

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing 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 also provides multiple issues for comment, some of which are contained within proposed amendments.

The specific proposed amendments and issues for comment in this notice are as follows: (A) Proposed amendment to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), 2A2.4 (Obstructing or Impeding Officers), 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry), 2A6.1 (Threatening or Harrassing Communications; Hoaxes), 2B1.1 (Fraud, Theft, and Property Damage), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), 2B2.3 (Trespass), 2K1.4 (Arson; Property Damage by Use of Explosives), 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)), 2X5.2 (Class A Misdemeanor Offenses (Not Covered by a Specific Offense Guideline)), Appendix A, and issues for

comment regarding implementation of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177 (hereinafter the "PATRIOT Act") and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, as these laws pertain to transportation offenses; (B) proposed amendment to Chapter Two, Parts A and G, §§ 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct), 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email), 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information), 2J1.2 (Obstruction of Justice), 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), Appendix A, and issues for comment regarding implementation of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 (hereinafter the "Adam Walsh Act"); (C) proposed amendment to re-promulgate as a permanent amendment the temporary, emergency amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark), effective September 12, 2006 (see USSG Supplement to Appendix C (Amendment 682)), and issues for comment regarding implementation of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-181; (D) proposed amendment to Chapter Two, Parts D and X, §§ 2A1.1, 2A1.2, 2B1.1, 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes),

2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K1.4, 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations of For a Terrorist Purpose), 2M6.1, 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), 2X1.1, 2X2.1 (Aiding and Abetting), 2X3.1 (Accessory After the Fact), Appendix A, and issues for comment regarding implementation of the PATRIOT Act and the Department of Homeland Security Appropriations Act, 2007, Pub. L. 109-295, as these laws pertain to terrorism offenses and border protection; (E) proposed amendment to §§ 2D1.1, 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), Appendix A (Statutory Index), and issues for comment regarding implementation of the PATRIOT Act and the Adam Walsh Act as these laws pertain to drug offenses; (F) proposed amendment to §§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L1.2 (Unlawfully Entering or Remaining in the United States), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport); (G)(1) proposed amendment to § 2B2.3 (Trespass) to implement the Respect for America's Fallen Heroes Act, Pub. L. 109-228; (2) proposed amendment to § 2H3.1 to implement the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162; and (3) issue for comment regarding implementation of the SAFE Port Act, Pub. L. 109-347; (H) proposed amendment to (1) §§ 2B1.1, 2D1.11, 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and 2L1.1 to correct typographical errors; and (2) Chapter Three, Part D (Introductory Commentary) and § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to address cases involving multiple counts contained in multiple indictments; (I)

issue for comment regarding § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons); (J) issues for comment regarding application of certain criminal history rules under § 4A1.2 (Definitions and Instructions for Computing Criminal History); (K) issue for comment regarding implementation of section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476, which provides the Commission with emergency amendment authority to amend the guidelines applicable to persons convicted of an offense under 18 U.S.C. § 1039; and (L) issue for comment regarding federal cocaine sentencing policy.

DATES: (A) Proposed Amendments.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 30, 2007.

(B) Public Hearing.—The Commission will be scheduling a public hearing on its proposed amendments. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the date of the hearing, will be provided by the Commission on its Web site 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 Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, *Telephone:* (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. 994(p).

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

presented in the proposed amendments, the Commission requests comment regarding simplification of the guidelines. Specifically, with respect to the guidelines that are the subject of the following proposed amendments, should the Commission make additional amendments to simplify those guidelines and, if so, how?

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments 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).

The proposed amendments in this notice are presented 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 in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2] [4] [6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

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

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

Ricardo H. Hinojosa,
Chair.

1. Transportation

Synopsis of Proposed Amendment: This proposed amendment implements a number of provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 (hereinafter “PATRIOT Act”) and the Safe, Accountable, Flexible,

Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 (hereinafter “SAFETEA-LU”). The proposed amendments also provide a corresponding amendment to Appendix A (Statutory Index). Specifically:

(A) Section 110 of the PATRIOT Act strikes 18 U.S.C. §§ 1992 and 1993 and creates a new section 1992 (Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air). The legislation creates a statutory maximum term of imprisonment of 20 years and includes a penalty of imprisonment for any years or life or, if the offense resulted in the death of any person, the defendant may be sentenced to death. There are exceptions to the life and death sentences for cases of surveillance, conveying false information, or attempting, threatening, or conspiring to engage in any violation under this section. The statute also contains aggravated offenses. First, a sentence of life or death may be imposed when the offense involved railroad on-track equipment or a mass transportation vehicle carrying a passenger or employee, or carrying hazardous material, or both. Second, a life or death sentence may be given if the offense was committed with the intent to endanger the safety of any person, or with a reckless disregard for the safety of any person, when the railroad on-track equipment or mass transportation vehicle was carrying a defined hazardous material at the time of the offense.

The proposed amendment updates all references to 18 U.S.C. 1992 and eliminates all references to 18 U.S.C. 1993. The proposed amendment also adds 18 U.S.C. 1992 to the referenced statutory provisions in §§ 2A1.1 (First Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), and 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Additionally, the amendment adjusts the definition of “mass transportation” in §§ 2A1.4, 2A5.2, and 2K1.4 (Arson; Property Damage by Use of Explosives) to reflect the new defining section, 18 U.S.C. 1992(d)(7). Also proposed is the addition of “Navigation” to the title and text of § 2A5.2 to better reflect the full scope of the newly created 18 U.S.C. 1992.

(B) Section 302 of the PATRIOT Act increases the scope of 18 U.S.C. 1036 (Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport) by

adding to the areas protected from illegal entry under this title secure and restricted areas of a seaport. Section 302 also increases the statutory maximum penalty from five years to ten years.

The proposed amendment refers this offense to § 2B2.3(b)(1) and adds seaports to the list of protected areas warranting a two-level enhancement. The amendment also adds a definition for "seaport", as one does not currently exist in the guidelines.

(C) Section 303 of the PATRIOT Act adds a new offense at 18 U.S.C. 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information). This new statute makes it a crime to refuse to stop a vessel in violation of a federal law enforcement officer's order or to provide materially false information to a federal law enforcement officer during a boarding of a vessel.

The proposed amendment references this new offense to §§ 2A2.4 (Obstructing or Impeding Officers) and 2B1.1 (Fraud, Theft, and Property Damage).

(D) Section 306 of the PATRIOT Act provides new offenses in 18 U.S.C. 2291 (Destruction of vessel or maritime facility) and 2292 (Imparting or conveying false information). Section 2291 of title 18, United States Code, covers the destruction of vessels and maritime facilities and creates a statutory maximum term of imprisonment of 20 years. If the conduct under this section involves a vessel carrying nuclear or radioactive waste, a statutory maximum life sentence applies, and if death results, a life or death sentence is possible. Section 2292 of title 18, United States Code, prohibits providing false information regarding an attempt or alleged attempt to commit a crime and provides a statutory maximum sentence of five years.

The proposed amendment references 18 U.S.C. 2291 to 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), 2A6.1 (Threatening or Harrassing Communications; Hoaxes), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). Section 2292 of title 18, United States Code, is referenced to § 2A6.1.

(E) Section 307(c) of the PATRIOT Act directs the Commission to review the guidelines to determine whether a

sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18, United States Code.

The proposed amendment provides two options to respond to this directive. Option 1 amends § 2B1.1(b)(4) to provide an alternative enhancement if the defendant was convicted under 18 U.S.C. 659. An issue for comment also requests input regarding whether any such enhancement should include convictions under 18 U.S.C. 2312 and 2313. Option 2 responds to the directive by revising § 2B1.1(b)(11). Currently this section provides a minimum offense level of 14 for offenses involving an organized scheme to steal vehicles or vehicle parts. The proposed amendment adds convictions under 18 U.S.C. 659 to this section and also provides a two-level increase for all cases covered under the subsection.

(F) Section 308 of the PATRIOT Act increases the statutory maximum penalties for 18 U.S.C. 2199 (Stowaways on vessels or aircraft). Absent any aggravating factors, the statutory maximum for offenses is increased from one year to five years. Section 308 adds a statutory maximum of 20 years if a person acts with the intent to commit serious bodily injury and serious bodily injury occurs. For offenses involving the intent to kill and death occurs, section 308 also adds a penalty of imprisonment for any term of years, including life or death.

The proposed amendment references 18 U.S.C. 2199 to 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A2.3 (Minor Assault).

(G) Section 4210 of SAFETEA-LU creates a new offense at 49 U.S.C. 14915 for failure to release household goods with a statutory maximum of two years.

The proposed amendment references this section to § 2B1.1 as it is the most analogous guideline.

(H) Section 4102(b) of SAFETEA-LU creates a new criminal violation for violating a commercial motor vehicle's out-of-service order. The offense carries a statutory maximum of one year.

The proposed amendment references this section to § 2X5.2 (Class A Misdemeanor (Not Covered by Another Specific Offense Guideline)).

The proposed amendment also includes five issues for comment pertaining to the following:

(1) Section 7121 of SAFETEA-LU creates a new aggravated felony under 49 U.S.C. 5124 that carries a statutory maximum of 10 years when conduct

under the section results in the release of a hazardous material that causes bodily injury or death. Appendix A (Statutory Index) currently references 49 U.S.C. 5124 to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). An issue for comment asks whether penalties under § 2Q1.2 are adequate for the new offense.

(2) The proposed amendment adds seaports to the two-level enhancement in § 2B2.3(b)(1). Section 2B2.3(c) also provides a cross reference if the offense was committed with the intent to commit another criminal offense. An issue for comment asks whether, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, it should amend § 2B2.3 (Trespass) to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit another offense.

(3) Section 309 of the PATRIOT Act creates a new offense at 18 U.S.C. 226 (Bribery affecting port security), making it a crime to knowingly, and with the intent to commit international or domestic terrorism, bribe a public official to affect port security. It is also a crime under this section to be the recipient of such a bribe in return for being influenced in the performance of public duties affecting port security with the knowledge that such influence will be used to commit or plan to commit an act of terrorism.

The proposed amendment references 18 U.S.C. 226 to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Official; Conspiracy to Defraud by Interference with Governmental Functions).

An issue for comment addresses this proposed reference to § 2C1.1 as well as the operation of the cross reference in § 2C1.1(c)(1) in cases involving an intent to commit an act of international or domestic terrorism.

(4) Whether the Commission should use the term "mass transportation" or "public transportation" in the context of § 2A5.2 and other guidelines.

(5) The proposed amendment provides options for increasing penalties for offenses under 18 U.S.C. 659. An issue for comment asks whether the Commission also should provide similar increases for offenses under 18 U.S.C. 2312 (Transportation of stolen vehicles) and 2313 (Sale or receipt of stolen vehicles).

Proposed Amendment

The Commentary to § 2A1.1 captioned “Statutory Provisions” is amended by inserting “1992(a)(7),” after “1841(a)(2)(C),”; and by inserting “2199, 2291,” after “2118(c)(2).”.

The Commentary to § 2A1.2 captioned “Statutory Provisions” is amended by inserting “2199, 2291,” after “1841(a)(2)(C),”.

The Commentary to § 2A1.3 captioned “Statutory Provisions” is amended by inserting “2199, 2291,” after “1841(a)(2)(C),”.

The Commentary to § 2A1.4 captioned “Statutory Provisions” is amended by inserting “2199, 2291,” after “1841(a)(2)(C),”.

The Commentary to § 2A1.4 captioned “Application Note” is amended in Note 1 by striking “18 U.S.C. 1993(c)(5)” and inserting “18 U.S.C. 1992(d)(7)”.

The Commentary to § 2A2.1 captioned “Statutory Provisions” is amended by striking “1993(a)(6)” and inserting “1992(a)(7), 2199, 2291”.

The Commentary to § 2A2.2 captioned “Statutory Provisions” is amended by striking “1993(a)(6)” and inserting “1992(a)(7), 2199, 2291”.

The Commentary to § 2A2.3 captioned “Statutory Provisions” is amended by inserting “, 2199, 2291” after “1751(e)”.

The Commentary to § 2A2.4 captioned “Statutory Provisions” is amended by inserting “2237(a)(1), (a)(2)(A),” after “1502,”.

Section 2A5.2 is amended in the heading by inserting “Navigation,” after “Dispatch,”; and by striking “or Ferry”.

Sections 2A5.2(a)(1) and (a)(2) are amended by striking the comma after “facility” each place it appears and inserting “or”; and by striking “, or a ferry” each place it appears.

The Commentary to § 2A5.2 captioned “Statutory Provisions” is amended by striking “1993(a)(4), (5), (6), (b);” and inserting “1992(a)(1), (a)(4), (a)(5), (a)(6);”.

The Commentary to § 2A5.2 captioned “Application Note” is amended in Note 1 in the last paragraph by striking “18 U.S.C. 1993(c)(5)” and inserting “18 U.S.C. 1992(d)(7)”.

The Commentary to § 2A6.1 captioned “Statutory Provisions” is amended by striking “1993(a)(7), (8),” and inserting “1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292,”.

[Option 1 (Section 659 offenses)

Section 2B1.1 is amended in subsection (b)(4) by inserting “(A)” before “offense involved”; and by striking “property, increase” and inserting “; or (B) defendant was convicted under 18 U.S.C. § increase”.]

The Commentary to § 2B1.1 captioned “Application Notes” is amended in

Note 5 by inserting “(A)” after “(b)(4)” each place it appears.]

[Option 2 (Section 659 offenses)
Section 2B1.1 is amended in subsection (b)(11) by inserting “(A)” before “offense involved”; and by striking “, and” and inserting “; or (B) defendant was convicted under 18 U.S.C. 659, increase by 2 levels. If”.]

