subject to complying with them, and E Trans LLC, a new company that will be affiliated with Gen upon implementation of the Plan and that will acquire the electric transmission assets of PG&E but not have any interest in Diablo Canyon, will be also be inserted in the conditions and thus become subject to complying with them. In addition, the application proposes that PG&E will remain designated in the conditions for the limited purpose of compliance with the conditions, notwithstanding the divesting of its interest in Diablo Canyon, while Nuclear will not be named in the conditions.

Notwithstanding the proposed changes to the antitrust conditions proffered as part of the amendments to conform the licenses to reflect their transfer from PG&E to Gen and Nuclear, the Commission is considering specifically whether to approve either all of the proposed changes to the conditions, or only some, but not all, of the proposed changes, as may be appropriate and consistent with the Commission's decision in Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI–99–19, 49 NRC 441, 466 (1999). In particular, the Commission is considering approving only those changes that would accurately reflect Gen and Nuclear as the only proposed entities to operate and own Diablo Canyon.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the transfer of a license if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of conforming license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility which does no more than conform the license to reflect the transfer action involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

By February 6, 2002, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart M, ''Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.1306, and should address the considerations contained in 10 CFR 2.1308(a). Untimely requests and petitions may be denied, as provided in 10 CFR 2.1308(b), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.1308(b)(1)–(2).

Requests for a hearing and petitions for leave to intervene should be served upon Richard F. Locke, Esq., Pacific Gas and Electric Company, 77 Beale Street, B30A, San Francisco, California 94105 (e-mail address *rfl6@pge.com*), and to David A. Repka, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005 (e-mail address *drepka@winston.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (e-mail address for filings regarding license transfer cases only: *ogclt@nrc.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.1313.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, by February 19, 2002, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

Further details with respect to this action, see the application dated November 30, 2001, available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/ADAMS/index.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room (PDR) Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov.*

Dated at Rockville, Maryland this 10th day of January 2002.

For the Nuclear Regulatory Commission.

Girija S. Shukla,

Project Manager, Section 2, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–1211 Filed 1–16–02; 8:45 am]

BILLING CODE 7590–01–P

SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

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. This notice additionally sets forth a number of issues for comment, including a request for comment set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice regarding retroactive application of proposed amendments.

The proposed amendments and issues for comment contained in this notice are as follows: (1) Proposed amendment and issues for comment in response 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, and the Commission's assessment of the guidelines' treatment of offenses involving terrorism; (2) proposed amendments to a number of guidelines covering controlled substances offenses, including enhancements and downward adjustments to account more adequately for aggravating and mitigating conduct sometimes associated with drug trafficking offenses, and issues for comment, including issues pertaining to offenses involving cocaine base (''crack cocaine''); (3) proposed amendment to provide increased sentencing alternatives in Zone B of the Sentencing Table; and (4) proposed amendment that corrects a technical error made in the November 27, 2001, **Federal Register** notice (66 F.R. 59295) pertaining to the proposed amendment to § 3E1.1 (Acceptance of Responsibility). In addition to the issues for comment that are contained within these proposed amendments, this notice sets forth a separate issue for comment regarding whether to expand § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to include discharged terms of imprisonment.

DATES: *Written Public Comment.*—Written public comment regarding the amendments set forth in this notice, including public comment regarding retroactive application of any of these proposed amendments, should be received by the Commission not later than March 19, 2002. Written public comment regarding retroactivity of proposed amendments set forth in the November 27, 2001, **Federal Register** notice (See 66 F.R. 59295) should be received by the Commission not later than March 4, 2002.

Public Hearings.—The Commission plans to hold three public hearings on its proposed amendments, one on each of the following days: February 25, 2002; February 26, 2002; and March 19, 2002. The tentative times for the hearings are as follows: 3:00 to 5:00 p.m. on February 25, 2002; 9:30 to 11:30 a.m. on February 26, 2002; and 3:00 to 5:00 p.m. on March 19, 2002. Witnesses at the first two hearings will be invited to testify by the Commission on issues specified by the Commission prior to the hearings. A person who wishes to testify at the third hearing, the subject of which may include any of the proposed amendments, should notify Michael Courlander, at (202) 502–4500, not later than March 9, 2002. Written testimony must be received by the Commission not later than March 9, 2002. Timely submission of written testimony is required for testifying at the public hearing. The Commission requests that, to the extent practicable, commentators submit an electronic version of the comment and of the testimony for the relevant public hearing. The Commission also reserves the right to select persons to testify at any of the hearings and to structure the hearings as the Commission considers appropriate and the schedule permits.

