• The employee is able to perform all the usual and customary duties of his/her employment on his/her regular work schedule; and

• The employee is not absent from work due to sickness, injury, annual leave, sick leave or any other leave. (An employee is not considered to be on leave on an alternate work schedule's scheduled day off.)

For coverage effective dates that fall on a weekend or holiday, the **Federal Register** notice stated that an employee must be actively at work on the last workday before his/her coverage effective date for coverage to become effective. This meant that coverage could be delayed for one month, or more, for employees with applications approved in November and December if they were on leave on November 29 or December 31, 2002, respectively.

In view of heavy leave usage on November 29th and December 31st, and in keeping with our objectives of being employee-oriented and family friendly, we have relaxed this actively at work requirement.

For this year only, coverage will not be delayed for employees in an approved leave status November 29 or December 31, 2002, as long as they return to being actively at work during the month when their coverage becomes effective and they pay their premium within established deadlines. This applies to any approved leave, including annual leave, sick leave, leave without pay and administrative leave.

Employees, as well as all applicants, still have an obligation to contact Long Term Care Partners if their health changes in a way that would affect their answers to one or more questions on their long term care insurance application on the effective date of their coverage.

We made this change in response to employee and agency concerns about holiday leave usage toward the end of the Open Season, a period in which large numbers of employees have expressed interest in applying. We also recognize that this is the first FLTCIP Open Season.

This family-friendly policy affects only employees and members of the uniformed services applying with the abbreviated underwriting application and will not be repeated in the future or apply to leave usage other than on November 29 and December 31, 2002. It does not apply to spouses of employees and members of the uniformed services, since they do not have an actively at work requirement, nor does it apply to annuitants, retired members of the uniformed services, or other qualified relatives who apply using the full underwriting application.

Authority: 5 U.S.C. 9008.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 02–31854 Filed 12–17–02; 8:45 am]

BILLING CODE 6325–50–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. Additional proposed amendments the Commission is considering promulgating, as both temporary and permanent amendments, in response to the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, and the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–55, can be found in the November 22, 2002, **Federal Register** (67 FR 70999).

The specific amendments proposed in this notice are as follows: (1) A proposed amendment and issues for comment that respond to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56; the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188; and the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. 107–197; (2) a proposed amendment that addresses various application issues in § 2L1.2 (Unlawful Entering or Remaining in the United States); (3) a proposed amendment and issue for comment that addresses a number of issues in § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); (4) a proposed amendment that makes technical and conforming changes to various guideline provisions; and (5) a proposed amendment and issue for comment regarding appropriate guideline penalties for offenses involving involuntary manslaughter.

In addition to the issues for comment that are contained within these proposed amendments, this notice sets forth separate issues for comment regarding the following: (1) Section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107–296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code; and (2) sections 11008 and 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273, which direct the Commission to review and amend the sentencing guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence or drug trafficking crime in which the defendant used body armor and an appropriate enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a federal judge, magistrate judge, or any other official described in section 111 or section 115 of title 18, United States Code.

DATES: Written public comment regarding (1) the amendments set forth in this notice, including public comment regarding retroactive application of any of these proposed amendments; and (2) the proposed repromulgation of the proposed emergency amendments set forth in the **Federal Register** on November 27, 2002 (67 FR 70999) as permanent, non-emergency amendments, should be received by the Commission not later than February 18, 2003.

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

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o)

and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. 994(p).

The Commission seeks comment on the proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *www.ussc.gov*.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC rules of practice and procedure, rule 4.4.

Diana E. Murphy,

Chair.

1. Terrorism

Synopsis of Proposed Amendment: This proposed amendment is a continuation of the Commission's work over the past two years to ensure that the guidelines provide appropriate guideline penalties for offenses involving terrorism. Specifically, this proposed amendment responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub.L. 107–56; the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. 107–88; and the Terrorist Bombings Convention Implementation Act of 2002, Pub.L. 107–97.

I. Remaining USA PATRIOT Act Amendments

The following amendments build on the Commission's response during the last amendment cycle to the USA PATRIOT Act.

A. Terrorism Enhancement in Money Laundering Guideline

This amendment provides two options for treatment of the current 6-level terrorism enhancement in the money laundering guideline, § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). Option One eliminates the terrorism enhancement. Elimination of the enhancement is appropriate because it prevents ''double-counting'' with the terrorism adjustment in § 3A1.4 (Terrorism). Specifically, the money laundering terrorism enhancement applies if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism. The terrorism adjustment at § 3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5). Therefore, if the money laundering terrorism enhancement applied, the terrorism adjustment at § 3A1.4 also would apply based on the same conduct.

In the event the Commission determines that the money laundering terrorism adjustment should not be eliminated, Option Two provides a definition of terrorism in the money laundering guideline that mirrors the definition in § 3A1.4.

Proposed Amendment (Part IA):

[Option One:

Section § 2S1.1(b)(1)(B)(iii) is amended by striking ''terrorism,''.]

[Option Two:

The Commentary to § 2S1.1 captioned ''Application Notes'' is amended in Note 1 by inserting at the end the following new paragraph:

'' 'Terrorism' means a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5).''.]

B. Reference of 18 U.S.C. 1960 to Money Laundering Guideline

This amendment provides two options for the treatment of certain offenses under 18 U.S.C. 1960. These offenses prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. 1960(b)(1)(C). That provision defines an unlicensed money transmitting business as ''a money transmitting business which affects interstate or foreign commerce in any manner or degree and otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity.'' The statutory maximum term of imprisonment is 5 years.

Option One changes the Statutory Index reference for these offenses from § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) to the main money laundering guideline, § 2S1.1. This change is appropriate for this offense because its essence is money laundering rather than structuring to evade reporting requirements.

In contrast, other offenses under 18 U.S.C. 1960 would remain in the structuring guideline under Option One because they are essentially structuring offenses. Specifically, they prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. 1960(b)(1)(A) and (B). Those provisions define an unlicensed money transmitting business as ''a money transmitting business which affects interstate or foreign commerce in any manner or degree and (A) is operated without an appropriate money transmitting license * * *; or (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section.''

Option Two maintains the initial Statutory Index reference for 18 U.S.C. 1960(b)(1)(C) offenses in the structuring guideline but provides a cross reference to the main money laundering guideline for conduct that falls under 18 U.S.C. 1960(b)(1)(C).

An issue for comment requests comment regarding whether the proposed cross reference should be broadened so that any structuring offense that involves the intent to promote unlawful activity, knowledge or belief that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds would be cross referenced to main money laundering guideline, leaving the structuring guideline to cover purely regulatory offenses.

Proposed Amendment (Part IB):

[Option One:

The Commentary to § 2S1.1 captioned ''Statutory Provisions'' is amended by inserting '', 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(C))'' after ''1957''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting ''(but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(A) and (B))'' after ''1960''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1960 by inserting ''2S1.1,'' before ''2S1.3''.]

[Option Two:

Section 2S1.3(c) is amended by striking ''Reference'' and inserting ''References''; and by adding at the end the following:

''(2) If the offense involved (A) a money transmitting business; and (B) the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity, apply § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).''.

The Commentary to § 2S1.3 captioned ''Application Notes'' is amended by adding at the end the following:

''4. Cross Reference in Subsection (c)(2).—For purposes of subsection (c)(2), 'money transmitting business' means a money transmitting business that affects interstate or foreign commerce. 'Money transmitting' includes transferring funds on behalf of the public by any means, including transfers within the United States or to foreign locations by wire, check, draft, facsimile, or courier.''.]

Issue for Comment: The proposed amendment provides two options for the treatment of offenses under 18 U.S.C. 1960(b)(1)(C). Option One provides for a Statutory Index reference for these offenses to the main money laundering guideline, § 2S1.1, rather than the structuring guideline, § 2S1.3, because such an offense is essentially a money laundering offense. Option Two references this offense to § 2S1.3 in the first instance but provides a cross reference for this offense from § 2S1.3 to § 2S1.1.