The Commentary to § 2B1.1 captioned “Statutory Provisions” is amended by inserting “(a)(1), (a)(5)” after “1992”; by striking “1993(a)(1), (a)(4),”; by inserting “2291,” after “2113(b),”; and by inserting “14915,” after “49 U.S.C. §§”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended by striking Note 10 and inserting the following:

“10. Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or ‘chop shop’) to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. This subsection also applies if the defendant was convicted of cargo theft under 18 U.S.C. 659. For purposes of this subsection, ‘vehicle’ means motor vehicle, vessel, or aircraft.”

The Commentary to § 2B1.1 captioned “Background” is amended in the paragraph that begins “A minimum offense level of level 14” by striking “Therefore, the” and inserting “The”; by inserting “in subsection (b)(11)(A)” after “is used”; and by adding at the end the following:

“The minimum offense level also applies to convictions under 18 U.S.C. 659 for offenses involving cargo theft. Subsection (b)(11)(B) implements the directive in section 307 of Public Law 109–177.”.]

Section 2B2.3 is amended in subsection (b)(1) by striking “secured” each place it appears and inserting “secure”; by redesignating subdivisions (E) and (F) as subdivisions (F) and (G), respectively; and by inserting the following after “airport;”:

“(E) in a secure area within a seaport;”.

The Commentary to § 2B2.3 captioned “Statutory Provisions” is amended by inserting “, 2199” after “1036”.

The Commentary to § 2B2.3 captioned “Application Notes” is amended in Note 1 by adding at the end the following:

“‘Seaport’ has the meaning given that term in 18 U.S.C. 26.”.

The Commentary to § 2B2.3 captioned “Background” is amended by striking “, such as nuclear facilities,” and inserting “(such as nuclear facilities) and other

locations (such as airports and seaports)”.

The Commentary to § 2C1.1 captioned “Statutory Provisions” is amended by inserting “226,” after “§§ 201(b)(1), (2),”.

The Commentary to § 2K1.4 captioned “Statutory Provisions” is amended by inserting “(a)(1), (a)(2), (a)(4)” after “1992”; by striking “1993(a)(1), (a)(2), (a)(3), (b),”; and by inserting “2291,” after “2275”.

The Commentary to § 2K1.4 captioned “Application Notes” is amended in Note 1 by striking “18 U.S.C. 1993(c)(5)” and inserting “18 U.S.C. 1992(d)(7)”.

The Commentary to § 2M6.1 captioned “Statutory Provisions” is amended by striking “1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D))” and inserting “1992(a)(2), (a)(3), (a)(4), (b)(2), 2291,”.

The Commentary to § 2Q1.1 captioned “Statutory Provisions” is amended by inserting “18 U.S.C. 1992(b)(3);” before “33 U.S.C. 1319(c)(3);”.

Section 2X1.1 is amended in subsection (d)(1)(A) by inserting “(a)(1)–(a)(7), (a)(9), (a)(10)” after “1992;”; and in subsection (d)(1)(B) by inserting “and” after “§ 32;”; and by striking “18 U.S.C. 1993; and”.

The Commentary to § 2X5.2 captioned “Statutory Provisions” is amended by inserting “; 49 U.S.C. 31310” after “14133”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 225 the following:

“18 U.S.C. 226 2C1.1”; by inserting after the line referenced to 18 U.S.C. 1035 the following:

“18 U.S.C. 1036 2B2.3”; by striking the line referenced to 18 U.S.C. 1992 through the end of the line referenced to 18 U.S.C. 1993(b) and inserting the following:

“18 U.S.C. 1992(a)(1)—2A5.2, 2B1.1, 2K1.4, 2X1.1

18 U.S.C. 1992(a)(2)—2K1.4, 2M6.1, 2X1.1

18 U.S.C. 1992(a)(3)—2M6.1, 2X1.1

18 U.S.C. 1992(a)(4)—2A5.2, 2K1.4, 2M6.1, 2X1.1

18 U.S.C. 1992(a)(5)—2A5.2, 2B1.1, 2X1.1

18 U.S.C. 1992(a)(6)—2A5.2, 2X1.1

18 U.S.C. 1992(a)(7)—2A1.1, 2A2.1, 2A2.2, 2X1.1

18 U.S.C. 1992(a)(8)—2X1.1

18 U.S.C. 1992(a)(9)—2A6.1, 2X1.1

18 U.S.C. 1992(a)(10)—2A6.1, 2X1.1”; in the line referenced to 18 U.S.C. 2199 by inserting “2A1.1, 2A1.2, 2A1.3,

2A1.4, 2A2.1, 2A2.2, 2A2.3,” before “2B1.1”; by inserting after the line referenced to 18 U.S.C. 2233 the following:

“18 U.S.C. 2237(a)(1), (a)(2)(A)—2A2.4 18 U.S.C. 2237(a)(2)(B)—2B1.1”;

by inserting after the line referenced to 18 U.S.C. § 2281 the following:

“18 U.S.C. 2291—2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2K1.4, 2M6.1 18 U.S.C. 2292—2A6.1”;

by inserting after the line referenced to 49 U.S.C. 14912” the following:

“49 U.S.C. 14915—2B1.1”;

by inserting after the line referenced to 49 U.S.C. 30170” the following:

“49 U.S.C. 31310—2X5.2”.

Issues for Comment

1. The SAFETEA—LU Act, Pub. L. 109–59, amended 49 U.S.C. 5124 to provide a new aggravated felony, with a 10-year statutory maximum term of imprisonment, for cases involving a release of a hazardous material that results in death or bodily injury. Appendix A (Statutory Index) references 49 U.S.C. § 5124 to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). In 2004 the Commission amended § 2Q1.2 to provide a two-level enhancement in § 2Q1.2(b)(7) for defendants convicted of 49 U.S.C. 5124 or 46312 because “[t]hese offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline. See USSG App. C (Amendment 672) (effective Nov. 1, 2004). In addition to application of § 2Q1.2(b)(7), a defendant convicted of 49 U.S.C. 5124 likely would receive a four-level enhancement under § 2Q1.2(b)(1)(B) for a release of a hazardous substance (because the offense of conviction necessarily involves such a release) and a nine-level enhancement for the substantial likelihood of death or serious bodily injury under § 2Q1.2(b)(2). When added to the Base Offense Level of 8, the minimum offense level under § 2Q1.2 would be level 23 (46–57 months at CHC I). Further, Application Note 6 states that an upward departure would be warranted in any case in which death or serious bodily injury results. The Commission requests comment regarding whether § 2Q1.2 currently provides adequate penalties for a defendant convicted under 49 U.S.C. 5124. If not, how should the

Commission amend § 2Q1.2 to address adequately these offenses? For example, should the Commission provide an enhancement greater than two levels for such offenses? Should the Commission provide a minimum offense level for 49 U.S.C. 5124 offenses that actually result in death or serious bodily injury?

2. The USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109–177, amended 18 U.S.C. 1036 to add seaports to the list of covered locations and to increase the statutory maximum term of imprisonment from 5 years to 10 years. The proposed amendment adds seaports to the two-level enhancement in § 2B2.3(b)(1). Section 2B2.3 (Trespass) also provides a cross reference in subsection (c) if the offense was committed with the intent to commit a felony offense. The Commission requests comment regarding whether, as an alternative to the cross reference provision, and as a possible means of simplifying this guideline, it should amend § 2B2.3 to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit a felony. If so, how many levels would be appropriate? Should the Commission consider amending § 2B2.3(b)(1) to provide an additional increase if the trespass on any of the enumerated locations was committed with the intent to commit a felony offense?

3. The USA PATRIOT Improvement and Reauthorization Act provided a new offense at 18 U.S.C. 226 for bribery affecting port security. The provision criminalizes bribery with the intent to commit international terrorism or domestic terrorism and provides a statutory maximum term of imprisonment of 15 years. In general, the guidelines reference bribery offenses to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), which provides alternative base offense levels of 14, if the defendant was public official, or 12, otherwise. Section 2C1.1(c)(1) provides a cross reference if the offense was committed for the purpose of facilitating the commission of another criminal offense (and the guideline applicable to a conspiracy to commit that other offense results in a greater offense level than § 2C1.1). The Commission requests comment regarding whether it should reference 18 U.S.C. § 226 to § 2C1.1 and, if so, whether the cross reference provision is a sufficient means of handling bribery

cases involving an intent to commit an act of international or domestic terrorism. If the offense is referenced to § 2C1.1, should the Commission, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, provide a specific offense characteristic for convictions of 18 U.S.C. 226 that results in an offense level proportionate to other terrorism-related offenses (e.g., providing a minimum offense level of 26 would provide parity with offenses sentenced under § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or for a Terrorist Purpose)). Alternatively, should the Commission reference 18 U.S.C. 226 to 2M5.3?

4. In addition to consolidating 18 U.S.C. 1992 and 1993, the USA PATRIOT Improvement and Reauthorization Act replaced the term “public transportation” (added by the SAFETEA—LU Act) with “mass transportation” (the term used in 18 U.S.C. 1992 prior to SAFETEA—LU). “Mass transportation” now is defined at 18 U.S.C. 1992(d)(7) to have the same meaning as “public transportation” (defined at 49 U.S.C. 5302(a)(7)) except that, for purposes of 18 U.S.C. 1992, “mass transportation” includes school bus, charter, sightseeing transportation, and passenger vessel. School bus and charter are otherwise expressly excluded from the definition of “public transportation” as are intercity bus transportation and intercity passenger rail transportation. The Commission requests comment regarding the appropriate term to use in the context of § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Specifically, should the Commission use “mass transportation” as that term is now defined by 18 U.S.C. 1992(d)(7) (i.e., including school bus, charter, sightseeing transportation and passenger vessel) or use the more limited term “public transportation” (i.e., excluding school bus, charter, intercity bus transportation, and intercity passenger rail transportation)?

5. The proposed amendment provides 2 options for amending § 2B1.1 to address 18 U.S.C. 659 (Cargo theft). The Commission requests comment regarding whether, rather than an enhancement based on the statute of conviction, it ought to provide an enhancement based on real offense conduct such as if the offense involved cargo theft. The Commission also requests comment regarding whether it

should provide an enhancement for conduct covered by convictions under 18 U.S.C. 2312 (Transportation of stolen vehicles) and 2313 (Sale or receipt of stolen vehicles), either as part of the proposed enhancement for 18 U.S.C. 659 offenses or as a separate enhancement.

2. Sex Offenses

Synopsis of Proposed Amendment: This multi-part proposed amendment implements the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248. Part I of this proposed amendment implements the directive in section 141 of the Act pertaining to the new offense in 18 U.S.C. 2250 for failure to register as a sex offender. The directive instructs the Commission, in promulgating guidelines for use of a sentencing court in determining the sentence to be imposed for [18 U.S.C. 2250], to consider the following matters:

(1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register.

(2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register.

(3) Whether the person voluntarily attempted to correct the failure to register.

(4) The seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in section 111 [of the Act].

(5) Whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.

Section 2250 of title 18, United States Code, provides a statutory maximum term of imprisonment of ten years for the failure to register. There is an additional mandatory consecutive term of 5 years' imprisonment applicable if a person commits a crime of violence while in failure to register status (18 U.S.C. 2250(c)). The requirements pertaining to who must register, where the registration must occur, and for how long are set forth in 42 U.S.C. 16911.

The proposed amendment provides a new guideline in § 2A3.5 (Failure to Register as a Sex Offender). The proposed amendment presents two options for addressing the fourth matter of the directive. Option One provides multiple base offense levels based on the category of offense that gave rise to the registration requirement: level 16 if the offense that gave rise to the requirement to register was a Tier III

offense; level 14 if the offense that gave rise to the requirement to register was a Tier II offense; and level 12 if the offense that gave rise to the requirement to register was a Tier I offense. Option Two provides a base offense level of [12] and a specific offense characteristic in § 2A3.5(b)(1) providing a two-level increase if the offense that gave rise to the requirement to register was a Tier II offense and a four-level increase if the offense that gave rise to the requirement to register was a Tier III offense. The resulting offense level under either option is the same for each tier of offense. The definitions for Tier I, II, and III offenses are the statutory definitions provided in 42 U.S.C. 16911(2), (3), and (4), respectively.

The first and second matters are addressed in § 2A3.5(b)(1) of Option One, and in § 2A3.5(b)(2) of Option Two. Both options provide alternative increases based on the type of offense committed while in a failure to register status and on whether that offense was committed against a minor or an adult. The proposed amendment provides a 6-level increase if, while in a failure to register status, the defendant committed a sex offense against an adult, or kidnapped or falsely imprisoned a minor. If the defendant committed a sex offense against a minor, the proposed amendment provides an 8-level increase and a minimum offense level of [24]–[28].

The third matter is addressed in § 2A3.5(b)(2) in Option One, and in § 2A3.5(b)(3) in Option Two. Both options provide a [2][4]-level decrease if the defendant voluntarily attempted to correct the failure to register.

Issues for comment #2 and #3 in Part V of the proposed amendment request comment regarding the scope of these proposed enhancements. Issue for comment #3 also asks whether the Commission should include an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.

The proposed amendment does not specifically address the fifth matter because application of Chapter Four will take into account whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.

The proposed amendment also provides another new guideline for certain aggravated offenses related to the requirement to register as a sex offender. As noted previously, 18 U.S.C. 2250(c) provides a mandatory consecutive term of 5 years if a crime of violence was committed while the defendant was in a failure to register status. Section

2260A of title 18, United States Code, provides a mandatory consecutive term of 10 years' imprisonment if a person who is required to register commits an enumerated offense (including kidnapping, human trafficking, and various sex offenses). The new guideline, § 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), will apply to convictions under 18 U.S.C. 2250(c) or 2260A, and instructs the court that the guideline sentence for any such conviction is the term of imprisonment required by statute. Neither Chapters Three nor Four will apply to any count of conviction covered by this guideline. This approach is the same approach the Commission has taken with other statutes that provide mandatory consecutive terms of imprisonment, namely 18 U.S.C. 1028A (see § 2B1.6 (Aggravated Identity Theft) and 18 U.S.C. 924(c) (See § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes)).