Further information regarding the public hearings, including the location, time, and scope of the hearings, will be provided by the Commission on its website at www.ussc.gov.

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

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4500.

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 sentencing 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 each year pursuant to 28 U.S.C. 994(p).

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 for how the Commission should respond to those issues.

The Commission also requests public comment regarding whether any of the proposed amendments contained in this notice, and the **Federal Register** notice of November 27, 2001, (66 FR 59295), that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

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

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 3.4, 4.3, 4.4.

Diana E. Murphy,

Chair.

1. Terrorism

Synopsis of Proposed Amendment

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

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

adjustment, and provides issues for comment.

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

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

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

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

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

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

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

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

Proposed Amendment (Part (A)):

The title to Chapter Two, Part A, Subpart 5 is amended by adding '', Offenses Against Mass Transportation Systems'' after ''Air Piracy''.

Section 2A5.2 is amended in the title by adding ''; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry'' after ''Attendant''.

Section 2A5.2 is amended by striking subsections (a)(1) and (a)(2) and inserting the following:

''(1) 30, if the offense involved intentionally endangering the safety of: (A) An aircraft; (B) a mass transportation vehicle or a ferry; or (C) any person in, upon, or near an aircraft, a mass transportation vehicle, or a ferry, with the intent to endanger the safety of an aircraft, a mass transportation vehicle, or a ferry, during the course of its operation;

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

The Commentary to § 2A5.2 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 1993(a)(4), (5), (6);''

before ''49 U.S.C. 46308''; and by inserting ''46503,'' before ''46504''.

The Commentary to § 2A5.2 is amended by inserting before ''Background'' the following:

''Application Note

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

The Commentary to § 2A5.2 captioned ''Background'' is amended in the first sentence by striking ''the aircraft and passengers'' and inserting ''an aircraft, a mass transportation vehicle, or a ferry, or any person in, upon, or near an aircraft, a mass transportation system, or a ferry''.

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

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

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

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

Subsection 2M6.1(a)(2) is amended by striking ''or''.

Subsection 2M6.1(a)(3) is amended by striking the period at the end and inserting ''; or''.

Subsection 2M6.1(a) is amended by adding at the end the following:

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

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''175b,'' after ''175,''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''18 U.S.C. 831(f)(1).'' the following:

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

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 175'' the following new line:

''18 U.S.C. § 175b 2M6.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. § 1992'' the following new lines:

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

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

''18 U.S.C. 2339 2X2.1, 2X3.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''49 U.S.C. 46502(a), (b)'' the following new line:

''49 U.S.C. 46503 § 2A5.2''.

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

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

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

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

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

(1) 18 U.S.C. 2339A, which prohibits the provision of material support or resources to terrorists, knowing or intending that they will be used in the preparation for, or in carrying out, specified crimes (i.e., those designated as predicate offenses for ''federal crimes

of terrorism'') or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation. The maximum term of imprisonment is 15 years.

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

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

The amendment also proposes to reference torture offenses under 18 U.S.C. 2340A to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). The statutory maximum penalty for this offense is 20 years imprisonment, or life imprisonment if death results. ''Torture'' is defined in 18 U.S.C. 2340(1) as ''an act committed by a person under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control''. Although this offense has not been listed in the Statutory Index for some time, reference in the Statutory Index is recommended at this time because the offense is now a predicate offense that may qualify as a ''federal crime of terrorism''.

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

Proposed Amendment (Part B):

Chapter Two, Part M, Subpart 6 is amended in the heading by adding at the end ''; Providing Material Support to Terrorists''.

Chapter Two, Part M, Subpart 6, is amended by adding at the end the following:

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

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

Commentary

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

Application Note:

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

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

''18 U.S.C. 2332b(a)(1) 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.2

18 U.S.C. 2332b(a)(2) 2A1.5, 2A2.1, 2M6.3

18 U.S.C. 2339A 2M6.3

18 U.S.C. 2339B 2M6.3

18 U.S.C. 2340A 2A1.1, 2A1.2, 2A2.2, 2A4.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''49 U.S.C. 46506'' the following new line:

''49 U.S.C. 60123(b) 2B1.1, 2K1.4, 2M2.1, 2M2.3''.