The Commission requests comment regarding whether the proposed cross reference to § 2S1.1 in Option Two should be expanded to cover any offense initially referenced to § 2S1.3 in the Statutory Index that involved the intent to promote unlawful activity, knowledge or belief that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds. Such an approach effectively would limit the application of § 2S1.3 to regulatory offenses (such as the failure to file transaction reports or structuring transactions to evade reporting requirements) unaccompanied by aggravated, real offense money laundering conduct. To effectuate such cross reference, § 2S1.3 would likely need to be amended as follows: First, the base offense level of 8 in subsection (a)(1) would be maintained for offenses under 31 U.S.C. 5318 and 5318A, but the alternative base offense level in subsection (a)(2) would be amended to level 6 without any increase from the loss table in § 2B1.1. An alternative base offense level of level 6 for a regulatory offense unaccompanied by aggravated conduct is proportionate to other regulatory offenses under the guidelines. Second, the aggravated conduct described in § 2S1.3(b)(1) and the aggravated conduct the absence of which is described in § 2S1.3(b)(3) would form the basis for the new cross reference. Accordingly, the cross reference to the main money laundering guideline would apply if: (1) The defendant knew or believed that the funds were the proceeds of unlawful activity or were intended to promote unlawful activity; [(2) the offense involved bulk cash smuggling;] or (3) the defendant acted with reckless disregard for the illegal source of the funds. The major possible effects of cross referencing offenses involving real offense money laundering conduct to the money laundering guideline are application of the six-level enhancement in § 2S1.1(b)(1) if the defendant knew or believed that the funds were the proceeds of or were intended to promote certain specified crimes, and application of the enhancement in § 2S1.1(b)(3) for sophisticated laundering.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

Currently in § 2X3.1 (Accessory After the Fact) there exists an offense level ''cap'' of level 20 for offenses in which the conduct is limited to harboring a fugitive (and an offense level ''cap'' of level 30 for all other offenses sentenced under the accessory guideline). This proposed amendment makes the lower offense level ''cap'' of level 20 inapplicable to offenses involving the harboring of terrorists because of the relative seriousness of those offenses.

Last year, the Commission promulgated an amendment that referenced 18 U.S.C. 2339 and 2339A to 2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). The offense at 18 U.S.C. 2339 prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit one of several enumerated offenses. The maximum term of imprisonment is 10 years. The offense at 18 U.S.C. 2339A prohibits the provision of material support or resources to terrorists, knowing or intending that they will be used in the preparation for, or in carrying out, specified crimes (*i.e.*, those designated as predicate offenses for ''federal crimes of terrorism'') or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation. The maximum term of imprisonment is 15 years. In contrast, a violation of the general harboring statute, 18 U.S.C. 1071, has a maximum term of imprisonment of 5 years.

For consistency and proportionality, the proposed amendment not only makes the ''cap'' of level 20 inapplicable to harboring a person who is convicted under 18 U.S.C. 2339 or 2339A but also to the conduct of harboring an individual who commits a terrorism offense, *i.e.*, one of the offenses listed in 18 U.S.C. 2339 or 2339A or an offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. 2332b(g)(5).

Proposed Amendment (Part IC):

Section 2X3.1 is amended by striking subsection (a) and inserting the following:

''(a) Base Offense Level:

(1) Six levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level 4.

(3)(A) The base offense level under this guideline shall be not more than level 30, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall not be more than level 20.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. 2339 or 2339A; or (ii) the conduct involved (I) harboring a person who committed any offense listed in 18 U.S.C. 2339 or 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. 2332b(g)(5); or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I). In such a case, the base offense level under this guideline shall be not more than level 30, as provided in subdivision (A).''.

II. Amendments Required by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

The following amendments to the guidelines are proposed in response to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188.

A. Biological AGents and Toxins

First, the proposed amendment amends the Statutory Index to refer new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, § 2M6.1. Specifically, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amends 18 U.S.C. 175b to redesignate the existing offense and create new offenses as follows:

(1) The existing offense, redesignated at 18 U.S.C. 175b(a)(1), prohibits any restricted person (as defined in subsection (b)) from transporting, receiving, or possessing any biological agent or toxin that the Secretary of Health and Human Services has listed under regulations as a ''select agent''. The maximum term of imprisonment is 10 years. During the last amendment cycle, the Commission referred this offense to § 2M6.1 and provided an alternative base offense level of level 22.

(2) Two new offenses, at 18 U.S.C. 175b(b)(1) and (2), prohibit a person from transferring a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, to any person the transferor knows or has reason to believe is not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.

(3) Two new offenses, at 18 U.S.C. 175b(c)(1) and (2), prohibit any person from knowingly possessing a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, if that person has not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.

Like the existing offense at 18 U.S.C. 175b(a)(1), reference of the new offenses to § 2M6.1 is appropriate. (An amendment to the statutory index is not necessary because there already exists a reference to § 2M6.1 for section 175b offenses.)

Second, the proposed amendment provides for a base offense level of level 22 for the new offenses involving transfer to, or possession of, select biological agents by unregistered persons. This proposed base offense level is the same as the existing base offense level for offenses involving transfer to, or possession of, select biological agents by restricted persons. The proposed amendment exempts these offenses from application of § 2M6.1(b)(1), which provides a two level enhancement for offenses involving select agents, because that factor is incorporated into the proposed base offense levels.

Third, in response to Act, the proposed amendment makes two modifications to the definition of ''select biological agent'' in § 2M6.1. That definition exists in the guideline for purposes of the two level enhancement in § 2M6.1(b)(1) for offenses that involved such an agent. First, in response to section 212 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, the amendment proposes to expand the definition of ''select biological agent'' to include biological agents and toxins the Secretary of Agriculture has determined pose a severe threat to animal and plant health and products. Second, section 201 of the Act codified a number of provisions of the Antiterrorism and Effective Death Penalty Act of 1996 in the Public Health Service Act. This codification necessitates a conforming amendment to the definition of ''select agent'' in Application Note 1 of § 2M6.1.

Proposed Amendment (Part IIA)

Section 2M6.1(a)(2) is amended by inserting ''and'' after ''(a)(3),''; and by striking '', and (a)(5)''.

Section 2M6.1(a)(3) is amended by inserting ''or'' after the semicolon.

Section 2M6.1(a)(4) is amended by inserting ''(A)'' after ''if''; and by inserting ''(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.'' after ''or''.

Section 2M6.1(a) is amended by striking subdivision (5).

Section 2M6.1(b)(1) is amended by striking the comma after ''(a)(2)'' and inserting ''or''; and by striking '', or (a)(5)''.

Section 2M6.1(b)(2) is amended by inserting ''(A)'' after ''(a)(4)''.

Section 2M6.1(b)(3) is amended by inserting ''or'' after ''(a)(3),'' and by striking '', or (a)(5)''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins ''Select biological agent'' by inserting ''(A)'' after ''identified''; by inserting ''and maintained'' after ''established''; and by striking ''511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 CFR part 72'' and inserting ''351A of the Public Health Service Act (42 U.S.C. 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. 8401)''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 2 by striking ''(a)(3)'' each place it appears and inserting ''(a)(4)(B)''.

B. Safe Drinking Water Provisions

This proposed amendment responds to amendments to the Safe Drinking Water Act made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002. Section 1432(a) of the Safe Drinking Water Act (42 U.S.C. 300i–1(a)) prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from 5 years imprisonment to 20 years imprisonment. This offense is the only offense referenced to § 2Q1.4 (Tampering or Attempted Tampering with Public Water System). Section 1432(b) of such Act (42 U.S.C. 300i–1(b)) prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from 3 years imprisonment to 10 years imprisonment. This offense is the only offense referenced to § 2Q1.5 (Threatened Tampering with Public Water System). For purposes of both offenses, ''tamper'' means ''to introduce a contaminant into a public water system with the intention of harming persons'' or ''to otherwise interfere with the operation of a public water system with the intention of harming persons''.