Part II implements other new offenses and increased penalties as follows:

(A) The Act provides a mandatory minimum term of imprisonment of 30 years for convictions under 18 U.S.C. 2241(c) (Aggravated sexual abuse with children). This statute covers crossing state lines to engage in the sexual abuse of a child under the age of 12 years. It also covers engaging in a sexual act under the circumstances described in 18 U.S.C. 2241(a) and (b) (force, threat, or other means) with a child who is between the ages of 12 years and 16 years and is at least four years younger than the person who is engaging in the sexual act. The proposed amendment provides a base offense level of [40] in § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the defendant was convicted under 18 U.S.C. 2241(c). The specific offense characteristic for the age of the victim, subsection (b)(2), would not apply because the higher base offense level takes into account the age of the victim. There also is an application note that instructs the court not to apply the enhancement in § 2A3.1(b)(1) (four-level enhancement if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)) if the basis for the conviction under 18 U.S.C. 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. 2241(a) or (b).

(B) The Act increased the statutory maximum term of imprisonment for convictions under 18 U.S.C. 2243(b) for sexual abuse of a ward from five years to 15 years. The proposed amendment proposes to increase the base offense level in § 2A3.3 (Criminal Sexual Abuse

of a Ward or Attempt to Commit Such Acts) to level [14][16][18][20].

(C) The Act created a new offense in 18 U.S.C. 2244(a)(5) for sexual contact offenses that would have violated 18 U.S.C. 2241(c) had the sexual contact been a sexual act. (Section 2241(c) covers sexual acts with a child under 12 years old or sexual acts involving conduct described in 18 U.S.C. 2241(a) or (b) with a child between the ages of 12 and 16 and who is at least four years younger than the defendant.) The offense has a statutory maximum term of imprisonment of life.

The proposed amendment addresses this new offense by increasing the minimum offense level in the age enhancement in subsection § 2A3.4(b)(1) from level 20 to level 22.

Issue for Comment #4 in Part V of the proposed amendment addresses whether § 2A3.4 already adequately accounts for the new offense and therefore does not need to be amended.

(D) The Act amended 18 U.S.C. 1591 (sex trafficking of children or by force, fraud, or coercion) to provide a mandatory minimum term of imprisonment of 15 years if the sex trafficking offense involved a minor who had not attained the age of 14 years or involved force, fraud, or coercion (subsection 1591(b)(1)) and a mandatory minimum of 10 years if the offense involved a minor who had attained the age of 14 years but had not attained the age of 18 years (subsection 1591(b)(2)). The Act also increased the statutory maximum term of imprisonment from 40 years to life for 18 U.S.C. 1591(b)(2) offenses.

To address the increased statutory minimums, the proposed amendment modifies the base offense levels in §§ 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct).

With respect to offenses involving force, fraud, or coercion, the proposed amendment would create a heightened base offense level of [34][36] in § 2G1.1 if the offense of conviction is 18 U.S.C. 1591 and the offense involved conduct described in subsection (b)(1) of that statute. An alternative base offense level of 14 would apply in all other cases. The proposed amendment also excludes application of the enhancement in § 2G1.1(b)(1) to cases that are sentenced under § 2G1.1(a)(1) because cases to which that base offense level apply necessarily involve fraud or coercion.

With respect to offenses involving minors, the proposed amendment would create alternative base offense levels in § 2G1.3 based on the statute of conviction and the conduct described in that conviction. For convictions under 18 U.S.C. 1591 in which the offense involved conduct described in subsection (b)(1) of that statute (*i.e.*, offense was effected by force, fraud, or coercion, or involved a minor who had not attained the age of 14 years), the proposed base offense level is [34][36]. For convictions under 18 U.S.C. 1591 in which the offense involved conduct described in subsection (b)(2) of that statute (*i.e.*, offense involved a minor who had attained the age of 14 but had not attained the age of 18 years), the proposed base offense level is [30][32].

The Act also increased the penalties for 18 U.S.C. 2422(b) (Coercion and enticement [of a minor to engage in criminal sexual activity]) and 2423(a) (Transportation [of a minor] with intent to engage in criminal sexual activity). Both statutes now have a mandatory minimum term of 10 years (increased from 5 years) and a statutory maximum term of imprisonment of life (increased from 30 years). The proposed amendment would add § 2G1.3(a)(3) with a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. 2422(b) or 2423(a). If the Commission decides that the base offense level should be the same for offenses under 18 U.S.C. 1591(b)(2), 2422(b), and 2423(a), then the Team would modify the proposed amendment to consolidate these offenses into one base offense level.

The proposed amendment also provides a range of [4]–[8] at § 2G1.3(b)(5). It also addresses the interaction of subsection (b)(5), which provides an 8-level increase if the offense involved a minor who had not attained the age of 12 years, and the proposed addition of alternative base offense levels. Now that age is a factor the court considers in determining the appropriate base offense level for convictions under 18 U.S.C. 1591, the proposed amendment provides a new application note that instructs the court not to apply subsection (b)(5) if subsection (a)(1) applies. The proposed amendment also provides an option for modifying the enhancement.

Issue for comment #8 asks whether the Commission should consider providing an increase of four or six levels, instead of eight levels, at § 2G1.3(b)(5) in any case in which the age of the minor victim is taken into account by base offense level.

(E) The Act created a new offense in 18 U.S.C. 2257A that imposes

recordkeeping requirements on individuals who produce depictions of simulated sexually explicit conduct. Failure to comply with the recordkeeping requirements carries a statutory maximum term of imprisonment of 1 year. If the offense was intended to conceal a child pornography offense, the statute provides a statutory maximum term of imprisonment of 5 years for the first offense; for the second offense, the penalty is a 2-year mandatory minimum and a statutory maximum of 10 years.

The proposed amendment references this new offense to § 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email). Issue for Comment #5 in Part V of the proposed amendment requests comment regarding the refusal to allow inspection of records in violation of 18 U.S.C. 2257(f)(5) or 2257A.

(F) The Act created a new offense in 18 U.S.C. 2252A(g) that prohibits engaging in child exploitation enterprises, defined in the statute as violating 18 U.S.C. § 1591, 1201 (if the victim is a minor), Chapter 109A (involving a minor), Chapter 110 (except for 18 U.S.C. 2257 and 2257A), or Chapter 117 (involving a minor), as part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and committing those offenses in concert with three or more other people. The statute provides a mandatory minimum term of imprisonment of 20 years.

The proposed amendment creates a new guideline, § 2G2.6 (Child Exploitation Enterprises), to cover this new offense. The guideline provides a base offense level of [34][35][36][37] and three specific offense characteristics, based on the age of the victim (subsection (b)(1)), whether the defendant was the parent or had some other custodial care of the victim (subsection (b)(2)), and whether the offense involved conduct described in 18 U.S.C. 2241(a) or (b) (subsection (b)(3)).

Issue for Comment #6 requests comment regarding the base offense level, the scope of the proposed specific offense characteristics, and whether the Commission should consider other conduct for purposes of providing additional specific offense characteristics.

(G) The Act created a new offense in 18 U.S.C. 2252C that prohibits knowingly embedding words or images into the source code of a Web site with the intent to deceive a person into

viewing obscenity, or to deceive a minor into viewing material harmful to minors. The statute carries a statutory maximum term of imprisonment of 20 years if the offense involved a minor, or a maximum of 10 years, otherwise. Application Note 2 proposes that the specific offense characteristic at § 2G3.1(b)(3) not apply for offenses under 18 U.S.C. 2252C.

The proposed amendment modifies subsection (b)(2) of § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which currently provides a two-level enhancement if the offense involved misleading domain names. The proposed amendment adds to this enhancement embedding words or digital images on a Web site and also presents the option of providing a four-level increase for this enhancement.

Issue for Comment #7 requests comment regarding whether the Commission should provide an enhancement if the defendant intended to deceive someone other than a minor into viewing obscenity.

Part III addresses other criminal provisions contained in the Act as follows:

(A) The Act created a new Class A misdemeanor in 42 U.S.C. 16984 prohibiting the use of a child's fingerprints that were derived from a program funded by federal grants to support voluntary fingerprinting of children for any purpose other than providing the fingerprints to the child's parents or guardian. The proposed amendment references this new offense to § 2H3.1.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and provides a base offense level of 6 for the offense. The heading of the guideline also is amended to cover personal information of this sort.

The Act also created 42 U.S.C. 16962 prohibiting the improper release of information obtained in fingerprint-based checks for the background check of foster or adoptive parents or of a person employed by, or considering employment with, a private or public educational agency. The statute provides a statutory maximum term of imprisonment of 10 years. The proposed amendment references this offense to § 2H3.1 and such offenses will receive a base offense level of 9 under § 2H3.1(a)(1).

(B) The Act amended 18 U.S.C. 1001 to provide an enhanced penalty of up to 8 years if the matter relates to an offense under 18 U.S.C. 1591 or Chapters 109A, 110, or 117 of title 18, United States Code. The proposed amendment adds a

[2]–[12] level enhancement in subsection (b)(1)(C) of § 2J1.2 (Obstruction of Justice) to cover such conduct.

(C) The Act added 18 U.S.C. 1591 to the list in 18 U.S.C. 3559(e)(2) of repeated sex offenses committed against children that require a mandatory life imprisonment. The proposed amendment adds 18 U.S.C. 1591 to the list of covered sex offenses in Application Note 2 of § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

Part IV addresses the probation and supervised release aspects of the Act. First, the proposed amendment updates subsection (a)(9) of § 5B1.3 (Conditions of Probation) and subsection (a)(7) of § 5D1.3 to include compliance with SORNA as one of the mandatory conditions. Second, it adds to the list of "special conditions" in §§ 5B1.3(d) and 5D1.3(d) a condition requiring a sex offender to submit to a search, as added to 18 U.S.C. 3563(b) and 3583(d) by the Act. Third, the proposed amendment modifies § 5D1.2 (Term of Supervised Release) to add Chapter 109B and 18 U.S.C. 1201 and 1591 to the definition of sex offense in Application Note 1 of that guideline.

Part V sets forth all of the issues for comment. In addition to the specific issues noted in this synopsis, Issue for Comment #1 requests input regarding how the Commission should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Act and discusses four approaches for incorporating these penalties.

Proposed Amendment

Part I—Implementing Directive Regarding 18 U.S.C. § 2250 Offenses

Chapter Two, Part A, Subpart 3 is amended in the heading by adding at the end "AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER"; and by adding at the end the following new guidelines and accompanying commentary:

"§ 2A3.5. Failure to Register as a Sex Offender

Option 1:

[(a) Base Offense Level:

(1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;

(2) 14, if the offense that gave rise to the requirement to register was a Tier II offense; or

(3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics:

(1) If, while in a failure to register status, the defendant (A)(i) committed a sex offense against someone other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by 6 levels; or (B) committed a sex offense against a minor, increase by 8 levels. If the offense level resulting from application of subdivision (B) is less than level [24]–[28], increase to level [24]–[28].

(2) If the defendant voluntarily attempted to correct the failure to register, decrease by [2][4] levels.]

Option 2:

[(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.

(2) If, while in a failure to register status, the defendant (A)(i) committed a sex offense against a person other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by 6 levels; or (B) committed a sex offense against a minor, increase by 8 levels. If the offense level resulting from application of subdivision (B) is less than level [24]–[28], increase to level [24]–[28].

(3) If the defendant voluntarily attempted to correct the failure to register, decrease by [2][4] levels.]

Commentary

Statutory Provision: 18 U.S.C. 2250(a).
Application Note:

1. Definitions.—For purposes of this guideline:

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

'Sex offense' has the meaning given that term in 42 U.S.C. § 16911(5), except that kidnapping and false imprisonment are not included.

['Tier I offense', 'tier II offense', and 'tier III offense' have the meaning given those terms in 42 U.S.C. § 16911[(2)], (3) and (4), respectively.

§ 2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

(a) If the defendant was convicted under 18 U.S.C. 2250(c) or § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four

(Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. 2250(c), 2260A.

Application Notes:

1. In General.—Sections 2250(c) and 2260A of title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to other offenses. Accordingly, the guideline sentence for a defendant convicted under either statute is the term required by the statute.

2. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction)."

Part II—Implementing New Sex Offenses and Increased Penalties

(A) New Mandatory Minimum for 18 U.S.C. 2241(c):

Section 2A3.1(a) is amended by striking "30" and inserting the following:

"(1) 40, if the defendant was convicted under 18 U.S.C. 2241(c); or (2) 30, otherwise."

Section 2A3.1(b)(2) is amended by striking "(A) If" and inserting "If subsection (a)(2) applies and (A)"; and by striking "if" after "(B)".

The Commentary to § 2A3.1 captioned "Application Notes" is amended in Note 2 by inserting "A. Definitions.—" before "For purposes of subsection (b)(1),"; and by adding at the end the following paragraph:

"B. Application in Cases Involving a Conviction under 18 U.S.C. 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1)."

The Commentary to § 2A3.1 captioned "Background" is amended in the first paragraph in the third sentence by inserting "in subsection (a)(2)" after "offense level"; and in the second paragraph in the second sentence by inserting ", except when subsection (b)(2) applies" after "twelve years of age".

(B) Increased Statutory Maximum for 18 U.S.C. § 2423(b):

Section 2A3.3(a) is amended by striking "12" inserting "[12][14][16][18][20]".