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

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

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

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

Issue for Comment: The Commission requests comment regarding whether guideline penalties should be increased for any of the following offenses for which statutory maximum terms of

imprisonment were increased by section 810 of the Act. Specifically:

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

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

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

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

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

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

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

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

Part (D): Penalties for Terrorist Conspiracies

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

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

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

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

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

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

Proposed Amendment (Part (E):

The Commentary to § 3A1.4 is amended by striking Application Note 1 in its entirety and inserting the following:

''1. Federal Crime of Terrorism Defined—For purposes of this guideline, 'federal crime of terrorism' has the meaning given that term in 18 U.S.C. 2332b(g)(5). Accordingly, in order for the adjustment under this guideline to apply, the offense (A) must be a felony that involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B);

and (B) pursuant to 18 U.S.C. 2332b(g)(5)(A), must have been calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.''.

The Commentary to § 3A1.4 is amended in Note 2 by inserting ''Computation of Criminal History Category.—'' before ''Under''.

The Commentary to § 3A1.4 is amended by adding at the end the following:

''3. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of Pub. L. 104–132, the adjustment provided by this guideline applies only to Federal crimes of terrorism. However, there may be cases that involve international terrorism (as defined in 18 U.S.C. 2331(1)) or domestic terrorism (as defined in 18 U.S.C. 2331(5)) but to which the adjustment under this guideline technically does not apply. For example, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B) but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the resulting sentence may not exceed the top of the guideline range that would result if the adjustment under this guideline had been applied.''.

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

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

Part (F): Money Laundering Offenses

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

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

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

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

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

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

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

(4) 31 U.S.C. 5332, added by section 371 of the Act, prohibits concealing on one's person or any conveyance more than $10,000 in currency or other monetary instruments in order to evade currency reporting requirements (i.e., bulk cash smuggling). The maximum term of imprisonment is not more than five years. An issue for comment follows regarding whether an enhancement for bulk cash smuggling should be added to the guidelines.

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

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

Proposed Amendment (Part (F))

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

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

international terrorism (as defined in 18 U.S.C. 2331(1)).''.

Section 2S1.3 is amended in the title by adding at the end ''; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts''.

Section 2S1.3(b) is amended by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

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

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting ''5318, 5318A(b),'' after ''5316,''; and by inserting '', 5331, 5332'' after ''5326''.

The Commentary to § 2S1.3 captioned ''Application Note'' is amended by striking the text of Note 1 and inserting the following:

''Definition of 'Value of the Funds'.—

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

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

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

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

The Commentary to § 2S1.3 captioned ''Application Note'' is amended in the heading by striking ''Note'' and inserting ''Notes''; and by adding at the end the following new note:

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

The Commentary to § 2S1.3 captioned ''Background'' is amended in the first sentence by striking ''The'' and inserting ''Some of the'' and by adding at the end the following new paragraph:

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''31 U.S.C. 5316'' the following new lines:

''31 U.S.C. 5318 2S1.3
31 U.S.C. 5318A(b) 2S1.3''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''31 U.S.C. 5326'' the following new lines:

''31 U.S.C. 5331 2S1.3
31 U.S.C. 5332 2S1.3''.

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

Offenses under 31 U.S.C. 5332, added by section 371 of the Act, prohibit concealing on one's person or any conveyance more than $10,000 in currency or other monetary instruments in order to evade currency reporting requirements (i.e., bulk cash smuggling). Congress has indicated that these offenses are more serious than failing to file a customs report, even though the statutory maximum terms of imprisonment are the same for both of these offenses. See H. Rept. 107–250. The Commission requests comment on whether an enhancement should be added to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) if the offense involved bulk cash smuggling.

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

Part (G): Currency and Counterfeiting Offenses

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

Issue for Comment: Section 374 of the Act changed or otherwise increased the statutory maximum penalties for counterfeiting domestic currency obligations as follows: the statutory maximum penalty for violations of 18 U.S.C. 470 (counterfeit acts committed outside the United States) was changed from 20 years to the punishment ''provided for the like offense within the United States;'' the statutory maximum penalty for violations of 18 U.S.C. 471 (obligations or securities of the United States) was increased from 15 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. 472 (uttering counterfeit obligations or securities) was increased from 15 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. 473 (dealing in counterfeit obligations or securities) was increased from 10 years to 20 years; the statutory maximum penalty for violations of 18 U.S.C. 476 (taking impressions of tools used for obligations or securities) was increased

from 10 years to 25 years; the statutory maximum penalty for violations of 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) was increased from 10 years to 25 years; the statutory maximum penalty for violations of 18 U.S.C. 484 (connecting different parts of different notes) was increased from 5 years to 10 years; and the statutory maximum penalty for violations of 18 U.S.C. 493 (bonds and obligations of certain lending agencies) was increased from 5 years to 10 years. The Commission requests comment regarding whether the guideline penalties for these offenses should be increased in light of the increased statutory maximum penalties.

