: FIREARMS

Synopsis of Proposed Amendment: *This proposed amendment addresses various issues pertaining to the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and to other firearm provisions in the guidelines.*

Part A of the proposed amendment addresses offenses involving a weapon described in 18 U.S.C. § 921(a)(30), which expired on September 13, 2004. Although possession of such weapons is no longer prohibited by 18 U.S.C. § 921(a)(30), possession of these weapons, particularly by a person with a prior conviction or who is a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level. Currently, §2K2.1 has four base offense level provisions that may be triggered by offenses involving such a section 921(a)(30) weapon. Under the proposed amendment, the references to 18 U.S.C. § 921(a)(30) in subsections (a)(1), (a)(3), and (a)(4) would be replaced with the phrase "a semiautomatic firearm capable of accepting a large capacity magazine." The reference to 18 U.S.C. § 921(a)(30) in subsection (a)(5) would simply be removed with no replacement language being inserted because a defendant sentenced under subsection (a)(5) does not have the same prohibited person status as a defendant sentenced under subsections (a)(1), (a)(3), or (a)(4).

The proposed amendment defines "semiautomatic firearm capable of accepting a large capacity magazine" as "a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (i) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (ii) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The definition is based on a definition of "large capacity ammunition feeding devices" (LCAFDs) previously found in 18 USC § 921(a)(31). This definition does not include a "semiautomatic firearm with attached tubular devices capable of operating only with .22 caliber rim fire ammunition." Attached tubular devices that take .22 caliber rim fire ammunition were exempt from the ban. The proposed amendment also amends §5K2.17 (High-Capacity, Semiautomatic Firearms) in a manner consistent with §2K2.1, except that it excludes language pertaining to .22 caliber rim fire ammunition in order to remain in conformity with a prior directive.

Part B of the proposed amendment provides an enhancement for trafficking in firearms in new subsection (b)(5). The proposed amendment provides a 4-level enhancement if the defendant engaged in the trafficking of firearms. The proposed amendment also provides an upward departure provision for a case in which the defendant trafficked substantially more than 25 firearms.

The proposed definition of trafficking would encompass transporting, transferring, or otherwise disposing of 2 or more firearms, or receipt of 2 or more firearms with the intent to transfer to another individual. The definition also requires that the defendant know or have reason to believe that such conduct would result in the transfer to an individual whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Additionally, the proposed definition provides that the enhancement applies regardless of whether anything of value was exchanged.

Part C of the proposed amendment modifies current §2K2.1(b)(4) to increase the penalties for offenses involving altered or obliterated serial numbers. Under the proposed amendment, a 2-level enhancement would continue to apply to offenses involving a stolen firearm. However, the proposed amendment would provide a 4-level enhancement for offenses involving altered or obliterated serial numbers. The 4-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers. The proposed amendment also makes slight technical changes to the corresponding application note.

Part D of the proposed amendment addresses a circuit conflict pertaining to application of

current §§2K2.1(b)(5) and (c)(1), specifically with respect to the meaning of use of a firearm "in connection with" another offense in the context of burglary and drug offenses. The majority of circuits have adopted a standard consistent with Smith v. United States, 508 U.S. 223 (1993), in which the Supreme Court determined the scope of "in relation to" as that term is used in 18 U.S.C. § 924(c). The proposed amendment accordingly provides that §§2K2.1(b)(5) and (c)(1) apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, the courts are split as to how this standard then applies with respect to burglary and drug offenses. The proposed amendment addresses whether the presence of a firearm during the course of a burglary or drug offense "facilitated or had the potential of facilitating" another offense. Under the proposed amendment subsections (b)(5) and (c)(1) would apply to a defendant who takes a firearm during the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary, because the firearm emboldens the defendant. (Please note that the definitions of "another felony offense" and "another offense" contained in this proposed amendment, as well as the upward departure note, are not new - this language is in current Application Notes 4, 11, and 15, and is included here for technical and conforming purposes.)

Proposed Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(A) § 921(a)(30)

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

(1) **26**, if (A) the offense involved a **semiautomatic** firearm **that is capable of accepting a large capacity magazine, or that is** described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

* * *

(3) **22**, if (A) the offense involved a **semiautomatic** firearm **that is a capable of accepting a large capacity magazine, or that is** described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if --

* * *

(B) the offense involved a **semiautomatic** firearm **that is a capable of**

accepting a large capacity magazine, or that is described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);

- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30);]

* * *

Commentary

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Application Notes:

2. Firearm Described in 18 U.S.C. § 921(a)(30).—For purposes of subsection (a), a "firearm described in 18 U.S.C. § 921(a)(30)" (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).

Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (i) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (ii) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

* * *

§5K2.17. **High-Capacity, Semiautomatic Firearms Capable of Accepting Large Capacity Magazine** (Policy Statement)

If the defendant possessed a ~~high-capacity~~, semiautomatic firearm **capable of accepting a large capacity magazine** in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "~~high-capacity~~, semiautomatic firearm **capable of accepting a large capacity magazine**" means a semiautomatic firearm that **has the ability to fire many rounds without reloading because at the time of the offense (i) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (ii) a magazine or similar device that could accept more then 15 rounds of ammunition was in close proximity to the firearm.** The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

(B) Trafficking SOC

(b) Specific Offense Characteristics

(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

~~(5)~~(6) * * *

~~(6)~~(7) * * *

Commentary

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Application Notes:

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13. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

- (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
- (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.

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

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

- (C) Upward Departure Provision.—*If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.*
- (D) Interaction of with Other Subsections.—*In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.*

(C) Stolen and Altered or Obliterated Serial Numbers

(b) Specific Offense Characteristics

* * *

- (4) If any firearm (a) was stolen, **increase by 2 levels**; or (B) had an altered or obliterated serial number, **increase by 2 4 levels**.

* * *

Commentary

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Application Notes:

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9.8. Application of Subsection (b)(4).—

- (A) Interaction with Subsection (a)(7).—*If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the ~~adjustment~~**enhancement** in subsection (b)(4)(A) ~~unless the offense involved a firearm with an altered or obliterated serial number~~. This is because the base offense level takes into account that the firearm or ammunition was stolen. **However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).***

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment *enhancement* in subsection (b)(4)(B) unless the offense involved a stolen firearm or stolen ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. *However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).*

16. (B) *Knowledge or Reason to Believe.*— ~~The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number~~ *Subsection (b)(4) applies regardless of whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.*

* * *

D. "In connection with" in Burglary and Drug Offenses

Commentary

* * *

Application Notes:

* * *

~~4. "Felony offense," as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.~~

5.4. *Application of Subsection (a)(7).*—

* * *

6.5. *Application of Subsection (b)(1).*—

* * *

7.6. *Application of Subsection (b)(2).*—

* * *

8.7. *Destructive Devices.*—

* * *

9.8. Application of Subsection (b)(4).—

* * *

~~10.9.~~ Application of Subsection (b)(6).—

* * *

~~11. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).~~

~~12.10.~~ Prior Felony Convictions.—

* * *

~~13.11.~~ Upward Departure Provisions.—

* * *

~~14.12.~~ Armed Career Criminal.—

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~~15. As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.~~

~~16.~~

* * *

14. "In Connection With".—

(A) In General.—Subsections (b)(5) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsection (b)(5) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsection (b)(1) and

(c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(5), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—*In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.*