The Commentary to § 2A3.3 captioned "Application Notes" is amended in Note 1 by striking "Minor" through the end of that sentence and inserting the following:

"Minor" means (A) an individual who had not attained the age of 18; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years."

The Commentary to § 2A3.3 is amended by striking the Background.

(C) New Offense in 18 U.S.C. § 2244(a)(5):

Section 2A3.4(b)(1) is amended by striking "20" each place it appears and inserting "22".

The Commentary to § 2A3.4 captioned "Statutory Provisions" is amended by striking "(a)(1), (2), (3)".

(D) Increased Penalties (statutory minimum and maximum) for 18 U.S.C. § 1591 Section 2G1.1(a) is amended by striking "14" and inserting the following:

"(1) [34][36], if the offense of conviction is 18 U.S.C. 1591 and the offense involved conduct described in subsection (b)(1) of that statute; or (2) 14, otherwise."

Section 2G1.1(b)(1) is amended by inserting "subsection (a)(2) applies and" after "If".

The Commentary to § 2G1.1 captioned "Application Notes" is amended in Note 2 by adding at the end the following:

"Do not apply this enhancement if the base offense level is determined under subsection (a)(1) because subsection (a)(1) necessarily involves fraud or coercion."

Section 2G1.3(a) is amended by striking "24" and inserting:

"(1) [34][36], if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute;

(2) [30][32], if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(2) of that statute;

(3) [28][30], if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or

(4) 24, otherwise."

Section 2G1.3 is amended in subsection (b)(5) by striking "8" and inserting "[4][6][8]".

The Commentary to § 2G1.3 captioned "Statutory Provisions" is amended by striking "2422(b)".

The Commentary to § 2G1.3 captioned "Application Notes" is amended by redesignating Notes 5 through 7 as Notes 6 through 8, respectively, and inserting the following after Note 4:

"5. Interaction of Subsections (a)(1) and (b)(5).—If subsection (a)(1) applies, do not apply subsection (b)(5)."

(E) New Recordkeeping Offense in 18 U.S.C. § 2257A:

The Commentary to § 2G2.5 captioned "Statutory Provisions" is amended by inserting "\$" before "2257"; and by inserting ", 2257A" after "2257".

(F) New Offense in § 2252A(g) for Child Exploitation Enterprise Chapter Two, Part G, Subpart Two is amended by adding at the end the following new guideline and accompanying commentary:

"§ 2G2.6. Child Exploitation Enterprises

(a) Base Offense Level:
[34][35][36][37]

(b) Specific Offense Characteristics
(1) If a victim (A) had not attained the age of 12 years, increase by 4 levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by 2 levels.

(2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(3) If the offense involved conduct described in 18 U.S.C. 2241(a) or (b), increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. 2252A(g).

Application Notes:

1. Application of Subsection (b)(2).—(A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

2. Application of Subsection (b)(3).—For purposes of subsection (b)(3), ‘conduct described in 18 U.S.C. § 2241(a) or (b)’ is: (i) Using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

3. Definition of Minor.—‘Minor’ means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.”

(G) New Offense in 18 U.S.C. 2252C for Embedding Words or Images

Section 2G3.1 is amended by striking subsection (b)(2) and inserting the following:

“(2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the sourcecode of a Web site, increase by [2][4] levels.”

The Commentary to § 2G3.1 captioned “Statutory Provisions” is amended by inserting “, 2252C” after “2252B”.

The Commentary to § 2G3.1 captioned “Application Notes” is amended in Note 2 by inserting “or § 2252C” after “§ 2252B”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2245 the following:

“18 U.S.C. 2250(a)—2A3.5
18 U.S.C. 2250(c)—2A3.6”;
by inserting after the line referenced to 18 U.S.C. 2252B the following:
“18 U.S.C. 2252C—2G3.1”;
by inserting after the line referenced to 18 U.S.C. 2257 the following:
“18 U.S.C. 2257A—2G2.5”;
and by inserting after the line referenced to 18 U.S.C. 2260(b) the following:

“18 U.S.C. 2260A—2A3.6”.

Part III—Other Criminal Provisions

(A) New Offenses in 42 U.S.C. 16962 and 16984 Relating to Fingerprints:

Section 2H3.1 is amended in the heading by striking “Tax Return Information” and inserting “Certain Personal Information”.

Section 2H3.1(a)(2) is amended in by striking “or 26 U.S.C. 7216” and inserting “, § 7216, or 42 U.S.C. § 16984”.

The Commentary to § 2H3.1 captioned “Statutory Provisions” is amended by inserting “42 U.S.C. 16962, 16984;” after “7216;”.

The Commentary to § 2H3.1 captioned “Application Notes” is amended by striking “Notes” and inserting “Note”; by striking Note 1; and by redesignating Note 2 as Note 1.

(B) Increased Penalty in 18 U.S.C. 1001:

Section 2J1.2(b)(1)(B) is amended by inserting “the” after “If”; and by striking “the” after “(ii)”.

Section 2J1.2(b)(1) is amended by adding at the end the following:

“(C) If the (i) defendant was convicted under 18 U.S.C. 1001; and (ii) statutory maximum term of imprisonment relating to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable, increase by [2]–[12] levels.”

The Commentary to § 2J1.2 captioned “Statutory Provisions” is amended by striking:

“when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable”, and inserting: “(when the statutory maximum term of imprisonment relating to international terrorism, domestic terrorism, or sex offenses under 18 U.S.C. 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable)”.

(D) 18 U.S.C. 1591 Added to List of Covered Sex Offenses:

The Commentary to § 4B1.5 captioned “Application Notes” is amended by striking Note 1 and inserting the following:

“1. Definition.—For purposes of this guideline, ‘minor’ means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.”

The Commentary to § 4B1.5 captioned “Application Notes” is amended in

Note 2 by inserting “or (iv) 18 U.S.C. § 1591;” after “alien individual;”; and by striking “through (iii)” and inserting “through (iv)”.

The Commentary to § 4B1.5 captioned “Background” is amended by striking the first and second sentences and inserting the following:

“This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public.”

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1001 by striking: “when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable”, and inserting: “(when the statutory maximum term of imprisonment relating to international terrorism, domestic terrorism, or sex offenses under 18 U.S.C. 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable)”; and by inserting after the line referenced to 42 U.S.C. 14905 the following:
“42 U.S.C. 16962—2H3.1
42 U.S.C. 16984—2H3.1”.

Part IV—Provisions Regarding Probation and Supervised Release

Section 5B1.3(a)(9) is amended by striking “a defendant” and all that follows through the end of “student;” and inserting the following:

“a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (B) providing information required by 42 U.S.C. 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. 16915;”.

Section 5B1.3(d)(7) is amended by adding at the end the following:

“(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any

probation officer in the lawful discharge of the officer's supervision functions."

The Commentary to § 5D1.2 captioned "Application Notes" is amended by striking Note 1 and inserting the following:

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

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. 1201; or (vi) an offense under 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years."

Section 5D1.3(a)(7) is amended by striking "a defendant" and all that follows through the end of "student;" and inserting the following:

"a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (B) providing information required by 42 U.S.C. 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. 16915;"

Section 5D1.3(d)(7) is amended by adding at the end the following:

"(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or

unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions."

Part V—Issues for Comment:

1. The Commission requests comment regarding how it should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Child Protection Act of 2006. There are four potential approaches to consider. First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121–151 months). Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108–135 months). Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act. Fourth, the Commission could decide not to change the base offense levels and allow § 5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

2. Pursuant to the directive in section 141 of the Act, the Commission must consider, "whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register." In light of this consideration, the Commission requests comment regarding the scope of the proposed enhancement in § 2A3.5(b)(1) of Option 1 and § 2A3.5(b)(2) of Option 2 with respect to minors. Should the Commission expand the proposed six-level enhancement so that it would apply in the case of any non-sexual offense committed against a minor? As an alternative to providing tiered

enhancements based on the type of offense committed against a minor (as presented in the proposed amendment), should the Commission structure the enhancement so that any offense committed against a minor would warrant an eight-level enhancement and any offense committed against a person other than a minor would warrant a six-level enhancement? If so, should the enhancement also provide a minimum offense level of [24]–[28]?

3. The proposed amendment provides in § 2A3.5 a [2][4]-level reduction if the defendant voluntarily attempted to correct the failure to register. The Commission requests comment regarding this reduction. Specifically, how should the Commission address circumstances in which it was impossible for the defendant to register, for example, the defendant had a debilitating illness or severe mental impairment, or the jurisdiction in which the defendant works or is a student does not allow non-residents to register. Should the proposed reduction be extended to such circumstances or is there an alternative way in which the Commission should take such circumstances into account in the guidelines?

The Commission also requests comment regarding whether it should provide an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.

4. The Adam Walsh Child Protection Act created a new offense at 18 U.S.C. 2244(a)(5), with a statutory maximum term of imprisonment of life, for sexual contact that would have violated 18 U.S.C. 2241(c) (Aggravated sexual abuse with children) had the sexual contact been a sexual act. The proposed amendment addresses this new offense in § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) by increasing the minimum offense level in subsection (b)(1) (if the victim was under the age of 12 years) from level 20 to level 22. The Commission requests comment regarding whether it should amend § 2A3.4 to account specifically for this new offense or whether the current provisions of the guideline are adequate to account for this new offense.

5. The proposed amendment references 18 U.S.C. 2257A (Record keeping requirements) to § 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email). For offenses in which the defendant refused to allow an inspection of records in violation of 18 U.S.C.

2257(f)(5) or § 2257A, the Commission requests comment regarding whether it should provide an application note that provides for an upward departure in such cases or instructs the court to apply § 3C1.1.

6. The Commission requests comment regarding the proposed new guideline in § 2G2.6 that would implement 18 U.S.C. 2252A(g). Specifically, the Commission requests comment regarding the appropriate base offense level for this new guideline given that the statute provides a mandatory minimum term of imprisonment of 20 years. Additionally, the proposed specific offense characteristics are targeted to offense conduct involving minors. Section 1591 is included as one of the predicate offenses under 18 U.S.C. 2252A(g) but it is not limited to offenses committed against minors. The Commission requests comment regarding whether it should provide a specific offense characteristic, or expand a proposed specific offense characteristic, to cover all 18 U.S.C. 1591 offenses. With respect to enhancements, is there additional conduct for which the Commission should consider providing specific offense characteristics? If so, for what conduct, and what is an appropriate increase for that conduct? The Commission further requests comment regarding whether this guideline should provide a decrease if the defendant's conduct was limited to possession or receipt of material involving the sexual exploitation of a minor and the defendant did not intend to traffic in or distribute such material.

The Commission also requests comment regarding whether it should provide an enhancement for the use of a computer or interactive computer service and if so, what would be an appropriate increase for such conduct. The Commission specifically asks whether this enhancement is appropriate if the base offense level is at the lower end of the proposed options.

7. The proposed amendment adds to the misleading domain name enhancement in subsection (b)(5) of § 2G3.1 the use of embedded words or digital images in the source code of a Web site to deceive a minor into viewing matter that would be harmful to the minor. The Commission requests comment regarding whether it also should include an enhancement if the offense involved the use of embedded words or digital images to deceive a person other than a minor into viewing obscenity. If so, how many levels would be appropriate for such an enhancement? For example, should the Commission provide two levels for such

an enhancement and four levels if the offense deceived a minor into viewing harmful matter?

8. The Commission requests comment regarding the interaction of the age enhancement in § 2G1.3(b)(5) and the proposed base offense levels. The proposed amendment presents options for reducing the age enhancement in § 2G1.3(b)(5) to as far as four levels. Should the Commission consider providing an increase of less than eight levels in any case in which the age of the minor victim is taken into account by the base offense level (because age is an element of the offense)? For example, should four levels be applied if the base offense level takes into account the age of the minor and eight levels be applied if the base offense level does not take age into account?

9. The Commission requests comment regarding the interaction of § 2G1.3 and § 2A3.1, particularly with respect to the application of the cross reference in § 2G1.3(c)(3) and the proportionality of resulting offense levels for a case involving a minor who had not attained the age 12 years. Do any of the proposed offense levels in either guideline need to be increased in order to provide proportionality between §§ 2G1.3 and 2A1.3 in cases involving a minor who had not attained the age of 12 years, taking into account the new mandatory minimum penalties provided for offenses referenced to these two guidelines? For example, the proposed amendment provides a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. 2422(b) or § 2423(a). If § 2G1.3(c)(3) applies because, for example, the offense involved interstate travel with a minor who had not attained the age of 12 years, the court would apply § 2A3.1 and the resulting offense level under that guideline would be 34 (BOL of 30 plus 4 levels for age of minor). If the court does not apply the cross reference and stays in § 2G1.3, the resulting offense level would be [36][38] (BOL of [28][30] plus 8 levels for the age of the minor). Are these offense levels appropriate given new mandatory minimum penalties and offense levels currently provided in § 2G1.3 and § 2A3.1, respectively, or should the Commission provide higher base offense levels in § 2G1.3?

3. Technical and Clarifying Amendments to the Sentencing Guidelines

Synopsis of Proposed Amendment: This proposed amendment makes various technical and conforming changes to the guidelines.

Specifically, Part A of the proposed amendment corrects typographical errors in §§ 2B1.1(b)(13)(C), 2D1.1(a), 2K2.1 (Application Note 14), and 2L1.1(b)(1). The proposed amendment also updates Appendix A by eliminating an outdated statutory reference and by including a statutory reference for 18 U.S.C. 931 to 2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons).