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

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

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

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

Part (H): Miscellaneous Amendments

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

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

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

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

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

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

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

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

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

Proposed Amendment (Part (H)):

Section 2B1.1 is amended by striking subsection (d) in its entirety.

The Commentary to 2B1.1 captioned ''Background'' is amended by striking the last paragraph in its entirety.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1, paragraph (B), by adding at the end the following new paragraph:

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

Section 2M5.1 is amended in the title by adding at the end ''; Financial Transactions with Countries Supporting International Terrorism''.

Section 2M5.1(a)(1) is amended by inserting ''(A)'' after ''if'' and by

inserting '', or (B) the offense involved a financial transaction with a country supporting international terrorism;'' after ''evaded''.

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 2332d;'' before ''50 U.S.C. App. secs. 2401–2420''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended by adding at the end the following:

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

[Option 1

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 by striking the period at the end of paragraph (i) and inserting a semicolon; and by inserting after paragraph (i) the following:

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

[Option 2

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 by adding at the end the following new paragraph:

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

Section 5D1.2(a) is amended by adding at the end the following new paragraph:

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

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

''18 U.S.C. 2332d 2M5.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''50 U.S.C. App. § 2410'' the following new line:

''Section 329 of the USA 2C1.1''.
Patriot Act of 2001,
Pub. L. 107–56.''.

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

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

2. Drugs

Synopsis of Proposed Amendment

In General

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

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

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

Base Offense Level

Mitigating Role Adjustment

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

Two issues for comment pertaining to mitigating role follow the proposed amendment. The first issue invites comment regarding whether application of the maximum base offense level should be limited in some manner, for example to defendants who receive a minimal role adjustment under § 3B1.2 or who do not receive enhancements for aggravating conduct such as weapon involvement or bodily injury. The second issue invites comment regarding

whether the Commission also should address three circuit conflicts that remain pertaining to mitigating role, and if so, how should those conflicts be resolved. The issue then requests comment regarding whether the Commission should provide guidance on whether particular drug offenders who perform certain drug trafficking functions (e.g., courier or mule) should or should not receive a mitigating role adjustment.

Enhancements

Violence

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

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

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

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

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

Protected Locations, Underage or Pregnant Individuals

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

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

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

The impact of this enhancement should be limited but it will allow increased sentences in appropriate cases. Compared to the 22,639 defendants sentenced under § 2D1.1 in fiscal year 2000, only 196 were convicted under any of the statutes referenced to § 2D1.2. The majority of those cases (89.3%) were for violations of 21 U.S.C. 860 for trafficking in a protected location. There likely would be no net penalty increase from this part of the proposed amendment because the proposed amendment still would require a conviction under that statute. Also, in fiscal year 2000, only 131 defendants received the adjustment in § 3B1.4 (Use of a Minor) and, for those cases, no net increase results from this part of the proposed amendment because proposed Application Note 22 expressly provides that if proposed

subsection (b)(3)(D) applies, § 3B1.4 does not apply. This proposed application note corresponds to Application Note 2 in § 3B1.4, which instructs that if the Chapter Two offense guideline incorporates use of a minor to commit a crime, § 3B1.4 should not be applied.

Prior Criminal Conduct

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

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

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

Reduction for No Prior Convictions

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

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

Maintaining Drug-Involved Premises and Ecstasy Offenses

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

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

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

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

The proposed amendment also amends the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in Application Note 11 of § 2D1.1 to more accurately reflect the type and quantity

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

Simple Possession of Crack Cocaine

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

The cross reference to the drug trafficking guideline is deleted to more adequately differentiate between the seriousness of an offense involving the distribution of crack cocaine and an offense merely involving simple possession of crack cocaine, with no intent to distribute. The impact of the proposed deletion of the cross reference will have minimal impact on drug penalties overall because a total of only 67 defendants have been cross referenced from § 2D2.1 to § 2D1.1 in the past three fiscal years.

Proposed Amendment

Section 2D1.1 is amended in the title by inserting ''Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Renting or Managing a Drug Establishment;'' after ''Offenses);''.