First, the amendment proposes to consolidate the guidelines covering tampering with consumer products, § 2N1.1, and tampering with a public water system, § 2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, § 2N1.2, and threatened tampering with a public water system, § 2Q1.5. Consolidation is proposed

because of the infrequency of occurrence of these offenses and because these guidelines cover very similar conduct; accordingly, the treatment of these offenses under the same guideline would promote proportionality in punishment. The substantive changes resulting from the proposed consolidation would include (1) increased base offense levels for public water system offenses, as discussed in the following paragraph; (2) application to consumer product cases of an existing enhancement in the public water system guidelines if the offense involved substantial disruption of governmental functions or substantial expenditure of funds to respond to the offense; (3) elimination of the existing enhancement in the public water system guideline for ongoing, continuous, or repetitive release of a contaminant into the water supply (elimination is proposed because of definitional difficulties); (4) replacement of the existing enhancement in the public water system guideline if the purpose of the offense was to influence government action or to extort money with an application note inviting an upward departure if a terrorist motive was present and a cross reference to the extortion guideline if the offense involved extortion; and (5) application to public water system offenses of an existing cross reference in the consumer products guideline to the murder guidelines if death resulted. Conforming changes are made to the Statutory Index.

An issue for comment follows regarding whether the proposed consolidations also should effectuate a consolidation of the tampering guidelines with the threatened tampering guidelines, similar to the manner in which offenses involving threats to use nuclear, biological, or chemical weapons are subsumed within the nuclear, biological and chemical guideline, § 2M6.1.

Second, the amendment proposes to increase the base offense level for offenses involving tampering and threatened tampering with a public water system. Under the proposed consolidation, the base offense level for tampering with a public water system would increase from level 18 to level 25, and the six level enhancement for the risk of death or serious bodily injury would be eliminated and replaced with a graduated enhancement for actual bodily injury. Likewise, the base offense level for threatening to tamper with a public water system is proposed to increase from level 10 to level 16. For point of comparison, the existing base offense level for threatening communications under § 2A6.1 is level 12 and for threatened use of nuclear, biological, and chemical weapons under § 2M6.1 is level 20. These substantial increases in the base offense levels are proposed to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002.

Third, the amendment proposes to provide an application note in the consolidated guideline that an upward departure (as provided in Application Note 4 of the terrorism adjustment in § 3A1.4 (Terrorism)) may be warranted if the tampering or threatened tampering was accompanied by a terrorist motive. The amendments to the Safe Drinking Water Act made by the Public Health Security and Bioterrorism Preparedness and Response of 2002 contemplated that terrorism may be the motive behind tampering with the public water supply. Section 1431 of the Safe Drinking Water Act (42 U.S.C. 300i–1) was amended to expand the authority of the Administrator of the Environmental Protection Agency to take emergency action to protect the public health if the Administrator determines that ''there is a threatened or potential terrorist attack or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals, which may present an imminent and substantial endangerment'' to the public health. Terrorist motives similarly may be present in offenses involving tampering with consumer products.

One other criminal provision was added by the Act, but it may be appropriate not to list this provision in the Statutory Index at this time. Section 401 of the Public Health Security and Bioterrorism Preparedness and Response of 2002 added section 1433 to the Safe Drinking Water Act. This provision requires local communities to conduct assessments of the vulnerability of their public water systems to terrorist and other intentional acts. Section 1433(a)(6) of the Safe Drinking Water Act (42 U.S.C. 300i–2(a)(6)) provides that any person who acquires information from this assessment and knowingly or recklessly reveals such information to a person other than to specified persons authorized to receive such information shall be imprisoned for not more than one year and/or fined in accordance with the fines applicable to Class A misdemeanors. This provision does not provide a neat fit within the guidelines. Most of the environmental regulatory guidelines cover the failure to report information or the falsification of information, rather than the reckless disclosure of information. Rather than provide a Statutory Index reference at this point, it may be best to assess over the next few years the frequency of prosecution of this offense and what conduct typically occurs in connection with the offense.

Proposed Amendment (Part IIB)

Chapter two, part N is amended in the heading by inserting ''Public Water Systems,'' after ''Involving''.

Chapter two, part N, subpart 1 is amended in the heading by inserting ''Or Public Water Systems'' after ''Products''.

Section 2N1.1 is amended in the heading by inserting ''with Consumer Products'' after ''Tampering''; by inserting ''with Consumer Products'' after ''Tamper''; and by adding ''; Tampering or Attempting to Tamper with a Public Water System'' after ''Injury''.

Section 2N1.1(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by adding at the end the following:

''(2) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.''.

The Commentary to § 2N1.1 captioned ''Statutory Provisions'' is amended by inserting ''; 42 U.S.C. 300i–1'' after ''(e)''.

The Commentary to § 2N1.1 captioned ''Application Notes'' is amended by striking Notes 1 and 2 and inserting the following:

''1. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

2. Departure Provisions.—

(A) Downward Departure Provision.—The base offense level reflects that offenses covered by this guideline typically pose a risk of death or serious bodily injury to one or more victims; or cause, or are intended to cause, bodily injury. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither

caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) Upward Departure Provisions.—If the offense posed a substantial risk of death or serious bodily injury to numerous victims, caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. *See* Application Note 4 of § 3A1.4 (Terrorism).''.

Section 2N1.2 is amended in the heading by adding at the end ''; Threatening to Tamper with a Public Water System''.

Section 2N1.2 is amended by redesignating subsection (b) as subsection (c); and by inserting after subsection (a) the following:

''(b) Specific Offense Characteristic

(1) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.''.

The Commentary to § 2N1.2 captioned ''Statutory Provisions'' is amended by inserting ''; 42 U.S.C. 300i–1'' after ''(d)''.

The Commentary to § 2N1.2 captioned ''Application Note'' is amended in Note 1 by inserting ''Upward Departure Provisions.—'' before ''If''; and by adding at the end the following paragraph:

''If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. *See* Application Note 4 of § 3A1.4 (Terrorism).''.

Chapter two, part Q is amended by striking §§ 2Q1.4 and 2Q1.5 in their entirety.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 300i–1 by striking ''2Q1.4, 2Q1.5'' and inserting ''2N1.1, 2N1.2''.

Issue for Comment: For the reasons stated in the foregoing synopsis, this amendment proposes to consolidate the guidelines covering tampering with consumer products, § 2N1.1, and tampering with a public water system, § 2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, § 2N1.2, and threatened tampering with a public water system, § 2Q1.5. The Commission requests comment regarding whether the Commission should effectuate the consolidation of these four guidelines into one guideline covering both tampering and threatened tampering cases. Such an approach would be consistent with the guideline covering nuclear, biological, and chemical weapons and materials, § 2M61, which covers both offenses involving such weapons and materials as well as offenses involving the threatened use of such weapons and materials.

C. Animal Enterprise Terrorism

This proposed amendment adds an invited upward departure provision in the fraud, theft, and property destruction guideline, § 2B1.1, to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. 43.

Specifically, section 336 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 increased the penalty provisions of 18 U.S.C. 43, which makes it an offense to travel in interstate or foreign commerce, or to use or cause to be used the mail or any facility in interstate or foreign commerce for the purpose of causing physical disruption to the functioning of an animal enterprise, and to intentionally damage or cause the loss of any property (including animals and records) used by the animal enterprise, or to conspire to do so.