In Part B, the proposed amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim.P. 20(a). Section 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) is silent as to this issue. The four circuits that have addressed the issue have concluded that the grouping rules apply when a defendant is sentenced on multiple indictments. See *United States v. Hernandez Coplin*, 24 F.3d 312 (1st Cir. 1994) (holding that § 5G1.2's rules regarding sentences imposed at the same time for different indictments must apply to Chapter 3, Part D); *United States v. Herula*, 464 F.3d 1132 (10th Cir. 2006) (holding that § 5G1.2 required that § 3D1.4 apply in cases involving multiple counts in separate indictments); *United States v. Tolbert*, 306 F.3d 244 (5th Cir. 2002) (holding that § 5G1.2 requires that total punishment be determined by the grouping principles from Chapter 3, Part D, thus requiring grouping for counts contained in different indictments). See also *United States v. Greer*, 91 F.3d 996 (7th Cir. 1996) (holding that the district court had erred by not using § 5G1.2 to sentence the defendant, who was sentenced for two separate crimes within minutes of each other).

The proposed amendment adopts the reasoning of these cases and clarifies that the grouping rules apply not only to multiple counts in the same indictment but also to multiple counts contained in different indictments when a defendant is sentenced on the indictments simultaneously. The proposed amendment provides clarifying language in the Introductory Commentary of Chapter Three, Part D, as well as in § 3D1.1. The proposed language is the same language that currently is provided in § 5G1.2 (Sentencing on Multiple Counts of Conviction) and relied on by the courts cited in the previous paragraph.

Proposed Amendment

Part A:

Section 2B1.1(b)(13)(C) is amended by striking “(12)” and inserting “(13)”.

Section 2D1.11(a) is amended by striking “(e)” and inserting “(d)”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended in Note 14 in subdivision (B) by striking “(b)(1)” and inserting “(b)(6)”.

Section 2L1.1(b)(1)(B) is amended by striking “(2)” and inserting “(3)”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 930 the following new line:

“18 U.S.C. 931–2K2.6”;

and by striking the following:

“18 U.S.C. 3174–2J1.7”.

Part B:

Chapter 3, Part D is amended in the Introductory Commentary in the first paragraph by inserting “These rules apply to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.” after “is convicted.”.

The Commentary to § 3D1.1 captioned “Application Note” is amended by striking “Note” and inserting “Notes”; by redesignating Note 1 as Note 2; and by inserting the following as new Note 1:

“1. In General.—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; (B) contained in different indictments or informations for which sentences are to be imposed at the same time or contained in a consolidated proceeding.”.

4. Miscellaneous Laws

Synopsis of Proposed Amendment: This is a two-part amendment that implements recently enacted legislation. Part One of this proposed amendment operates to support the Respect for America’s Fallen Heroes Act, Public Law 109–228, which created a new offense in 38 U.S.C. 2413, prohibiting certain demonstrations at Arlington National Cemetery and at cemeteries under control of the National Cemetery Administration. The penalty for a violation of 38 U.S.C. 2413 is imprisonment of not more than one year, a fine, or both.

The proposed amendment references this new crime to § 2B2.3, because the new crime shares with other crimes that are referred to the trespass guideline the basic element of unauthorized access to particular federal land or site. The proposed amendment expands the two-level enhancement in § 2B2.3(b)(1) to

include Arlington National Cemetery or a cemetery under the control of the National Cemetery Association.

(Arlington National Cemetery is, of course, considered a national cemetery, but it is not maintained by the National Cemetery Administration. Rather, it is maintained by the Department of the Army and should be named separately in the Guidelines.)

Part Two of this proposed amendment operates to support the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), Public Law 109–162. VAWA includes the International Marriage Broker Regulation Act of 2005 (IMBRA), which requires marriage brokers to collect background information about United States clients and places limitations on the marriage brokers’ sharing of information about foreign national clients. A violation of 8 U.S.C. 1375a(d)(3)(C) is subject to a misdemeanor conviction with a base offense level of 6. The felony offenses covered under 8 U.S.C. § 1375a(d)(5)(B) will receive a base offense level of 9.

The proposed amendment refers the new offense to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and expands the heading of the guideline to include the unauthorized disclosure of private information. Currently, the guideline covers the wrongful disclosure of certain tax information. In addition to expanding the guideline to cover IMBRA offenses, the Commission also may wish to consider referencing other similar privacy statutes to this guideline, such as 18 U.S.C. 1905 (Disclosure of confidential information generally (by an officer or employee of the U.S.)), 42 U.S.C. 405(c)(2)(C)(viii)(I)–(IV) (pertaining to the unauthorized willful disclosure of social security account numbers and related information), and 42 U.S.C. 1320d(6) (wrongful disclosure of individually identifiable health information), which currently are not included in Appendix A. The proposed amendment brackets language that would include the wrongful disclosure of confidential information covered by these additional statutes.

Following the proposed amendment is an issue for comment regarding implementation of 31 U.S.C. 5363, which prohibits the acceptance of any financial instrument for unlawful Internet gambling. The offense was created by the Safety and Accountability for Every Port Act (SAFE Port Act), Public Law 109–347.

Proposed Amendment

I. Respect for America’s Fallen Heroes Act (Pub. L. 109–228)

Section 2B2.3(b)(1) is amended by redesignating subdivision (F) as subdivision (G); and by inserting “(F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration;” after “residence;”.

The Commentary to § 2B2.3 captioned “Statutory Provisions” is amended by inserting “38 U.S.C. 2413;” after “1036;”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 38 U.S.C. 787 the following new line:

“38 U.S.C. 2413—2B2.3”.

II. Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162)

Section 2H3.1 is amended in the heading by striking “Tax Return Information” and inserting “Certain Personal Information”.

Section 2H3.1(a)(2) is amended by inserting “8 U.S.C. 1375(d)(3)(C); 18 U.S.C. 1905;” after “convicted of;” and inserting “; 42 U.S.C. 405(c)(2)(C)(viii)(I)–(IV); or 42 U.S.C. 1320d–6;]” after “7216”.

The Commentary to § 2H3.1 captioned “Statutory Provisions” is amended by inserting “8 U.S.C. 1375(d)(3)(C), (d)(5)(B);” before “18 U.S.C.”; by inserting “§ 1905,” before “2511”; and by inserting “[42 U.S.C. 405(c)(2)(C)(viii)(I)–(IV); 42 U.S.C. 1320d–6;]” after “7216;”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 8 U.S.C. 1328 the following new line:

“8 U.S.C. 1375a–2H3.1”;

by inserting after the line referenced to 42 U.S.C. 300i–l the following new line:

“[42 U.S.C. 405(c)(2)(C)(viii)(I)–(IV)—2H3.1”]; and

by inserting after the line referenced to 42 U.S.C. 1320a–7b the following new line:

“[42 U.S.C. 1320d–6—2H3.1]”.

Issue for Comment:

The SAFE Port Act, Pub. L. 109–347, created a new offense in 31 U.S.C. 5363, prohibiting the acceptance of any financial instrument for unlawful Internet gambling Section 5366 of title 31, United States Code, and providing a statutory maximum term of imprisonment of not more than 5 years. The Commission requests comment regarding how it should implement the new offense. Specifically, should the

offense be referenced to § 2E3.1 (Gambling Offenses), which provides a base offense level of 6 or, alternatively, a base offense level of 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation. If the Commission should reference this statute to § 2E3.1, are there additional amendments that should be made to this guideline in order to implement fully the new offense? For example, should the Commission provide a cross reference to either § 2S1.1 (Laundering of Monetary Instruments) or § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) if the offense involves conduct more adequately covered by either of those guidelines? Alternatively, should 31 U.S.C. 5363 be referenced to either § 2S1.1 or § 2S1.3 instead of § 2E3.1, and if so, what other modifications, if any, should be made in those guidelines to implement fully the new offense?

5. Re-Promulgation of Emergency Intellectual Property Amendment

Synopsis of Proposed Amendment: This proposed amendment re-promulgates the emergency amendment, effective September 12, 2006, that responded to the directive contained in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-181. The directive, which required the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to “review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code.” The directive further provides that the Commission shall: Determine whether the definition of “infringement amount” set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as *U.S. v. Sung*, 87 F.3d 194 (7th Cir. 1996).

The emergency amendment added subdivision (vii) to Application Note 2(A) of § 2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the “infringed item” is the identifiable, genuine good or service. This proposed amendment would re-promulgate this application note as a permanent amendment to § 2B5.3.

The emergency amendment did not address the portion of the directive pertaining to anti-circumvention devices. This proposed amendment addresses that portion of the directive in two ways. First, the proposed amendment presents two options for addressing the trafficking in devices that circumvent a technological measure. Option One expands the specific offense characteristic in § 2B5.3(b)(3) to include convictions under 17 U.S.C. 1201(b) for trafficking in devices that circumvent a technological measure. Currently, § 2B5.3(b)(3) provides a two-level enhancement and a minimum offense level of 12 for cases involving the manufacture, importation, or uploading of infringing items. The purpose of the enhancement in § 2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce, thereby enabling other individuals to infringe the copyright or trademark. See App. C (Amendment 594, effective Nov. 1, 2000). A defendant who traffics in devices that circumvent a technological measure similarly enables others to infringe a copyright and arguably warrants greater punishment. The minimum offense level guarantees the defendant will be in Zone D of the Sentencing Table. Under this option, the minimum offense level also works as a proxy for the infringement amount.

Options Two and Three address trafficking in devices used to circumvent a technological measure by providing a special rule under Application Note 1 for determining the infringement amount. Option Two adds trafficking cases to the note pertaining to the retail value of the infringing item. Under this option, the court would use

the retail value of the device (the “infringing item”) multiplied by the number of devices involved in the offense. Option Three is similar but provides two alternative measures under a new Application Note 1(C). It instructs the court to determine the infringement amount by using the greater of two calculations: (i) The retail value of the device multiplied by the number of such devices; and (ii) the number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.

All options use the statutory definition of “circumvent a technological measure” found in 17 U.S.C. 1201(a)(3)(A), which is “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”

Second, the proposed amendment adds an application note regarding the determination of the infringement amount in cases under 17 U.S.C. 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the “retail value of the infringed item” is the price the user would have paid to access lawfully the copyrighted work, and the “infringed item” is the accessed work.

Two issues for comment follow the proposed amendment. The first issue is regarding whether the Commission should amend § 2B5.3 to provide a downward departure for cases in which the infringement amount overstates the seriousness of the offense. The second issue is regarding the interaction between the proposed provisions on circumventing a technological measure and application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Proposed Amendment

[Option 1:

Section 2B5.3 is amended by striking subsection (b)(3) and inserting the following:

“(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. 1201(b) and 1204 for trafficking in devices used to circumvent a technological measure, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.”]

The Commentary to § 2B5.3 captioned “Statutory Provisions” is amended by inserting “, 1201, 1204” after “506(a)”.

The Commentary to § 2B5.3 captioned “Application Notes” is amended in Note 1 by inserting after “Definitions.—

For purposes of this guideline:" the following:

"'Circumvent a technological measure' has the meaning given that term in 17 U.S.C. 1201(a)(3)(A)."

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

"(vii) A case under 18 U.S.C. 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service.

(viii) A case under 17 U.S.C. 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the 'retail value of the infringed item' is the price the user would have paid to access lawfully the copyrighted work, and the 'infringed item' is the accessed work."

[Option 2:

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2 in subdivision (B) by adding at the end the following:

"This note also applies in a case involving the trafficking of devices used to circumvent a technological measure in violation of 17 U.S.C. 1201 and 1204. In such a case the 'infringing item' is the device.".]

[Option 3:

The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2 by redesignating subdivisions (C) through (E) as subdivisions (D) through (F), respectively; and by inserting after subdivision (B) the following:

"(C) Determination of Infringement Amount in Cases Involving Trafficking in Devices Used to Circumvent a Technological Measure.—In a case in which the defendant is convicted under 17 U.S.C. §§ 1201(b) and 1204 for trafficking in a device used to circumvent a technological measure, the infringement amount is the greater of the following:

(i) The number of such devices multiplied by the retail value of the device; or

(ii) The number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.".]

The Commentary to § 2B5.3 captioned "Background" is amended by adding at the end the following:

"[Option One: Subsection (b)(3)(B) and] Application Notes 1(a)(vii) and [Option Two: (viii)][Option Three: 1(C)] implement the directive in section 1(c) of Public Law 109–181."

Issues for Comment:

1. The Commission requests comment regarding whether it should provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense.

2. The Commission requests comment regarding the interaction of Application Note 4 pertaining to the application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). This application note, added in 2000 as part of the Commission's implementation of the No Electronic Theft Act, provides that an adjustment under § 3B1.3 shall apply in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. The Commission has received comment that not every de-encryption or circumvention case involves a "special skill" as that term is defined in § 3B1.3 ("a skill not possessed by members of the general public and usually requiring substantial education, training or licensing"). Additionally, the proposed amendment specifically addresses cases involving the circumvention of a technological measure, either in the form of trafficking in devices used to circumvent a technological measure or in the determination of infringement amount in cases involving actual circumvention. Should the Commission delete Application Note 4 because the skill, whatever degree, needed to de-encrypt or circumvent a technological measure would be taken into account in § 2B5.3? As an alternative, should the Commission modify the note to emphasize that § 3B1.3 applies only when the defendant's skill in de-encrypting or otherwise circumventing a technological measure was one not possessed by the general public, as contemplated by § 3B1.3?

6. Terrorism

Synopsis of Proposed Amendment: This multi-part proposed amendment implements the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "USA PATRIOT Act"), Pub. L. 109–177, and the Department of Homeland Security Appropriations Act, 2007 (the "Homeland Security Act"), Pub. L. 109–295.