Subsection 2D1.1(a)(3) is amended by striking ''below'' and inserting '', except that if the defendant qualifies for an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall not exceed level [24–32]''.

Subsection 2D1.1(b)(1) is amended to read as follows:

''(1) (Apply the greatest):

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

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

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

Subsection 2D1.1(b)(5) is amended by striking ''greater'' and inserting ''greatest''.

Subsection 2D1.1(b) is amended by redesignating subdivision (6) as subdivision (9); by redesignating subdivisions (2) through (5) as subdivisions (4) through (7), respectively; by inserting the following after subsection (b)(1):

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

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

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

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

and by inserting after redesignated subdivision (7) (formerly subdivision (5)) the following:

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

Subsection 2D1.1(b)(9) (formally subdivision (6)) is amended by inserting ''(A)'' before ''If the'' and by adding at the end the following:

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

The Commentary to § 2D1.1 captioned ''Statutory Provisions'' is amended by inserting ''849, 856, 859, 860, 861,'' before ''960(a)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking Note 3 in its entirety and inserting the following:

''3. Application of Subsection (b)(1).—

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

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

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

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

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

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in the second paragraph of Note 8 by striking ''(b)(2)(B)'' and inserting ''(b)(4)(B)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11 in the table captioned ''Typical Weight Per Unit (Dose, Pill, or Capsule) Table'' in the line referenced to ''MDA'' by striking the asterisk after ''MDA''; and by striking ''100 mg'' and inserting ''250 mg''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11 in the table captioned ''Typical Weight Per Unit (Dose, Pill, or Capsule) Table'' by inserting after the line referenced to ''MDA'' the following:

''MDMA 250 mg''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 19 by striking ''(b)(5)(A)'' both places it appears and inserting ''(b)(7)(A)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by striking ''(b)(5)(B)'' and inserting ''(b)(7)(B)''; and by striking ''subsection (b)(5)(C)'' and inserting ''subsection (b)(7)(C)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by adding at the end the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Commentary to § 2D1.1 captioned ''Background'' is amended in the fifth paragraph by striking ''Specific Offense Characteristic (b)(2)'' and inserting ''Subsection (b)(4)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the ninth paragraph by striking ''(b)(5)(A)'' and inserting ''(b)(7)(A)''.

The Commentary captioned ''Background'' is amended in the tenth paragraph by striking ''(b)(5)(B)'' and inserting ''(b)(7)(B)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by inserting after the fourth paragraph the following:

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

Chapter Two, Part D, is amended by striking § 2D1.2 and its accompanying commentary in its entirety.

Chapter Two, Part D, is amended by striking § 2D1.8 and its accompanying commentary in its entirety.

Section 2D2.1 is amended by striking subsection (b)(1) in its entirety and by redesignating subsection (b)(2) as subsection (b)(1).

The Commentary to § 2D2.1 captioned ''Background'' is amended by striking the second paragraph in its entirety.

Appendix A (Statutory Index) is amended by striking the following:

''21 U.S.C. 845 2D1.2
21 U.S.C. 845a 2D1.2
21 U.S.C. 845b 2D1.2''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 846'' by striking ''2D1.2,''; and by striking ''2D1.8,''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 849'' by striking ''2D1.2'' and inserting ''2D1.1''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 856'' by striking ''2D1.8''; and inserting ''2D1.1''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 859'' by striking ''2D1.2'' and inserting ''2D1.1''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 860'' by striking ''2D1.2'' and inserting ''2D1.1''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 861'' by striking ''2D1.2'' and inserting ''2D1.1''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. 963'' by striking ''2D1.2,''; and by striking ''2D1.8,''.

Issues for Comment

(1) The Commission requests comment concerning the sentencing of defendants convicted of cocaine base (''crack cocaine'') offenses under the sentencing guidelines. Currently, five grams of crack cocaine triggers a five year mandatory minimum sentence and is assigned a base offense level of 26 under the guidelines, and 50 grams of crack cocaine triggers a ten year mandatory minimum sentence and is assigned a base offense level of 32. This penalty structure has raised several concerns. First, concern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes

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

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

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

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

The Commission also requests comment regarding the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses. Under the current penalty structure of the sentencing guidelines and 21 U.S.C. 841, 100 times as much powder cocaine as crack cocaine is required to trigger the same five and ten year penalties based on drug quantity. The Commission requests comment regarding whether the 100:1 drug quantity ratio is appropriate, or whether some alternative ratio is more appropriate for guideline purposes. If so, how should the alternative ratio be achieved (i.e., by decreasing the penalties for crack cocaine, increasing the penalties for powder cocaine, or a combination of both) and why? How would any such change to the penalty structure for crack cocaine effect crime rates and deterrence? How would such change impact minority populations? Additionally, the Commission requests comment regarding whether the penalties for crack cocaine offenses should be more severe, less severe, or equal to the penalties for heroin or methamphetamine offenses. In particular, how do the addictiveness of crack cocaine, short term and long term physiological and psychological effects on the user, the violence associated with its use or distribution, its distribution trafficking pattern, and any secondary health consequences of its use (e.g., its effect on an infant who has been exposed prenatally to crack cocaine) compare to those associated with heroin or methamphetamine?

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

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

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

(4) Subsection (b)(8) of the proposed amendment provides a [two][four] level enhancement if the defendant

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

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

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

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

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

(B) Whether, in determining if a mitigating role adjustment is warranted, the court may consider only the relevant conduct for which the defendant is held accountable at sentencing, or whether it may also consider ''expanded'' relevant conduct (additional conduct that would appear to be properly includable under § 1B1.3 but was not considered in determining the defendant's offense level). *Compare United States* v. *James*, 157 F.3d 1218, 1220 (10th Cir. 1998) (holding that defendant's role in the offense is determined on the basis of the relevant conduct attributed to him in calculating his base offense level); *United States* v. *Burnett*, 66 F.3d 137, 140 (7th Cir. 1995) (same); *United States* v. *Atanda*, 60 F.3d 196, 199 (5th Cir. 1995) (per curiam) (same); *United States* v. *Lampkins*, 47 F.3d 175, 180 (7th Cir. 1995) (same); *United States* v. *Gomez*, 31 F.3d 28, 31 (2d Cir. 1994) (per curiam) (same); *United States* v. *Lucht*, 18 F.3d 541, 555–56 (8th Cir. 1994) (same); *United States* v. *Olibrices*, 979 F.2d 1557, 1560 (D.C. Cir. 1992) (''To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.'') with *United States* v. *Assisi-Zapata*, 148 F.3d 236, 240–41 (3d Cir. 1998) (relying on this Court's panel opinion in *De Varan* and holding that a court must examine all relevant conduct even if defendant is sentenced only for own acts); *United States* v. *Rails*, 106 F.3d 1416, 1419 (9th Cir.) (recognizing that ''[the defendant's role in relevant conduct may provide a basis for an adjustment even if that conduct is not used to calculate the defendant's base offense level'' but holding that defendant was ''not entitled to a reduction in his sentence simply because he was tied to a larger drug trafficking scheme''), *cert. denied*, 520 U.S. 1282 (1997); *United States* v. *Demers*, 13 F.3d 1381, 1383 (9th Cir. 1994) (declining ''to restrict the scope of relevant conduct on which a downward adjustment may be based to the relevant conduct that is included in the defendant's base offense level.'').

(C) Whether the court may depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under § 3B1.2. *Compare United States* v. *Speenburgh*, 990 F.2d 72, 75 (2d Cir. 1993) (if a district court would have decreased the defendant's offense level under section 3B1.2 had the other

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

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

3. Alternatives to Imprisonment

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

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

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

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

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

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

Proposed Amendment

Option 1

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

The Commentary to § 5B1.1 is amended in subdivision (a) of Note 1 by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''.

The Commentary to § 5B1.1 is amended in subdivision (b) of Note 1 by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)''; and by striking ''where'' and inserting ''in a case in which''.

The Commentary to § 5B1.1 is amended in Note 1 by redesignating subdivisions (a) and (b) as subdivisions (A) and (B), respectively.

The Commentary to § 5B1.1 is amended in Note 2 by striking ''Where'' and inserting ''In a case in which''; by striking ''or D''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)''.

Section 5C1.1(c)(1) is amended by striking ''or''.

Section 5C1.1(f) is amended by striking ''Zone D'' and inserting ''Zone C''.

Section 5C1.1 is amended by striking subsection (d) in its entirety; and by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in the first paragraph of Note 2 by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''; and by striking ''Where'' and inserting ''In a case in which''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''where'' each place it appears and inserting ''in a case in which''; in the first paragraph by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)''; in paragraph (C) by striking ''must'' and

inserting ''shall''; and in the last paragraph by inserting ''of '' after ''two months''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking Note 4 in its entirety; and by redesignating Notes 5 through 8 as Notes 4 through 7, respectively.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 4 (formerly Note 5) by striking ''(e)'' and inserting ''(d)''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 6 (formerly Note 7) by striking ''subsections (c) and (d)'' and inserting ''subsection (d)''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 7 (formerly Note 8) by striking ''(f)'' and inserting ''(e)''; by striking ''where'' and inserting ''in a case in which''; by striking ''Zone D'' and inserting ''Zone C''; by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more)''; and by striking ''subsection (e)'' and inserting ''subsection (d)''.