Before amendment by the Act, the penalty structure was (1) not more than one year imprisonment for causing economic damage exceeding $10,000; (2) not more than 10 years' imprisonment for causing serious bodily injury in the course of such an offense; and (3) life or any term of years of imprisonment if death resulted. As a result of the Act, the penalty structure now is (1) not more than 6 months imprisonment for causing economic damage not exceeding $10,000 (18 U.S.C. 43(b)(1)); (2) not more than 3 years' imprisonment for causing economic damage exceeding $10,000 (18 U.S.C. 43(b)(2)); (3) not more than 20 years' imprisonment for causing serious bodily injury in the course of such an offense (18 U.S.C. 43(b)(3)); and (4) life or any term of years of imprisonment if death resulted (18 U.S.C. 43(b)(4)).

This offense currently is referenced only to § 2B1.1. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the proposed amendment adds an invited upward departure provision in Application Note 15(A)(ii) of § 2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Proposed Amendment (Part IIC)

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in subdivision (A)(ii) of Note 15 by adding at the end the following:

''An upward departure would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.''.

III. Amendments Required by the Terrorist Bombings

Convention Implementation Act of 2002

The proposed amendment amends the Statutory Index (and the Statutory Provisions of the pertinent chapter two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. 107–197, and provides conforming amendments within a number of chapter two guidelines to more fully incorporate the new offenses into the offense guidelines.

First, section 102 of the Act created a new offense at 18 U.S.C. 2332f, which provides in subsection (a) that ''whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (A) with the intent to cause death or serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss'' and in subsection (b) that ''whoever attempts or conspires to commit [such] an offense'' shall be punished as provided under 18 U.S.C. 2332a(a). Section 2332a offenses currently are referenced to §§ 2K1.4 (the arson and property damage by use of explosives guideline) and 2M6.1 (the

guideline covering nuclear, biological, and chemical weapons). The proposed amendment refers this new offense to those guidelines as well. In addition, the proposed amendment amends the alternative base offense levels in the arson guideline § 2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. 2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and ''places of public use''.

Second, section 202 of the Act created a new offense at 18 U.S.C. 2339C, which provides in subsection (a)(1) that ''whoever, in a circumstance described in subsection (c) (*i.e.*, in the United States or outside of the United States by a national of the United States or an entity organized under the laws of the United States), by any means directly or indirectly, unlawfully and willfully provides or collects funds, with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out (A) an act which constitutes an offense, within the scope of certain international treaties, as implemented by the United States, or (B) any other act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act'', and in subsection (b) that whoever attempts or conspires to commit such an offense, shall be punished for a maximum term of imprisonment of 20 years.

The proposed amendment refers the new offense at 18 U.S.C. 2339C(1)(A) to 2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the proposed amendment treats these offenses in the same manner as 18 U.S.C. 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is proposed to be made in § 2X2.1 to conform the definition of the ''underlying offense'' that is aided and abetted.

The proposed amendment refers the new offense at 18 U.S.C. 2339C(a)(1)(B) to 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to § 2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the provision of material support to terrorists, which is appropriately referenced to § 2M5.3. The proposed amendment expands § 2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Third, 18 U.S.C. 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were: (A) Provided in violation of 18 U.S.C. 2339B, or (B) provided or collected in violation of 18 U.S.C. 2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. 2339C(c) is 10 years.

The proposed amendment references offenses under 18 U.S.C. 2339C(c)(2)(A) to 2X3.1 (Accessory After the Fact), since the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. 2339B. An amendment is proposed to be made in § 2X3.1 to conform the definition of the ''underlying offense'' to which the defendant is an accessory.

The proposed amendment references offenses under 18 U.S.C. 2339C(c)(2)(B) to 2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(1), the offense should be sentenced under 2X3.1. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(2), the offense should be sentenced under 2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is proposed to be added to the Statutory Provisions of §§ 2M5.3 and 2X3.1.

Proposed Amendment (Part III)

Section 2K1.4(a)(1)(B) is amended by striking ''or a ferry'' and inserting ''a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use''.

Section 2K1.4(a) is amended by striking subdivision (2) and inserting the following:

''(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or''.

The Commentary to § 2K1.4 captioned ''Statutory Provisions'' is amended by inserting '', 2332f'' after ''2332a''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'State or government facility', 'infrastructure facility', 'place of public use', and 'public transportation system' have the meaning given those terms in 18 U.S.C. 2332f(e)(3), (5), (6), and (7), respectively.''.

Section 2M5.3 is amended in the heading by adding ''or For a Terrorist Purpose'' after ''Organizations''.

The Commentary to § 2M5.3 captioned ''Statutory Provisions'' is amended by inserting '', 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B))'' after ''2339B''.

The Commentary to § 2X2.1 captioned ''Statutory Provisions'' is amended by inserting '', 2339C(a)(1)(A)'' after ''2339A''.

The Commentary to § 2X2.1 captioned ''Application Note'' is amended in Note 1 by inserting ''or 2339C(a)(1)(A)'' after ''2339A''; and by inserting ''or provided or collected funds for'' after ''supported''.

The Commentary to § 2X3.1 captioned ''Statutory Provisions'' is amended by inserting '', 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C(a)(1)(A))'' after ''2339A''.

The Commentary to § 2X3.1 captioned ''Application Notes'' is amended in Note 1 by inserting '', or in the case of a violation of 18 U.S.C. 2339C(c)(2)(A), 'underlying offense' means the violation of 18 U.S.C. 2339B with respect to which the material support, resources, or funds were concealed or disguised'' after ''offense)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2332d the following new line:

''18 U.S.C. 2332f 2K1.4, 2M6.1''; and

by inserting after the line referenced to 18 U.S.C. 2339B the following new lines:

''18 U.S.C. 2339C(a)(1)(A) 2X2.1
18 U.S.C. 2339C(a)(1)(B) 2M5.3
18 U.S.C. 2339C(c)(2)(A) 2X3.1
18 U.S.C. 2339C(c)(2)(B) 2M5.3, 2X3.1''.

IV. Miscellaneous Amendments

The proposed amendment amends § 2K1.3 to add an additional base offense level of 18 for certain offenses committed under 18 U.S.C. 842(p)(2). Section 842(p)(2) criminalizes knowingly or intentionally facilitating Federal crimes of violence by teaching or demonstrating the making or use of an explosive, destructive device, or weapon of mass destruction. It also criminalizes the distribution ''by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive, device, or weapon of mass destruction'' with the intent or knowing that the teaching, demonstration, or information will be used for or in furtherance of, an activity that constitutes a Federal crime of violence. The statutory maximum term of imprisonment is 20 years.

The statute is referenced in the Statutory Index to §§ 2K1.3 (covering prohibited transactions involving explosive materials) and 2M6.1 (covering weapons of mass destruction). The applicable base offense levels at § 2M6.1 are levels 42 and 28. The applicable offense level at § 2K1.3 currently is base offense level 12. Section 2K1.3 has alternative base offense levels predicated upon recidivism. An alternative base offense level of 24 applies to a defendant with two prior felony convictions of a crime of violence or a controlled substance offense, and an alternative base offense level of 20 applies to a defendant with one prior felony conviction of a crime of violence or a controlled substance offense. The base offense level of 12 appears to be disproportionately low compared with other 20 year offenses, and compared with the treatment of 18 U.S.C. 842(p)(2) offenses under § 2M6.1. This is especially true in light of the definition of ''destructive device'', defined at 18 U.S.C. 921(a)(4) to include ''(A) any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses * * * .''

The proposed amendment also makes the enhancement at § 2K1.3(b)(3) and the cross reference at § 2K1.3(c)(1) applicable to 18 U.S.C. 842(p)(2) offenses. Currently, in cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18, and, if the resulting offense level is greater, the cross reference at subsection (c)(1) references such cases either to § 2X1.1 (Attempt, Solicitation, or Conspiracy), or to the most analogous homicide guideline if death resulted. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

Finally, the proposed amendment makes minor technical changes to the Statutory Provisions of § 2M6.1.