Part I of the proposed amendment addresses section 122 of the PATRIOT Act, which created a new offense in 21

U.S.C. 960a covering narco-terrorism. This new offense prohibits engaging in conduct that would be covered under 21 U.S.C. 841(a) if committed under the jurisdiction of the United States, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or terrorism (defined in section 140(d)(2) of the Foreign Relations Authorization Act). The penalty is not less than twice the minimum punishment under 21 U.S.C. 841(b)(1) and not more than life. Section 960a also provides a mandatory term of supervised release of at least 5 years.

The proposed amendment presents two options for addressing this new offense, although under either option the sentence determination is the same. Option 1 would amend § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide a new base offense level of 6 plus the offense level specified in the Drug Quantity Table if the defendant was convicted under 21 U.S.C. 960a (see proposed § 2D1.1(a)(4)). Option 2 would create a new guideline in § 2D1.14 (Narco-Terrorism) that would add 6 levels to the offense level determined under § 2D1.1. Both options bracket the exclusion of the mitigating role cap in § 2D1.1(a)(3) and the safety valve reduction in § 2D1.1(b)(9) to highlight this discussion point for the Commission. The proposed amendment also provides a corresponding amendment to Appendix A (Statutory Index).

Part II of the proposed amendment addresses section 551 of the Homeland Security Act, which created a new offense in 18 U.S.C. 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country. (The USA PATRIOT Act also amended title 18, United States Code, to provide a new offense in 18 U.S.C. 554 for smuggling goods from the United States. For purposes of presenting proposed statutory references, the proposed amendments to Appendix A (Statutory Index) for border tunnels is presented in Part II and the proposed amendments to Appendix A (Statutory Index) for smuggling goods from the United States is presented in Part IV.) Section 554(a) prohibits the construction or financing of such tunnels and passages and provides a statutory maximum term of imprisonment of 20 years. Section

554(b) prohibits the knowing or reckless disregard of the construction on land the person owns or controls and provides a statutory maximum term of imprisonment of 10 years. Section 554(c) prohibits the use of the tunnels to smuggle an alien, goods (in violation of 18 U.S.C. 545), controlled substances, weapons of mass destruction (including biological weapons), or a member of a terrorist organization (defined in 18 U.S.C. 2339B(g)(6)) and provides a penalty of twice the maximum term of imprisonment that would have otherwise been applicable had the unlawful activity not made use of the tunnel or passage.

Section 551(c) of the Homeland Security Act also directs the Commission, under its regular amendment authority, to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. 554. In carrying out this directive, the Commission "shall—

(A) Ensure that the sentencing guidelines, policy statements, and official commentary reflect the serious nature of the offenses described in section 554 of title 18, United States Code, and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(B) Provide adequate base offense levels for offenses under such section;

(C) Account for any aggravating or mitigating circumstances that might justify exceptions, including—

(i) The use of a tunnel or passage described in subsection (a) of such section to facilitate other felonies; and
(ii) The circumstances for which the sentencing guidelines currently provide applicable sentencing enhancements;

(D) Ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutes;

(E) Make any necessary and conforming changes to the sentencing guidelines and policy statements; and

(F) Ensure that the sentencing guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

The proposed amendment provides a new guideline in § 2X7.1 (Border Tunnels and Subterranean Passages) for this offense. If the defendant was convicted under 18 U.S.C. 554(a) or (c), the base offense level would be 4 plus the offense level applicable to the underlying smuggling offense. If the defendant was convicted under 18 U.S.C. 554(b), the proposed amendment provides a base offense level of 8.

Part III of the proposed amendment addresses other new offenses created by

the PATRIOT Act. Based on an assessment of similar offenses already covered by the relevant guidelines, the proposed amendment provides for the following:

(A) The new offense in 18 U.S.C. 554, pertaining to smuggling of goods from the United States is referenced to §§ 2B1.5 (Cultural Heritage), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

(B) The new offense in 18 U.S.C. 2282A, pertaining to mining of U.S. navigable waters, is referenced to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The proposed amendment also adds vessel, maritime facility, and a vessel's cargo to § 2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. 2282A. The definitions provided for vessel, maritime facility, and aids to maritime navigation come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.

Section 2282B, pertaining to violence against maritime navigational aids, is referenced to §§ 2B1.1, 2K1.4, and 2X1.1. Section 2K1.4(a) is amended to provide a new base offense level of [16] [if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. 2282B].

(C) The new offense in 18 U.S.C. 2283 pertaining to transporting biological and chemical weapons is referenced to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations of For a Terrorist Purpose), 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). The new offense in 18 U.S.C. 2284 pertaining to transporting terrorists is referenced to §§ 2M5.3, 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).

Part IV of the proposed amendment addresses two other statutes that were amended by the PATRIOT Act as follows:

(A) Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband

cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. 2342 and 2344 from 60,000 to 10,000. The proposed amendment makes conforming changes to the background commentary of § 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes). The proposed amendment also expands the headings of Chapter Two, Part E, Subpart 4 and § 2E4.1 to include smokeless tobacco.

(B) The Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. 1705) from 10 years to 20 years to make penalties for these offenses commensurate with terrorist financing violations. The proposed amendment references 50 U.S.C. 1705 to § 2M5.3 and also modifies the heading of the guideline to include "specially designated global terrorist" because it is another list identifying terrorists and terrorist organizations.

Part V of the proposed amendment sets forth all of the proposed statutory references in Appendix A (Statutory Index) for the new offenses described in Parts III and IV.

Part VI of the proposed amendment presents two issues for comment. The first requests comment regarding whether current guideline penalties are sufficient for increases in statutory maximum terms of imprisonment to 18 U.S.C. 545 and 549. The second issue for comment addresses a directive contained in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, regarding a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of 18 U.S.C. 716.

Proposed Amendment

Part I Narco-Terrorism

[Option 1:

Section 2D1.1(a)(3) is amended by inserting before "the offense level" the following:

"[except if the defendant is convicted under 21 U.S.C. 960a,]"; and by striking the period at the end and inserting " ; or".

Section 2D1.1(a) is amended by inserting after subsection (a)(3) the following:

"(4) [4][6] plus the offense level specified in the Drug Quantity Table set forth in subsection (c) if the defendant was convicted under 21 U.S.C. 960a.".

Section 2D1.1(b)(9) is amended by inserting before "decrease by two levels." the following:

“[and the defendant was not convicted under 21 U.S.C. 960a,]”. [Use with Option to add 6 levels under proposed subsection (a)(4):

The Commentary to § 2D1.1 captioned “Background” is amended by inserting after the third paragraph the following:

“Section 960a of title 21, United States Code, provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C. 841(b)(1). Adding six levels to the offense level determined under the Drug Quantity Table for convictions under 21 U.S.C. 960a establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus [6] levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.”.]

[Option 2:

Chapter 2, Part D, Subpart 1, is amended by adding at the end the following new guideline and accompanying commentary:

“§ 2D1.14.—Narco-Terrorism

(a) Base Offense Level: [4][6] plus the offense level from § 2D1.1 applicable for the underlying offense[, except that § 2D1.1(a)(3) and (b)(9) shall not apply].

Commentary

Statutory Provision: 21 U.S.C. 960a.

Application Note:

1. In General.—The base offense level is determined using the Drug Quantity Table in § 2D1.1(c) and any appropriate specific offense characteristics in § 2D1.1(b)(1) through (b)(8).

Background: This guideline implements 21 U.S.C. § 960a, which provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C. § 841(b)(1). [Use the following with Option to add six levels under subsection (a): Adding six levels to the offense level determined under § 2D1.1 establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus 6 levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.]”

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. § 960(d)(7) the following:

“21 U.S.C. § 960a—[Option 1: 2D1.1][Option 2: 2D1.14]”.

Part II—Border Tunnels

Chapter 2, Part X is amended by adding at the end the following new guideline and accompanying commentary:

“7. OFFENSES INVOLVING BORDER TUNNELS

§ 2X7.1.—Border Tunnels and Subterranean Passages

“(a) Base Offense Level:

(1) If the defendant was convicted under 18 U.S.C. § 554(c), [4] plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level [16], increase to level [16].

(2) [16], if the defendant was convicted under 18 U.S.C. § 554(a); or

(3) [8][9], if the defendant was convicted under 18 U.S.C. § 554(b).

Commentary

Statutory Provision: 18 U.S.C. 554.

Application Note:

1. Definition.—For purposes of this guideline, ‘underlying smuggling offense’ means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 553(a)(2) the following:

“18 U.S.C. 554—2X7.1”.

Part III—Other New Offenses

The Commentary to § 2B1.5 captioned “Statutory Provisions” is amended by inserting “554,” before “641.”.

The Commentary to § 2M5.2 captioned “Statutory Provisions” is amended by inserting “18 U.S.C. 554,” before “22 U.S.C. 2778, 2780.”.

The Commentary to § 2Q2.1 captioned “Statutory Provisions” is amended by inserting “, 554” after “545”.

The Commentary to § 2Q2.1 captioned “Background” is amended by striking “§ 545 where” and inserting “§§ 545 and 554 if”.

Section 2K1.4 is amended in subsections (a)(1) and (a)(2) by striking “a ferry,” each place it appears and inserting “a maritime facility, a vessel, or a vessel’s cargo,”; by redesignating subsection (a)(3) as (a)(4); and by inserting the following after subsection (a)(2):

“(3) [16,] [if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. 2282B]; or”.

Section 2K1.4(b)(2) is amended by striking “(a)(3)” and inserting “(a)(4)”.

The Commentary to § 2K1.4 captioned “Statutory Provisions” is amended by inserting “2282A, 2282B,” after “2275.”.

The Commentary to § 2K1.4 captioned “Application Notes” is amended in Note 1 by inserting after “For purposes of this guideline:” the following paragraph:

“‘Aids to maritime navigation’ means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.”; by inserting after “destructive device.” the following paragraph:

“‘Maritime facility’ means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.”; by striking “1993(c)(5)” and inserting “1992(d)(7)”; and by adding at the end the following:

“‘Vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”.

The Commentary to § 2K1.3 captioned “Statutory Provisions” is amended by inserting “, 2283” after “1716”.

The Commentary to § 2M5.3 captioned “Statutory Provisions” is amended by inserting “, 2283, 2284” after “18 U.S.C. §§”.

Section 2M6.1 is amended in the heading by inserting “Transport,” after “Transfer,”.

The Commentary to § 2M6.1 captioned “Statutory Provisions” is amended by inserting “§ 2283,” before “2332a”.

The Commentary to § 2X2.1 captioned “Statutory Provisions” is amended by inserting “2284,” after “2”.

The Commentary to § 2X3.1 captioned “Statutory Provisions” is amended by inserting “2284,” after “1072.”.

Part IV—Other PATRIOT Act Statutes

Chapter Two, Part E, Subpart Four is amended in the heading by adding at the end “AND SMOKELESS TOBACCO”.

Section 2E4.1 is amended in the heading by adding at the end “and Smokeless Tobacco”.

The Commentary to § 2E4.1 captioned “Background” is amended by striking “60,000” and inserting “10,000”.

Section 2M5.3 is amended in the heading by inserting “Specially Designated Global Terrorists, or” after “Organizations or”.

The Commentary to § 2M5.3 captioned “Statutory Provisions” is amended by striking the period at the end and inserting “; 50 U.S.C. 1705; 50 U.S.C. App. § 1701.”.

The Commentary to § 2M5.3 captioned “Application Notes” is amended in Note 1 by adding at the end the following paragraph:

“‘Specially designated global terrorist’ means any foreign person or

person so designated pursuant to Executive Order 13224 of September 23, 2001.”.

Part V—Statutory Index Amendments

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 553(a)(2) the following:

“18 U.S.C. § 554 2B1.5, 2M5.2, 2Q2.1”;

by inserting after the line referenced to 18 U.S.C. 2281 the following:

“18 U.S.C. § 2282A—2A1.1, 2A1.2,

2B1.1, 2K1.4, 2X1.1

18 U.S.C. § 2282B—2B1.1, 2K1.4, 2X1.1

18 U.S.C. § 2283—2K1.3, 2M5.3, 2M6.1

18 U.S.C. § 2284—2M5.3, 2X2.1, 2X3.1”;

in the line referenced to 18 U.S.C.

§ 2339 by inserting “2M5.3,” before

“2X2.1”;

by inserting after the line referenced to

50 U.S.C. § 783(c) the following:

“50 U.S.C. § 1705—2M5.3”;

and in the line referenced to 50 U.S.C. App.

§ 1701 by inserting “, 2M5.3” after

“2M5.2”.

Part VI—Issues for Comment

1. The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 increased the statutory maximum terms of imprisonment for 18 U.S.C. 545 from 5 years to 20 years and for 18 U.S.C. 549 from 2 years to 10 years. The guidelines currently reference 18 U.S.C. 545 offenses to §§ 2B1.5 (Cultural Heritage), 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), and 2T3.1 (Evading Import Duties; Smuggling). Section 549 offenses are referenced to §§ 2B1.1 (Theft, Fraud, and Property Damage) and 2T3.1. The Commission requests comment regarding whether the current referenced guidelines provide sufficient penalties for 18 U.S.C. 545 and 549 offenses in light of the increased statutory maximum terms of imprisonment. If not, how should the Commission amend these guidelines to provide adequate punishment?

2. Part II of the proposed amendment creates a new guideline, § 2X7.1 (Border Tunnels and Subterranean Passages) to implement the new offense in 18 U.S.C. 554. The Commission requests comment regarding the proposed offense levels, specifically whether the offense levels for any of subsections ought to be higher than proposed, and if so, what would be appropriate offense levels for convictions under 18 U.S.C. 554(a), (b), and (c), respectively?