Option Two

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

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in subdivision (a) of Note 1 by striking ''Where'' and inserting ''In a case in which''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in subdivision (b) of Note 1 by striking ''Where'' and inserting ''In a case in which''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)''; by striking ''In such cases'' and inserting ''(i) Except as provided in subdivision (ii)''; by striking ''where'' and inserting ''in a case in which''; and by inserting after ''at least two months.'' the following:

''The court, of course, may impose a sentence at a point within that 2–7 month range that is higher than the minimum sentence. For example, a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.

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

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in Note 1 by redesignating subdivisions (a) and (b) as subdivisions (A) and (B), respectively.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''Where'' and inserting ''In a case in which''; by striking ''or D''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)''.

Section 5C1.1(c)(1) is amended by striking ''or''.

Section § 5C1.1(c) is amended by striking subsection (2) in its entirety and by inserting the following:

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

Section § 5C1.1(c)(3) is amended by striking ''(e)'' and inserting ''(d) sufficient to satisfy the minimum term of imprisonment specified in the guideline range, except that if the minimum term of the applicable guideline range is at least eight months, at least one-half of that minimum term shall be served in a form of confinement other than home detention.''.

Section § 5C1.1 is amended by striking subsection (d) in its entirety; and by redesignating subsections (e) and (f) and subsections (d) and (e), respectively.

Redesignated section § 5C1.1(e) (formerly § 5C1.1(f)) is amended by striking ''Zone D'' and inserting ''Zone C''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''; and by striking ''Where'' and inserting ''In a case in which''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking Note 3 in its entirety; and by inserting the following:

''3. Subsection (c) provides that in a case in which the applicable guideline range is in Zone B of the Sentencing Table , the court has three options:

(A) It may impose a sentence of imprisonment.

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

requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.

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

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

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

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking Note 4 in its entirety.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by redesignating Notes 5 through 8 as Notes 4 through 7, respectively.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 4 (formerly Note 5) by striking ''(e)'' and inserting ''(d)''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 6 (formerly Note 7) by striking ''subsections (c) and (d)'' and inserting ''subsection (d)''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in redesignated Note 7 (formerly Note 8) by striking ''(f)'' and inserting ''(e)''; by striking ''where'' and inserting ''in a case in which''; by striking ''Zone D'' and inserting ''Zone C''; and by striking ''subsection (e)'' and inserting ''subsection (d)''.

Option Three

Section § 5B1.1(a)(2) is amended by inserting '', or in criminal history Category I of Zone C,'' after ''Zone B''.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in subdivision (a) of Note 1 by striking ''Where'' and inserting ''In a case in which''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in subdivision (b) of Note 1 by striking ''Where'' and inserting ''In a case in which''; by inserting '', or in criminal history Category I of Zone C,'' after ''Zone B''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months)''; and by striking ''where'' and inserting ''in a case in which''.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in Note 1 by redesignating paragraphs (a) and (b) as paragraphs (A) and (B), respectively.

The Commentary to § 5B1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''Where'' and by inserting ''In a case in which''; by striking ''Zone C or'' and inserting ''criminal history Category II, III, IV, V, or VI of Zone C, or any criminal history category of Zone''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more)''.

Section § 5C1.1(c) is amended by inserting '', or in criminal history Category I of Zone C,'' after ''Zone B''; and in subdivision (c)(1) by striking ''or''.

Section § 5C1.1(d) is amended by inserting ''criminal history Category II, III, IV, V, or VI of'' after ''is in''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended by striking ''where'' each place it appears and inserting ''in a case in which''.

The Commentary to § 5C1.1 is amended in Note 2 by striking ''Where'' and inserting ''In a case in which''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months)''.

The Commentary to § 5C1.1 is amended in Note 3 by inserting '', or in criminal history Category I of Zone C,'' after ''Zone B''; and by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline

range is at least one but not more than six months)''.

The Commentary to § 5C1.1 is amended in Note 4 by inserting ''criminal history Category II, III, IV, V, or VI of'' after ''is in''; and by striking ''(i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months)''.