Proposed Amendment (Part IV)

Section 2K1.3(a) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

''(3) 18, if the defendant was convicted under 18 U.S.C. 842(p)(2);''.

Section 2K1.3(b)(3) is amended by inserting ''(A) was convicted under 18 U.S.C. 842(p)(2); or (B)'' after ''defendant''.

Section 2K1.3(c)(1) is amended by inserting ''(A) was convicted under 18 U.S.C. 842(p)(2); or (B)'' after ''defendant''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''(3)'' and inserting ''(4)''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in the second paragraph of Note 9 by striking ''(3)'' and inserting ''(4)''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''(only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector),'' after ''842(p)(2)''.

2. Immigration

Synopsis of Amendment: This proposed amendment addresses various application issues that have come to the Commission's attention through Helpline calls, training sessions, and case law. First, two options are provided to address felony drug trafficking offenses that receive a sentence other than imprisonment. Currently, there is some confusion regarding whether such offenses should receive a 16-, 12-, or 8-level enhancement. Under the current guideline (as well as both proposed options), drug trafficking offenses for which the term of imprisonment imposed was more than 13 months receive a 16-level enhancement. Under Option One, all other felony drug trafficking offenses will receive a 12-level enhancement. Under Option Two, felony drug trafficking offenses that receive a term of imprisonment of less than 13 months will receive a 12-level enhancement, and felony drug trafficking offenses that receive a sentence other than imprisonment (*e.g.*, probation or a fine) will receive an 8-level enhancement.

This amendment also makes the following commentary changes: Adds definitions of ''alien smuggling'', ''child pornography'', and ''human trafficking'' offenses; adds commentary to clarify how revocations of probation, parole, or supervised release should be treated for purposes of determining the term of imprisonment imposed; adds language prohibiting the use of juvenile adjudications under this guideline; and amends the definition of ''aggravated felony'' to exclude offenses of simple possession of a controlled substance.

Proposed Amendment

Section 2L1.2(b)(1)(A)(i) is amended by inserting ''was a term of imprisonment that'' after ''imposed''.

[Option One:

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

''(B) a conviction for a felony drug trafficking offense other than a felony drug trafficking offense covered under subdivision (A), increase by 12 levels;''.]

[Option Two:

Section 2L1.2(b)(1)(B) is amended by inserting ''a term of imprisonment of'' after ''imposed was''.]

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in subdivision (A) of Note 1 by striking subdivision (iv) and inserting the following:

''(iv) 'Term of imprisonment'.—

(I) Definition.—'Term of imprisonment' means the sentence of incarceration originally imposed.

(II) Probated, Suspended, Deferred, or Stayed Sentences.—If all or any part of a term of imprisonment was probated, suspended, deferred, or stayed, 'sentence imposed' refers only to the portion that was not probated, suspended, deferred, or stayed. A sentence in which all of a term of imprisonment was suspended and a term of probation was imposed is not a term of imprisonment for purposes of this guideline. [Option Two: Accordingly, for purposes of subsections (b)(1)(A) and (B), the sentence imposed for a felony drug trafficking offense must be a sentence of incarceration. Any felony drug trafficking sentence other than a sentence of incarceration (*e.g.*, probation or a fine) shall be counted under subsection (b)(1)(C).]

(III) Revocations of Probation or Parole.—For purposes of determining the term of imprisonment in a case involving a revocation of probation, parole, or supervised release add the term of imprisonment given upon revocation to any term of imprisonment originally imposed.

(v) Subsection (b)(1) does not apply to a conviction for an offense committed prior to age of eighteen years unless it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a Federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (B) and inserting the following:

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

(i) 'Alien smuggling offense committed for profit' means (I) an offense described in section 1324(a) of title 8, United States Code, that was committed for profit, regardless of whether the indictment charged that the offense was committed for profit; or (II) an offense under state law consisting of conduct that would have been an offense under 8 U.S.C. 1324(a) that was committed for profit, regardless of whether the indictment charged that the offense was committed for profit, if the offense had occurred within the special maritime and territorial jurisdiction of the United States. 'Committed for profit' means the offense was committed for payment or expectation of payment.

(ii) 'Child pornography offense' means (I) an offense described in section 2251, 2251A, 2252[, or 2260] of title 18, United States Code; or (II) an offense under state law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Crime of violence' means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) 'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

(vi) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. 5845(a), or of an explosive material as defined in 18 U.S.C. 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

(VI) An offense under state law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) 'Human trafficking offense' means (I) any offense described in section 1581, 1582, 1583, 1584, 1585, 1588 [, 1589, 1590, or 1591] of title 18, United States Code; or (II) an offense under state law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(viii) 'Terrorism offense' means any offense involving, or intending to promote, a 'federal crime of terrorism', as that term is defined in 18 U.S.C. 2332b(g)(5).''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended by striking Note 2 and inserting the following:

''2. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), 'aggravated felony' (i) has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction of the aggravated felony, and (ii) does not include the offense of possession of a controlled substance without an intent to distribute that controlled substance.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B) [(*e.g.*, a felony drug trafficking offense for which the sentence imposed was a sentence other than imprisonment)].''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 3(B) by striking ''(i) were separated by an intervening arrest; (ii) did not occur on the same occasion; (iii) were not part of a single common scheme or plan; or (iv) were not consolidated for trial or sentencing'' and inserting ''are not considered related cases as defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History)''.

3. § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment)

Synopsis of Proposed Amendment: This is a three part proposed amendment that addresses a number of issues in § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an

Undischarged Term of Imprisonment). First, the amendment amends § 5G1.3(b) to allow the court to adjust the length of the sentence for any prior period of imprisonment that ''resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense''. Currently, this subsection only applies to undischarged terms of imprisonment for any such prior period of imprisonment. As a conforming amendment, the proposed amendment deletes the downward departure provision in Application Note 7 for prior discharged terms of imprisonment.

In addition to adding discharged terms of imprisonment to the operation of subsection (b), this amendment proposes two options to clarify the rule for application of subsection (b) to a prior term of imprisonment. There has been litigation regarding what ''fully taken into account'' means. *See United States* v. *Garcia-Hernandez,* 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is ''fully taken into account'' if and only if the Guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding); *United States* v. *Caraballo,* 200 F.3d 20, 25 (1st Cir. 1999) (holding that the term ''fuly'' cannot be read as synonymous with the term ''relevant conduct'' because this would be over-inclusive). Compare *United States* v. *Fuentes,* 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been ''fully taken into account'' when the prior offense is part of the same course of conduct, common scheme, or plan). Option One makes clear that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. Option Two makes clear that subsection (b) shall apply in cases in which the conduct of the prior offense is (1) Incorporated in the base offense level for the instant offense, (2) covered by a specific offense characteristic in the guideline for the instant offense, or (3) covered by a chapter three adjustment applicable to the instant offense. Option Two does not require that the chapter two or three offense level necessarily be increased by the prior offense.

This proposed amendment provides two options to address how this guideline applies in cases in which an instant offense committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. In doing so, this amendment resolves a circuit conflict on the issue. The majority of circuits to consider the issue have held that imposition of consecutive sentence is required by Application Note 6. See, *e.g.*, *United States* v. *Smith,* 282 F.3d 1045, 1048 (8th Cir. 2002) (stating that Application Note 6 requires consecutive sentences); *United States* v. *Alexander,* 100 F.3d 24, 27 (5th Cir. 1996) (same); *United States* v. *Gondek,* 65 F.3d 1, 3 (1st Cir. 1995) (same); *United States* v. *Bernard,* 48 F.3d 427, 431–32 (9th Cir. 1995) (same). *See* also *United States* v. *Campbell,* No. 01–5661, 2002 U.S. App. LEXIS 23024 (6th Cir., Nov. 6, 2002) (affirming imposition of consecutive sentence as consistent with guideline commentary); *United States* v. *Walker*, 98 F.3d 944, 945 (7th Cir. 1996) (noting a strong presumption in favor of consecutive sentence). Three circuits, however, have disagreed. The second, third, and tenth circuits held that the word ''should'' in Application Note 6 renders the commentary non-binding. *See United States* v. *Maria,* 186 F.3d 65, 70–73 (2d Cir. 1999); *United States* v. *Swan,* 275 F.3d 272, 279–83 (3d Cir. 2002); *United States* v. *Tisdale,* 248 F.3d 964, 977–79 (10th Cir. 2001). Under Option One A, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. Option One B maintains the current language in Application Note 6 which provides that the sentence for the instant offense should run consecutively to the undischarged term of imprisonment.