3. Section 1191(c) of Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, directs the Commission to amend the guidelines “to assure that the sentence imposed on a defendant who

is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor.” Section 716, of title 18, United States Code, is a class B misdemeanor to which the guidelines do not apply. Notwithstanding, the Commission requests comment regarding how it should address this directive. For example, should the Commission provide a Chapter Three adjustment applicable in any case in which a uniform or insignia received in violation of 18 U.S.C. 716 was worn or displayed during the commission of the federal offense? If so, how many levels would be appropriate for such an adjustment? If not, what alternatives should the Commission consider? Alternatively, should the Commission amend Chapter Five, Part K (Departures) to provide a new upward departure provision for such cases? The Commission also requests comment regarding whether, instead of an adjustment or departure, the Commission should provide an application note, perhaps in § 1B1.9 (Class B or C Misdemeanors and Infractions), recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.

7. Drugs

Synopsis of Proposed Amendment: This proposed amendment addresses new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the “PATRIOT Act”), Pub. L. 109–177, and the Adam Walsh Child Protection and Safety Act of 2006 (the “Adam Walsh Act”), Pub. L. 109–248.

First, the proposed amendment addresses 21 U.S.C. 865, which provides a mandatory consecutive sentence of not more than 15 years’ imprisonment for any drug offense involving the smuggling of methamphetamine or any listed chemical while using a facilitated entry program for entry into the United States. The proposed amendment provides a new two-level enhancement in §§ 2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted under 21 U.S.C. 865. A proposed application note in both guidelines provides instruction as to how the court should impose a sentence in order to comply with the statutory requirement of a consecutive sentence.

Second, the proposed amendment provides three options for addressing the new offense in 21 U.S.C. 841(g), which was created by the Adam Walsh Act. This offense prohibits the use of the Internet to distribute a date rape drug to any person, “knowing or with

reasonable cause to believe that—(A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser;” The statute defines “date rape drug” as “(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol; (ii) ketamine; (iii) flunitrazepam; or (iv) any substance which the Attorney General designates * * * to be used in committing rape or sexual assault.” The penalty is not more than 20 years’ imprisonment.

Option One provides a new [two-] [four-]level enhancement in § 2D1.1(b)(9) if the defendant was convicted under 21 U.S.C. 841(g). Option Two focuses on the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. This option also requires a conviction under 21 U.S.C. 841(g) but provides a four-level enhancement if the defendant knew or had reasonable cause to believe the drug would be used in the commission of criminal sexual conduct. Option Three adopts a tiered approach: If the defendant knew the drug was to be used to commit criminal sexual conduct, add six levels with a floor of 29; if the defendant had reasonable cause to believe the drug would be used to commit criminal sexual conduct, add three levels with a floor of 26; in all other cases involving a conviction under this section, that is to say, the defendant sold the drug to an unauthorized purchaser, add two levels. “Criminal sexual conduct” is defined as any offense covered by the criminal sexual abuse guidelines (Chapter 2, Part A, Section 3). (Section 841(g) of title 21, United States Code, does not define this term.)

Third, the proposed amendment addresses the new offense in 21 U.S.C. 860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which a minor is present or resides. Two options are presented. The first option recognizes that currently § 2D1.1(b)(8) provides a six-level enhancement and a minimum offense level of 30, if the offense involved the manufacture of methamphetamine or amphetamine and the offense created a substantial risk of harm to the life of a minor or incompetent (the “substantial risk of harm” enhancement). The Commission added this provision in 2000 in response to a very specific

congressional directive contained in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310. See USSC App. C (amendments 608 and 620 (effective Dec. 12, 2000, and Nov. 1, 2001, respectively)). To address the overlap of conduct covered by the substantial risk of harm enhancement and the new offense, the proposed amendment would apply in any case in which the defendant is convicted under 21 U.S.C. § 860a and the substantial risk of harm enhancement does not apply. Thus, two levels will be applied in a case in which a minor is present, but in which the offense did not create a substantial risk of harm to the life of a minor. In any methamphetamine manufacturing case in which the government proves a substantial risk of harm to the life of a minor, the offense level will be increased by six levels and the defendant will be subject to a minimum offense level of 30. The second option, recognizing that manufacturing methamphetamine poses an inherent danger to minors, establishes an enhancement for manufacturing and possession with intent to manufacture that is separate and apart from proving substantial risk of harm to the life of the minor under existing § 2D1.1(b)(8). Option Two adds six levels with a floor of 29 if the defendant manufactured or possessed with intent to manufacture methamphetamine on premises where a minor resides or was present. If a defendant distributed or possessed with intent to distribute where a minor resides or was present, add three levels with a floor of 15.

Fourth, the proposed amendment eliminates the offense level cap of 20 for ketamine. Ketamine is a schedule III controlled substance. Currently, the Drug Quantity Table provides a maximum of level 20 for most schedule III substances because such substances are subject to a statutory maximum of 5 years. If a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years. Accordingly, the Drug Quantity Table in § 2D1.1(c) is modified to allow for sentencing of 21 U.S.C. 860a offenses involving quantities of ketamine corresponding to offense levels greater than level 20. The proposed amendment also provides a marihuana equivalency in Application Note 10 for ketamine (1 unit of ketamine = 1 gram of marihuana).

Fifth, the proposed amendment adds to Application Note 10 a new drug equivalency table for 1,4-butanediol (BD) and gamma butyrolactone (GBL), both of which are included in the

definition of date rape drugs under 21 U.S.C. 841(g). Neither is a controlled substance. The proposed drug equivalency is 1 ml of BD or GBL equals 8.8 grams of marihuana.

Sixth, the proposed amendment updates Appendix A (Statutory Index) to include references to the new offenses.

Finally, issues for comment request input regarding the proposals addressing 21 U.S.C. 841(g), 860a, and 865.

Proposed Amendment

Section 2D1.1(b) is amended by redesignating subdivisions (8) and (9) as subdivisions [Option 1 (21 U.S.C. 860a: (11) and (12), respectively) [Option 2 (21 U.S.C. 860a: (10) and (11), respectively); and by redesignating subdivisions (5) through (7) as subdivisions (6) through (8), respectively; and by inserting after subdivision (4) the following:

“(5) If the defendant is convicted under 21 U.S.C. 865, increase by 2 levels.”.

Section 2D1.1(b) is amended by inserting after subdivision (8), as redesignated by this amendment, the following:

[Option 1 (21 U.S.C. 841(g)):

“(9) If the defendant was convicted under 21 U.S.C. 841(g), increase by [2][4] levels.”.]

[Option 2 (21 U.S.C. 841(g)):

“(9) If the defendant was convicted under 21 U.S.C. 841(g) of knowing, or having reasonable cause to believe, that the drug would be used in the commission of criminal sexual conduct, increase by [4] levels.”.]

[Option 3 (21 U.S.C. 841(g)):

“(9) (A) If the defendant committed the offense under 21 U.S.C. 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 6 levels; if the offense level is less than 29, increase to 29; or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 3 levels. If the offense level is less than 26, increase to 26.

(B) If the defendant committed the offense under 21 U.S.C. 841(g)(1)(B) and knew or had reasonable cause to believe that the buyer was not an authorized purchaser, increase by 2 levels.”.]

[Option 1: (21 U.S.C. 860a):

Section 2D1.1(b) is amended by inserting after subdivision (9), as amended by this amendment, the following:

“(10) If (A) the defendant was convicted under 21 U.S.C. 860a; and (B) subsection (b)(11)(C) does not apply, increase by 2 levels.”;

and in subdivision (11), as redesignated by this amendment, by

striking “greater” and inserting “greatest”.]

[Option 2: (21 U.S.C. 860a):

Section 2D1.1 is amended in subsection (b)(10), as redesignated by this amendment, by striking “greater” and inserting “greatest”; and by inserting after subdivision (C) the following:

“(D) (i) If (I) the defendant was convicted under 21 U.S.C. 860a; and (II) the offense involved the manufacturing or possession with intent to manufacture methamphetamine on premises in which an individual under the age of 18 years is present or resides, add [6] levels. If the resulting offense level is less than [29], increase to level [29]; or

(ii) If (I) the defendant was convicted under 21 U.S.C. 860a; and (II) the offense involved the distribution or possession with intent to distribute methamphetamine on premises in which an individual under the age of 18 years is present or resides, increase by [2][3] levels. If the resulting offense level is less than [15], increase to [15]”.]

Section 2D1.1(c)(1) is amended by inserting “30,000,000 units or more of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(2) is amended by inserting “At least 10,000,000 but less than 30,000,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(3) is amended by inserting “At least 3,000,000 but less than 10,000,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(4) is amended by inserting “At least 1,000,000 but less than 3,000,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(5) is amended by inserting “At least 700,000 but less than 1,000,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(6) is amended by inserting “At least 400,000 but less than 700,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(7) is amended by inserting “At least 100,000 but less than 400,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(8) is amended by inserting “At least 80,000 but less than 100,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(9) is amended by inserting “At least 60,000 but less than 80,000 units of Ketamine;” after the line referenced to “Hashish Oil”.

Section 2D1.1(c)(10) is amended by inserting “At least 40,000 but less than 60,000 units of Ketamine;” after the line

referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(11) is amended by inserting “At least 20,000 but less than 40,000 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(12) is amended by inserting “At least 10,000 but less than 20,000 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(13) is amended by inserting “At least 5,000 but less than 10,000 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(14) is amended by inserting “At least 2,500 but less than 5,000 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(15) is amended by inserting “At least 1,000 units but less than 2,500 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(16) is amended by inserting “At least 250 units but less than 1,000 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

Section 2D1.1(c)(17) is amended by inserting “Less than 250 units of Ketamine;” after the line referenced to “Hashish Oil”; and by inserting “(except Ketamine)” after “Schedule III substances”.

The Commentary to § 2D1.1 captioned “Statutory Provisions” is amended by inserting “(g), 860a, 865,” after “(3), (7),”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 10 in the “Drug Equivalency Tables” in the subdivision captioned “Schedule III Substances” by inserting in the heading “(except ketamine)” after “Substances”;

by adding after the subdivision captioned “Schedule III Substances” the following new subdivision:

“Ketamine

1 unit of ketamine = 1 gm of marijuana”;

and by adding after the subdivision captioned “List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)” the following new subdivision: “Date Rape Drugs (except flunitrazepam, GHB, or ketamine)

1 ml of 1,4-butanediol = 8.8 gm marijuana

1 ml of gamma butyrolactone = 8.8 gm marijuana”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 19 [Option 1 (21 U.S.C. 860a): By striking “(b)(8)” each place it appears and inserting “(b)(11)”] [Option 2 (21 U.S.C. 860a): By striking “(b)(8)” and inserting each place it appears “(b)(10)”].

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 20 [Option 1 (21 U.S.C. 860a): By striking “(b)(8)” each place it appears and inserting “(b)(11)”] [Option 2 (21 U.S.C. 860a): By striking “(b)(8)” each place it appears and inserting “(b)(10)”].

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 21 [Option 1 (21 U.S.C. 860a): By striking “(b)(9)” each place it appears and inserting “(b)(12)”] [Option 2 (21 U.S.C. 860a): by striking “(b)(9)” each place it appears and inserting “(b)(11)”].

The Commentary to § 2D1.1 captioned “Application Notes” is amended by redesignating Notes 22 through 25 as Notes 23 through 26, respectively; and by inserting after Note 21 the following:

“22. Imposition of Consecutive Sentence for 21 U.S.C. 860a or 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate “total punishment” and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. 860a or 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. 860a or 865. [For example, if the applicable adjusted guideline range is 151–188 months and the court determines a “total punishment” of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. 860a or 865 would achieve the ‘total punishment’ in a manner that satisfies the statutory requirement of a consecutive sentence.”.]

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 23, as redesignated by this amendment, by striking “(5)” each place it appears and inserting “(6)”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 25, as redesignated by this amendment, by striking “(6)” each place it appears and inserting “(7)”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 26, as redesignated by this amendment, by striking “(7)” each place it appears and inserting “(8)”.

[Option 2 (21 U.S.C. 841(g)):

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

“27. Application of Subsection (b)(9).—For purposes of this subsection, ‘criminal sexual conduct’ means an offense covered by Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse).”.]

The Commentary to § 2D1.1 captioned “Background” is amended in the ninth paragraph [Option 1 (21 U.S.C. 860a): By striking “(b)(8)” and inserting “(b)(11)”] [Option 2 (21 U.S.C. 860a): By striking “(b)(8)” and inserting “(b)(10)”]; and in the last paragraph [Option 1 (21 U.S.C. 860a): by striking “(b)(8)” and inserting “(b)(11)”] [Option 2 (21 U.S.C. 860a): By striking “(b)(8)” and inserting “(b)(10)”].

Section 2D1.1(b) is amended by adding at the end the following subdivision:

“(5) If the defendant is convicted under 21 U.S.C. 865, increase by 2 levels.”.

The Commentary to § 2D1.11 captioned “Statutory Provisions” is amended by inserting “865,” after “(f)(1),”.

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

“8. Imposition of Consecutive Sentence for 21 U.S.C. 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate ‘total punishment’ and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. 865. [For example, if the applicable adjusted guideline range is 151–188 months and the court determines a ‘total punishment’ of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. 865 would achieve the ‘total punishment’ in a manner that satisfies the statutory requirement of a consecutive sentence.”.]

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. 841(f)(1) the following:

“21 U.S.C. § 841(g)—2D1.1”;
by inserting after the line referenced to
21 U.S.C. § 860 the following:
“21 U.S.C. § 860a—2D1.1”;
and by inserting after the line referenced
to 21 U.S.C. § 864 the following:
“21 U.S.C. § 865—2D1.1, 2D1.11”.