The Commentary to § 5C1.1 is amended in Note 8 by striking ''(i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more)''.

4. Discharged Term of Imprisonment

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

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

5. Acceptance of Responsibility

Synopsis of Amendment: This proposed amendment corrects a technical error made in the Commission's notice of proposed amendments to sentencing guidelines, policy statements, and commentary in the **Federal Register**, November 27, 2001(66 FR. 59330–59340). Specifically, proposed amendment 5, regarding § 3E1.1 (Acceptance of Responsibility), inadvertently deletes ''timely'' from subsection (b)(2) of § 3E1.1. The following proposed amendment corrects that inadvertent deletion.

Section 3E1.1(b) is amended by striking ''has assisted authorities'' and all that follows through ''notifying'' and inserting ''timely notified''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''Appropriate Considerations in Determining Applicability of Acceptance of Responsibility.''—before ''In determining''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Convictions by Trial.—'' before ''This adjustment''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 3 by inserting ''Application of Subsection (a).—''before ''Entry of a plea''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended by striking the text of Note 4 in its entirety and inserting the following:

''Inapplicability of Adjustment.—A defendant who (A) receives an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice); or (B) commits another offense while pending trial or sentencing on the instant offense, ordinarily is not entitled to a reduction under this guideline. [There may, however, be extraordinary cases in which an adjustment under this guideline is warranted even though the defendant received an enhancement under § 3C1.1, or committed another such offense, or both.]''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 5 by inserting ''Deference on Review.—'' before ''The sentencing judge''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended by striking the first sentence of Note 6 and inserting ''Application of Subsection (b).—''; and by striking ''has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b)'' and inserting ''timely notified authorities of the defendant's intention to enter a guilty plea''.

The Commentary to § 3E1.1 captioned ''Background'' is amended in the second sentence of the first paragraph by striking ''by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action)''; and in the second paragraph by striking ''has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b)'' and inserting ''timely notified authorities of the defendant's intention to enter a guilty plea''.

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SMALL BUSINESS ADMINISTRATION

Notice of Sale of Business and Disaster Assistance Loans

AGENCY: Small Business Administration.

ACTION: Notice of sale of business and disaster assistance loans—Loan Sale #5.

SUMMARY: This notice announces the Small Business Administration's (''SBA'') intention to sell approximately 30,000 secured and unsecured business and disaster assistance loans, (collectively referred to as the ''Loans''). The total unpaid principal balance of the Loans is approximately $620 million. This is the fifth sale of loans originated under the SBA's Business Loan Programs and the fourth sale of Disaster Assistance Loans (both business and consumer loans). SBA previously guaranteed some of the Loans under various sections of the Small Business Investment Act, as amended, 15 U.S.C. 695 et seq. Any SBA guarantees that might have existed at one time have been paid and no SBA guaranty is available to the successful bidders in this sale. The majority of the loans were originated by and are serviced by SBA. The collateral for the secured Loans includes commercial and residential real estate and other business and personal property located nationwide. This notice also summarizes the bidding process for the Loans.

DATES: The Bidder Information Package became available to qualified bidders on October 25, 2001. The Bid Date is scheduled for January 15, 2002, and closings are scheduled to occur between January 22, 2002 and February 15, 2002. These dates are subject to change at SBA's discretion.

ADDRESSES: Bidder Information Packages will be available from the SBA's Transaction Financial Advisor, KPMG Consulting, Inc. (''KPMG'') and its subcontractor, Hanover Capital Partners, Ltd. (''Hanover''). Bidder Information Packages will only be made available to parties that have submitted a completed Confidentiality Agreement and Bidder Qualification Statement and have demonstrated that they are qualified bidders. The Confidentiality Agreement and Bidders Qualification Statement are available on the SBA Web site at *http://www.sba.gov/assets/current__sale/sale5.html* or by calling the SBA Loan Sale #5 Center toll-free at Hanover at (888) 737–3840. The completed Confidentiality and Bidder Qualification Statement can be sent to the attention of Kathryn Merk, SBA Loan Sale #5, by either fax, at (732) 572–5959 or by mail, to Hanover Capital Partners, Ltd., 100 Metroplex Drive, Suite 301, Edison, NJ 08817.

The Due Diligence Facility opened October 29, 2001 and will close January 14, 2002. These dates are subject to change at SBA's discretion.

FOR FURTHER INFORMATION CONTACT: Margaret L. Hawley, Program Manager,