Finally, an issue for comment is provided regarding whether the Commission should resolve a circuit split with respect to § 5G1.3(c) and whether the sentencing court may grant ''credit'' for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the remaining portion of the defendant's preexisting state sentence. *Compare Ruggiano* v. *Reish,* 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with *United States* v. *Fermin,* 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit).

Proposed Amendment

Option One:

Section 5G1.3 is amended in the heading by striking ''on a Defendant Subject to an'' and inserting ''in Cases Involving an''; and by inserting ''or Discharged'' after ''Undischarged''.

[Option One A:

Section 5G1.3(a) is amended by inserting ''(1)'' before ''serving''; and by striking ''imprisonment,'' and inserting ''imprisonment; or (2) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked,''.]

Section 5G1.3 is amended by striking subsection (b) and inserting the following:

''(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that (1) is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct); and (2) was the basis for an increase in the offense level for the instant offense under chapter two (Offense Conduct) or chapter three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(A) If the term of imprisonment for that other offense is undischarged—

(i) The court [may][shall] adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(ii) The sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(B) If the term of imprisonment is discharged, the court [may][shall] adjust the sentence for any period of imprisonment already served.''.

[Option One A:

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. *See* subsection (f) of § 7B1.3 (Revocation of Probation or Supervised Release).''.]

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by striking Note 2 and inserting the following:

''2. Subsection (b) Cases.—

(A) In General.—Subsection (b) applies in cases in which (i) all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct); and (ii)

such prior offense has resulted in an increase in the chapter two or chapter three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the chapter two or chapter three offense level for the instant offense, but was not relevant conduct to the instant offense under § 1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a 'sentence reduction pursuant to § 5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons.'

(D) Examples.—The following are examples in which subsection (b) applies and an adjustment to the sentence is appropriate:

(i) The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (chapter two offense level of 16 for sale of 55 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 13; Criminal History Category I).

The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant already has served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

(ii) The defendant is convicted of a federal offense charging the sale of 150 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The state term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24–30 months (chapter two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant already has served six months on the discharged state term, a sentence of 18 months on the instant offense achieves this result.''.

[Option One B would maintain current Application Note 6 of the Commentary to § 5G1.3 as follows:

''6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. *See* § 7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).]''.

Section 5G1.3 captioned ''Application Notes'' is amended by striking Note 7.

Option Two:

Section 5G1.3 is amended in the heading by striking ''on a Defendant Subject to an'' and inserting ''in Cases Involving an''; and by inserting ''or Discharged'' after ''Undischarged''.

[Option Two A:

Section 5G1.3(a) is amended by inserting ''(1)'' before ''serving''; and by striking ''imprisonment,'' and inserting ''imprisonment; or (2) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked,''.]

Section 5G1.3 is amended by striking subsection (b) and inserting the following:

''(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is covered by the applicable chapter two guideline or an applicable chapter three adjustment for the instant offense of conviction, the sentence for the instant offense shall be imposed as follows:

(1) If the term of imprisonment for that other offense is undischarged—

(A) The court [may][shall] adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(B) The sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(2) If the term of imprisonment is discharged, the court [may][shall] adjust the sentence for any period of imprisonment already served.''.

[Option Two A:

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. *See* subsection (f) of § 7B1.3 (Revocation of Probation or Supervised Release).''.]

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by striking Note 2 and inserting the following:

''2. Subsection (b) Cases.—

(A) In General.—Subsection (b) applies in cases in which the conduct comprising all of the prior offense is covered by the applicable chapter two guideline or an applicable chapter three adjustment for the instant offense of conviction. Such conduct is covered by the chapter two guideline or a chapter three adjustment if the conduct is (i) incorporated in the base offense level for the instant offense of conviction; (ii) covered by a specific offense characteristic in the guideline for the instant offense of conviction; or (iii) covered by a chapter three adjustment applicable to the instant offense of conviction. Cases in which only part of

the prior offense is covered are addressed under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the base offense level or the specific offense characteristic in the applicable chapter two offense guideline is an enhancement for a prior conviction (*e.g.*, the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a 'sentence reduction pursuant to § 5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons.'

(D) Examples.—The following are examples in which subsection (b) applies and an adjustment to the sentence is appropriate:

(i) The defendant is convicted of a Federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in State court. The defendant received a nine-month sentence of imprisonment for the State offense and has served six months on that sentence at the time of sentencing on the instant Federal offense. The guideline range applicable to the defendant is 10–16 months (chapter two offense level of 14 for sale of 45 grams of cocaine; 2 level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant already has served six months on the related State charge as of the date of sentencing on the instant Federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's State sentence, achieves this result.

(ii) The defendant is convicted of a Federal offense charging the sale of 150 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in State court. The State term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24–30 months (chapter two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant already has served six months on the discharged State term, a sentence of 18 months on the instant offense achieves this result.''.

[Option Two B would maintain current Application Note 6 of the commentary to § 5G1.3 as follows:

''[6. Revocations. If the defendant was on Federal or State probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. *See* § 7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).]''.

Section 5G1.3 captioned ''Application Notes'' is amended by striking Note 7 .

Issue for Comment: The Commission requests comment on whether it should resolve a circuit split with respect to § 5G1.3(c) and whether the sentencing court may grant ''credit'' for time served in State prison for an undischarged sentence, in addition to running the Federal sentence concurrently with the remaining portion of the defendant's preexisting State sentence. *Compare Ruggiano* v. *Reish*, 307 F.3d 121 (3d Cir. 2002) (Federal sentencing court may grant such credit), with *United States* v. *Fermin*, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). If so, how should this apparent conflict be resolved?

4. Miscellaneous Amendments

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

(1) Amends § 1B1.1 (Application Instructions) to (A) provide an instruction that makes clear that the application instructions are to be applied in the order presented in the guideline; (B) amend Application Note 4 to make clear that, absent an instruction to the contrary, multiple specific offense characteristics (or a chapter two specific offense characteristic and a chapter three adjustment) that are triggered by the same conduct are to be applied cumulatively; and (C) provide an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.

(2) Restructures the definitions of ''prohibited sexual conduct'' in §§ 2A3.1 (Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of ''means'' and ''includes''.

(3) Amends the definition of ''child pornography'' in §§ 2A3.1 and 4B1.5, and the definition of ''visual depiction'' in § 2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct), in light of *Ashcroft* v. *The Free Speech Coalition, et al.*, 122 S.Ct. 1389 (2002).

(4) (A) Amends § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) by: (i) providing a maximum base offense level of 30 if the defendant receives an adjustment under § 3B1.2 (Mitigating Role) and providing a two level reduction if the defendant meets the criteria of subdivisions (1) through (5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to conform this guideline to § 2D1.1 (Drug Trafficking), which was amended last amendment cycle; (ii) adding red phosphorus to the Chemical Quantity Table in response to a recent classification of red phosphorus as a List I chemical; and (B) provides an issue for comment regarding the penalties for oxycodone generally and a brand named pill containing oxycodone known as Oxycontin.

(5) Amends the departure provision in Application Note 6 of § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to conform to Application Note 12 of § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).

(6) Amends subsection (b)(5) of § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) to include receipt and distribution in the enhancement for use of a computer. Currently the enhancement only applies to offenses in which a computer was used for the transmission of child pornography.

(7) Responds to new legislation and makes other technical amendments as follows:

(a) Amends Appendix A (Statutory Index) and § 2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security and Rural Investment Act of 2002 (the ''Act''), Pub. L. 107–171. The first new offense provides a statutory maximum of one year for violating the Animal Health Protection Act (subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or article for distribution or sale. The Act also provides a statutory maximum of 10 years for a subsequent violation of either offense.

(b) Amends Appendix A (Statutory Index) and § 2B1.1 in response to a new offense (19 U.S.C. 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment assistance to qualifying agricultural commodity producers.

(c) Amends Appendix A (Statutory Index) and §§ 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or an incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The proposed amendment references 40 U.S.C. 5104(e)(1) to 2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment penalty of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of not more than one year. The proposed amendment references 40 U.S.C. 14309(a) and (b) to 2C1.3.

(d) Amends Appendix A (Statutory Index) and § 2H2.1 (Obstructing an Election or Registration) to provide a guideline reference for offenses under 18 U.S.C. 1015(f). Currently, 18 U.S.C. 1015 generally is referenced to 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), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use). However, 18 U.S.C. 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. The proposed amendment references 18 U.S.C. 1015(f) to § 2H2.1 (Obstructing an Election or Registration).

Proposed Amendment

Section 1B1.1 is amended by adding ''.—Except as specifically directed, the provisions of this manual are to be applied in the following order:'' after ''Application Instructions''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended by striking Note 4 and inserting the following:

''4. (A) Specific Offense Characteristics.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in § 2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)–(E)) are not added together.

(B) Adjustments from Different Guideline Sections.—Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). In some cases, such adjustments (*e.g.*, a chapter two specific offense characteristic and a chapter three [or chapter four] adjustment) may be triggered by the same conduct, but are meant to take into account different aspects of that conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under § 2B3.1(b)(3) and an official victim enhancement under § 3A1.1, even though both enhancements are triggered by the shooting of the officer. Section 2B3.1(b)(3) accounts for the injury to the police officer, while § 3A1.2(a) accounts for the official status of the victim.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''(7) Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to § 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) may be abbreviated as follows: § 2B1.1 (Theft, Fraud, and Property Destruction).''.

The Commentary to section § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by striking '''Prohibited sexual conduct''' and all that follows through ''child pornography.'' and inserting the following:

'''Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense. 'Prohibited sexual conduct' includes the production of child pornography, but does not include trafficking in, or possession of, child pornography.''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in subdivision (A) of Note 4 by inserting ''means any of the following:'' After ''conduct''''; by striking ''means'' after ''(i)''; by striking ''includes'' each place it appears; by inserting ''or'' before ''(iii)''; and by striking ''; and (iv)'' and inserting ''. It''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 in the paragraph that begins '''Prohibited sexual conduct''' by striking '''Child pornography''' and all that follows through ''2256(8).'' and inserting the following:

'''Child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—

(A) The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) Such visual depiction is a minor engaging in sexually explicit conduct; or

(C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.''.

The Commentary to § 2G2.4 captioned ''Application Notes'' is amended in Note 1 by deleting '''Visual depiction''' and all that follows through ''and (8).'' and inserting the following:

'' 'Visual depiction' means any visual depiction described in 18 U.S.C. 2256(5) or any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—

(A) The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) Such visual depiction is a minor engaging in sexually explicit conduct; or

(C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in subdivision (A) of Note 3 by striking subdivision (ii) and inserting the following:

'' 'Sex offense conviction' means any offense described in 18 U.S.C. 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor, and does not include trafficking in, receipt of, or possession of, child pornography. 'Child pornography' has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).''.

The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in subdivision (A) of Note 4 by striking ''18 U.S.C. 2256(8)'' and inserting ''Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)''.

Section § 2D1.11(a) is amended by inserting '', except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level shall be not more than level 30'' after ''appropriate''.

Section § 2D1.11(b) is amended by inserting at the end the following:

''(4) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.''.

Section § 2D1.11(e)(1) is amended in the subdivision captioned ''List I Chemicals'' by striking the period after ''Gamma-butyrolactone'' and inserting a semi-colon; and by adding at the end the following:

''714 G or more of Red Phosphorus.''.

Section § 2D1.11(e)(2) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 214 G but less than 714 G of Red Phosphorus;''.

Section § 2D1.11(e)(3) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 71 G but less than 214 G of Red Phosphorus;''.

Section § 2D1.11(e)(4) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 50 G but less than 71 G of Red Phosphorus;''.

Section § 2D1.11(e)(5) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 29 G but less than 50 G of Red Phosphorus;''.

Section § 2D1.11(e)(6) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 7 G but less than 29 G of Red Phosphorus;''.

Section § 2D1.11(e)(7) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 6 G but less than 7 G of Red Phosphorus;''.

Section § 2D1.11(e)(8) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 4 G but less than 6 G of Red Phosphorus;''.

Section § 2D1.11(e)(9) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 3 G but less than 4 G of Red Phosphorus;''.

Section § 2D1.11(e)(10) is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''Less than 3 G of Red Phosphorus.''

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by adding at the end the following:

''7. Applicability of Subsection (b)(4).—The applicability of subsection (b)(4) 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)(4) applies.''.

Issue for Comment: The Commission requests comment regarding the penalties for oxycodone generally and a brand named prescription drug containing oxycodone known as Oxycontin. Currently, the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) provide a marihuana equivalency of 500 grams for one gram of a mixture of substance containing oxycodone. Recently, however, drug enforcement has reported an increase in trafficking of the prescription drug Oxycontin, which contains higher than historical amounts of oxycodone but weighs substantially less than other prescription drugs containing oxycodone. Consequently, a defendant convicted of trafficking in certain prescription drugs containing smaller amounts of oxycodone relative to the total weight of the pill may receive a higher sentence than a defendant convicted of trafficking in larger amounts of Oxycontin.

How should the Commission address the weight differential and the resulting sentencing disparity? Should the equivalency for oxycodone be reevaluated? Should the Commission amend the Drug Equivalency Tables in § 2D1.1 to provide a separate marihuana equivalency for Oxycontin, notwithstanding that the guidelines do not otherwise provide specific penalties for brand name drugs? If so, what should that marihuana equivalency be?

Alternatively, should the Commission sentence oxycodone defendants based on the purity of the prescription drug involved (an approach currently used in sentencing methamphetamine and amphetamine defendants)? This approach may require amending the Drug Quantity Tables in § 2D1.1 to provide separate penalties for oxycodone (actual) and oxycodone (mixture). Oxycontin additionally has a time release element that can be eliminated simply by crushing or breaking the pill, increasing the immediate effect for the user. Should the Commission provide an enhancement for trafficking in pills that have a time release element?

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by striking Note 6 and inserting the following:

''6. Upward Departure Provisions.—An upward departure may be warranted if the offense involved more than 10 victims.''.

Section 2G2.2(b)(5) is amended by inserting '', receipt, or distribution'' after ''transmission''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''19 U.S.C. 2401f;'' after ''2332b(a)(1);''.

The Commentary to § 2C1.3 captioned ''Statutory Provisions'' is amended by inserting ''; 40 U.S.C. 14309(a), (b)'' after ''1909''.

The Commentary to § 2H2.1 captioned ''Statutory Provisions'' is amended by inserting '', 1015(f)'' after ''597''.

The Commentary to § 2K2.5 captioned ''Statutory Provisions'' is amended by inserting ''; 40 U.S.C. 5104(e)(1)'' after ''930''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by inserting '', 8313'' after ''7734''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. 7734 the following new line:

''7 U.S.C. 8313 2N2.1'';

in the line referenced to 18 U.S.C. 1015 by inserting ''(a)–(e)'' after ''1015'';

by inserting after the line referenced to 18 U.S.C. 1015 the following new line:

''18 U.S.C. 1015(f) 2H2.1'';

by inserting after the line referenced to 19 U.S.C. 2316 the following new line:

''19 U.S.C. 2401f 2B1.1''; and

by inserting after the line referenced 38 U.S.C. 3502 to the following new lines:

''40 U.S.C. 5104(e)(1) 2K2.5

40 U.S.C. 14309(a), (b) 2C1.3''.

5. Involuntary Manslaughter

Synopsis of Proposed Amendment: This proposed amendment is a continuation of the Commission's work over the past several years to ensure that the guidelines provide appropriate guideline penalties for offenses involving involuntary manslaughter. In 1994, Congress increased the statutory maximum penalty for involuntary manslaughter offenses from three years' to six years' imprisonment after receiving a Commission report analyzing federal criminal penalties and recommending that the statutory maximum penalty for involuntary manslaughter be increased to six years. Studies have shown that the heartland of involuntary manslaughter offenses involves vehicular homicide and that these offenses are punished more severely by many of the States. The Commission further examined both voluntary and involuntary manslaughter offenses in 1997, and in 1998 sent a report and letter to Congress recommending that the statutory maximum penalty for voluntary manslaughter offenses be increased to permit the Commission to make changes that would maintain proportionality based on offense severity. Although no action has been taken on that recommendation, the Commission has received recommendations from Congress and the Department of Justice that it proceed to amend the guidelines for involuntary manslaughter to increase the base offense levels. Accordingly, this proposed amendment increases the base offense levels for involuntary manslaughter by [2][4][6] levels. An issue for comment follows that generally seeks the public's input regarding the appropriate offense levels for involuntary manslaughter offenses, including (with a view toward proportionate sentencing) the appropriate offense levels for involuntary manslaughter offenses compared to offense levels for aggravated assault.

Proposed Amendment

Section 2A1.4(a)(1) is amended by striking ''10'' and inserting ''[12][14][16]''.

Section 2A1.4(a)(2) is amended by striking ''14'' and inserting ''[16][18][20]''.

Issue for Comment: The Commission requests comment generally on the appropriate offense levels for offenses involving involuntary manslaughter. In addition, the Commission requests comment regarding the appropriate and proportionate offense levels for involuntary manslaughter compared to offense levels for aggravated assault under § 2A2.2 (Aggravated Assault). Currently, the base offense level for aggravated assault is level 15, and the guideline contains several enhancements, such as enhancements for bodily injury. As a consequence, the guideline penalties for aggravated assault currently are more serious than those for involuntary manslaughter.

6. Cybersecurity

Issue for Comment: Section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107–296, directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code, to ensure that the sentencing guidelines and policy statements reflect the serious nature of such offenses, the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.

The directive also includes a number of factors for the Commission to consider, including the potential and actual loss resulting from the offense, the level of sophistication and planning involved in the offense, whether the offense was committed for purposes of commercial advantage or private financial benefit, whether the defendant acted with malicious intent to cause harm in committing the offense, the extent to which the offense violated the privacy rights of individuals harmed, whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, whether the violation was intended to, or had the effect of, significantly interfering with or disrupting critical infrastructure, and whether the violation was intended to, or had the effect of, creating a threat to public health or safety, or injury to any person.

The Commission requests comment regarding how it should respond to this directive.

7. Offenses Involving Body Armor and Assault Against a Federal Judge Issues for Comment:

1. Section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the ''Act''), Pub. L. 107–273, directs the Sentencing Commission to review and amend the sentencing guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in 18 U.S.C. 16) or drug trafficking crime (as defined in 18

U.S.C. 924(c) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act further states that it is the sense of Congress that any such enhancement should be at least two levels. The Commission requests comment regarding how it should respond to this directive. For example, should the Commission provide a Chapter Three adjustment for the use of body armor in any crime of violence or drug trafficking crime? Alternatively, should the Commission provide a specific offense characteristic in all relevant chapter two guidelines (*e.g.*, § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) that would apply if the defendant used body armor in the course of the offense?

What would be an appropriate increase for the use of body armor if the Commission provides a chapter three adjustment or a specific offense characteristic in the relevant chapter two guidelines?

2. Section 11008 of the Act directs the Commission to review and amend, if appropriate, the guidelines or policy statements to provide an appropriate enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in 18 U.S.C. 111 or 115. The directive also contains a number of factors for the Commission to consider, including the range of conduct covered by the offenses, the existing sentence for the offense, the extent to which the guidelines for these offenses have been constrained by statutory maximum penalties, and the adequacy of the guidelines to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense. The Act also increases the statutory maximum terms of imprisonment for the following offenses: For threatened assaults under 18 U.S.C. 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), from three years to six years; for all other threats made in violation of 18 U.S.C. 115, from five years to ten years; for a violation of 18 U.S.C. 111 (Assaulting, resisting, or impeding certain officers or employees), from three years to eight years; and for the use of a dangerous weapon or inflicting bodily injury in the commission of an offense under 18 U.S.C. 111, from 10 to 20 years.

Appendix A (Statutory Index) references 18 U.S.C. 111 to 2A2.2 (Aggravated Assault) and 2A2.4 (Obstructing or Impeding Officers). These guidelines have base offense levels of 15 and 6, respectively. Section 115 of title 18, United States Code, is referenced to, among other guidelines, §§ 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2, and 2A2.3 (Minor Assault). The base offense level for § 2A2.1 is level 28 (if the object of the offense would have constituted first degree murder) or level 22. The base offense level for § 2A2.3 is level 6 (if the conduct involved physical contact, or if a dangerous weapon was possessed or its use was threatened) or level 3.

Given the directive, the factors to consider, and the increases in the statutory maximum penalties, the Commission requests comment regarding the following:

(A) Should the Commission provide an enhancement in the assault guidelines for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in 18 U.S.C. 111 or 115? If so, what would be an appropriate increase for such enhancement? Are there additional, related enhancements that the Commission should provide in the assault guidelines, particularly given the directive to consider providing sentences at or near the statutory maximum for the most egregious cases?

(B) Do the current base offense levels in each of the assault guidelines provide adequate punishment for the covered conduct? If not, what would be appropriate base offense levels for §§ 2A2.2, 2A2.3, and 2A2.4?

(C) Should the Commission consider more comprehensive amendments to the assault guidelines as part of, or in addition to, its response to the directives? For example, should the Commission consolidate §§ 2A2.3 and 2A2.4? Should the Commission amend § 2A2.3(b)(1) to provide a two level enhancement for bodily injury? Some commentators have argued that such an amendment would bring the minor and aggravated assault guidelines more in line with one another because there may be cases in which an assault that does not qualify as an aggravated assault under § 2A2.2 nevertheless involves bodily injury. Are there any other application issues pertaining to the assault guidelines that the Commission should address?

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DEPARTMENT OF STATE

[Public Notice 4199]

Overseas Schools Advisory Council; Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Executive Committee Meeting on Thursday, January 23, 2003, at 9:30 a.m. in Conference Room 1105, Department of State Building, 2201 C Street, NW., Washington, DC. The meeting is open to the public.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas, which are assisted by the Department of State and which are attended by dependents of U.S. Government families and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. The agenda includes a review of the recent activities of American-sponsored overseas schools and the overseas schools regional associations, a presentation on the status of education in the United States and its impact on American-sponsored overseas schools, and selection of projects for the 2003 program.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the State Department is controlled, and individual building passes are required for all attendees. Persons who plan to attend should so advise the office of Dr. Keith D. Miller, Department of State, Office of Overseas Schools, Room H328, SA–1, Washington, DC 20522–0132, telephone 202–261–8200, prior to January 13, 2003. Each visitor will be asked to provide a date of birth and Social Security number at the time of registration and attendance and must carry a valid photo ID to the meeting. All attendees must use the C Street entrance to the building.