Issues for Comment:

1. Section 201 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, created a new offense in 21 U.S.C. 841(g) for “knowingly using the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser.” The Commission requests comment regarding this offense, particularly with respect to the criminal sexual conduct aspect. The proposed amendment presents two options. Option One would provide a [two-][four-]level increase if the defendant was convicted under 21 U.S.C. 841(g), regardless of what the defendant knew or had reasonable cause to believe. Option Two would provide a four-level increase if the defendant was convicted under 21 U.S.C. 841(g) and the defendant knew or had reason to believe the drug would be used in the commission of criminal sexual conduct. Option Three would provide a six level increase with a floor of 29 if the defendant knew the drug would be used in the commission of criminal sexual conduct, and a three level increase with a floor of 26 if the defendant had reasonable cause to believe that the drug would be used to commit criminal sexual conduct. Where the defendant sold the drug using the internet to an unauthorized purchaser, add two levels. Is there an alternative approach that the Commission should consider with respect to the criminal sexual abuse aspect of the offense? For example, should the Commission provide a cross reference to the criminal sexual abuse guidelines (§§ 2A3.1–2A3.4) for defendants convicted under 21 U.S.C. 841(g)(A) even though it is not the defendant who committed the criminal sexual conduct?

The Commission also requests comment regarding whether any enhancement for a conviction under 21 U.S.C. 841(g) also should provide a minimum offense level. If so, what offense level would be appropriate?

2. Section 860a of title 21, United States Code, prohibits manufacturing or distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which an individual under the age of 18 years is present or resides. Two options

are presented. The first option uses the existing § 2D1.1(b)(8)(C) in cases where the government proves that manufacturing methamphetamine poses a substantial risk of harm to the minor (add 6 levels with a floor of 30), and in all other cases (i.e. distribution and possession with intent to distribute), add two levels. The second option presumes that manufacturing methamphetamine on premises where a minor resides or was present poses a risk of harm and thus calls for adding six levels with a floor of 29. In distribution or possession with intent to distribute cases, option two would add three levels with a floor of 15. The Commission requests comment on which option is preferable, or whether there is an alternative approach that should be considered. If Option One’s approach were to be adopted, the Commission requests comment regarding whether the substantial risk of harm enhancement (currently in § 2D1.1(b)(8)(C) but proposed to be redesignated as § 2D1.1(b)(11)(C)) should be expanded to include distribution of methamphetamine such that distribution offenses that create a substantial risk of harm to the life of a minor or incompetent also would be subject to the six-level enhancement and the minimum offense level of 30. Similarly, should it be expanded to include possession with intent to distribute or manufacture? If so, what would constitute a substantial risk of harm to the life of a minor or incompetent in a case involving methamphetamine distribution or possession with intent to distribute or manufacture methamphetamine? With regard to Option Two, the Commission requests comment on whether the six level increase with a floor of 29, and the three level increase with a floor of 15, in manufacturing and distribution cases, respectively, is appropriate, or whether other levels would be more appropriate for the offense.

Both options presented in the proposed amendment are statute of conviction based. As an alternative to a statute of conviction based enhancement, the Commission requests comment regarding whether any enhancement that implements 21 U.S.C. 860a should be relevant conduct based. Additionally, rather than limit an enhancement to the manufacture and/or distribution of methamphetamine where a minor resides or is present, should the Commission expand any enhancement to all drugs. Finally, should the Commission expand the enhancement to apply when this conduct occurs

where an incompetent resides or is present?

3. The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, established a new offense at 21 U.S.C. 865 that provides a mandatory consecutive sentence of not more than 15 years’ imprisonment for any drug offense involving the smuggling of methamphetamine or methamphetamine precursor chemical while using a dedicated commuter lane, an alternative or accelerated inspection system, or other facilitated entry program for entry into the United States. The proposed amendment provides a two-level enhancement in §§ 2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted in 21 U.S.C. 865.

The Commission requests comment regarding this proposed enhancement. Specifically, the Commission requests comment on the following:

(a) Should this enhancement be greater than two levels and, if so, what would be appropriate? Additionally, should there be a minimum offense level and, if so, what offense level would be appropriate?

(b) Should the Commission provide an enhancement in §§ 2D1.1 and 2D1.11 that applies if the offense involved the use of a facilitated entry program to import drugs, regardless of the type of drug the defendant is convicted of importing, or conspiring to import, under 21 U.S.C. 960 or 963, respectively?

(c) Should the Commission amend § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), Application Note 2, to include offenses that involve use of a facilitated entry program into the United States among cases that receive the § 3B1.3 adjustment? If so, should the Commission provide a special instruction in §§ 2D1.1 and 2D1.11 that § 3B1.3 applies if the defendant is convicted of an offense under 21 U.S.C. 865?

8. Immigration

Synopsis of Proposed Amendment: In April 2006, the Commission promulgated a number of amendments to the immigration guidelines, primarily focusing on smuggling offenses. These amendments became effective November 1, 2006. This proposed amendment addresses the number of aliens involved in an offense, the number of documents involved in an offense, and options for modifying to § 2L1.2 (Unlawfully Entering or Remaining in the United States). Two issues for comment follow the proposed amendment. The first requests input regarding base offense levels in §§ 2L1.1 (Smuggling, Transporting, or Harboring

an Unlawful Alien), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The second issue requests comment regarding *Lopez v. Gonzalez*, 127 S.Ct. 625 (Dec. 5, 2006).

Number of Aliens and Number of Documents

The proposed amendment provides two options for amending § 2L1.1(b)(2) and 2L2.1(b)(2) regarding the number of aliens and number of documents, respectively, involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Option One amends the table to provide a nine-level increase for offenses involving 100 to 199 aliens, a [12]-level increase for offenses involving 200 to 299 aliens, and a [15]-level increase for offenses involving 300 or more aliens. Option Two, in part, mirrors Option One by providing the same increases at the top end of the table for offenses involving 100 or more aliens. However, Option Two also provides smaller categories at the low end of the table. Offenses involving six to [15] aliens would receive an increase of three levels, [16 to 49] aliens would receive an increase of [six] levels, and [50 to 99] aliens would receive an increase of [nine] levels.

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

The current structure of § 2L1.2 requires the court, using the “categorical approach,” to assess whether a prior conviction qualifies for a particular category under the guideline. This analysis is often complicated by lack of documentation, competing case law decisions, and the volume of cases. In addition, § 2L1.2 contains different definitions of covered offenses from the statute. Courts, then, are faced with making these assessments multiple times in the same case. The proposed amendment provides six options to

address the complexity of this guideline.

The first, second, and third options amend the structure of § 2L1.2 by using the statutory definition of aggravated felony in combination with the length of the sentence imposed for that prior felony conviction. Option One provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was less than 13 months; and an eight-level increase for all other aggravated felonies. Option Two provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded two years; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was at least one year, but less than two years; and an eight-level increase for all other aggravated felonies. Option Three, mirroring the criminal history guidelines, provides a 16-level increase for an aggravated felony in which the sentence imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence imposed was at least 60 days but did not exceed 13 months; and an eight-level increase for all other aggravated felonies.

For Options One through Three, the proposed amendment also eliminates the categories of crimes of violence and drug trafficking offenses from § 2L1.2(b)(1)(E) (three or more misdemeanor offenses).

The fourth option maintains the current structure of § 2L1.2, except that the categories of offenses delineated under this guideline are defined by 8 U.S.C. 1101(a)(43), the statute providing definitions for “aggravated felonies”. Additionally, this option provides use of length of sentence of imprisonment imposed in conjunction with “crime of violence” to further distinguish between the numerous types of prior convictions that fall within this category.

The proposed amendment also provides for an upward departure in any case in which reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense. This note is modeled after § 4A1.3 and could be used in conjunction with any of Options One through Four.

The fifth option provides an increased base offense level and a reduction if the prior conviction is not a felony.

The sixth option provides a 20-level increase for prior convictions for a national security or terrorism offense and creates further distinctions among

type of conviction and length of prior sentence in relation to enhancements based on specific offense characteristics.

Proposed Amendment

[Option 1:

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

“(C) 100–199—add 9
(D) 200–299—add [12]
(E) 300 or more—add [15].]”

[Option 2:

Section 2L1.1(b)(2) is amended by striking subdivisions (A) through (C) and inserting the following:

“(A) 6–[15]—add 3
(B) [16–49]—add [6]
(C) [50–99]—add [9]
(D) [100–199]—add [12]
(E) [200–299]—add [15]
(F) [300 or more]—add [18].”]

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 3 by striking “100” and inserting “300”.

Section 2L2.1(b)(2) is amended by striking subdivision (C) and inserting the following:

[Option 1:

“(C) 100–199—add 9
(D) 200–299—add [12]
(E) 300 or more—add [15].]”

[Option 2:

Section 2L2.1(b)(2) is amended by striking subdivisions (A) through (C) and inserting the following:

(A) 6–[15]—add 3
(B) [16–49]—add [6]
(C) [50–99]—add [9]
(D) [100–199]—add [12]
(E) [200–299]—add [15]
(F) [300 or more]—add [18].”]

The Commentary to § 2L2.1 captioned “Application Notes” is amended in Note 5 by inserting “Application of Subsection (b)(2).—” before “If the”; and by striking “100” and inserting “300”.

Section 2L1.2 is amended by striking the guideline and accompanying commentary and inserting the following:

[Option 1:

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

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
- (1) Apply the Greatest:

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

(A) A conviction for an aggravated felony for which a sentence of imprisonment exceeding 13 months was imposed, increase by 16 levels;

(B) A conviction for an aggravated felony for which a sentence of imprisonment of 13 months or less was imposed, increase by 12 levels;

(C) A conviction for an aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B), increase by 8 levels;

(D) A conviction for any other felony, increase by 4 levels; or

(E) Three or more convictions for misdemeanors, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) ‘Aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) ‘Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)’ means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).

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

(iv) ‘Sentence of imprisonment’ has the meaning given that term in Application Note 2 and subsection (b) of

§ 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) ‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) ‘Three or more convictions’ means at least three convictions for offenses that are not considered ‘related cases’, as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]’.]

[Option 2:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

(A) A conviction for an aggravated felony for which the sentence imposed exceeded 2 years, increase by 16 levels;

(B) A conviction for an aggravated felony for which the sentence imposed was at least 12 months but did not exceed 2 years, increase by 12 levels;

(C) A conviction for an aggravated felony, not covered in (b)(1)(A) or (b)(1)(B), increase by 8 levels;

(D) A conviction for any other felony, increase by 4 levels; or

(E) Three or more convictions for misdemeanors, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory

provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) ‘Aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) ‘Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)’ means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).

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

(iv) ‘Sentence of imprisonment’ has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) ‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) ‘Three or more convictions’ means at least three convictions for offenses that are not considered ‘related cases’,

as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

[5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.”.]

[Option 3:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic (1) Apply the Greatest:

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

(A) A conviction for an aggravated felony for which the sentence imposed exceeded 13 months, increase by 16 levels;

(B) A conviction for an aggravated felony for which the sentence imposed was at least 60 days but did not exceed 13 months, increase by 12 levels;

(C) A conviction for an aggravated felony not covered in (b)(1)(A) or (b)(1)(B), increase by 8 levels;

(D) A conviction for any other felony, increase by 4 levels; or

(E) Three or more convictions for misdemeanors, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) ‘Aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(ii) ‘Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)’ means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (*e.g.*, probation).

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

(iv) ‘Sentence of imprisonment’ has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) ‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) ‘Three or more convictions’ means at least three convictions for offenses that are not considered ‘related cases’, as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

[5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.”.]

[Option 4:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic (1) Apply the Greatest:

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

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

(B) A conviction for an aggravated felony that is a (i) drug trafficking offense for which the sentence imposed was 13 months or less; or (ii) crime of violence for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) A conviction for an aggravated felony not covered by subdivisions (b)(1)(A) or (b)(1)(B), increase by 8 levels;

(D) A conviction for any other felony, increase by 4 levels; or

(E) Three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the

United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) ‘Alien smuggling offense’ has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(N)).

(ii) ‘Child pornography offense’ is an offense described in 8 U.S.C. 1101(a)(43)(I).

(iii) ‘Crime of violence’ has the meaning given that term in 18 U.S.C. § 16.

(iv) ‘Drug trafficking offense’ has the meaning given that term in 18 U.S.C. 924(c).

(v) ‘Firearms offense’ is an offense described in 8 U.S.C. 1101(a)(43)(C) and (E).

(vi) ‘Human trafficking offense’ is an offense described in 8 U.S.C. 1101(a)(43)(K).

(vii) ‘Sentence imposed’ has the meaning given the term ‘sentence of imprisonment’ in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) ‘National security or terrorism offense’ is an offense described in 8 U.S.C. 1101(a)(43)(L).

2. Definition of ‘Felony’.—For purposes of subsection (b)(1)(A), (B), and (D), ‘felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).—(A) Definitions.—For purposes of subsection (b)(1)(C), ‘aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not

increased under subsections (b)(1)(A) or (B).

4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) ‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) ‘Three or more convictions’ means at least three convictions for offenses that are not considered ‘related cases’, as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

[7. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.”.] [Option 5:

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

(a) Base Offense Level:[16][20][24]
(b) Specific Offense Characteristic
[(1) If the defendant does not have a prior conviction for a felony, decrease by [8][6][4] levels.]

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A.

Application Notes:

1. Definition of ‘Felony’.—For purposes of subsection (b)(1)(A), (B), and (D), ‘felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

2. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.”.] [Option 6:

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

(a) Base Offense Level: 8
(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

(A) a prior conviction for a national security or terrorism offense, increase by 20 levels;

(B) A prior conviction resulting in a sentence of imprisonment of at least 13 months, or a prior conviction for murder, rape, a child pornography offense or an offense involving sexual abuse of a child, or three prior convictions resulting in sentences of imprisonment of at least 60 days, increase by 16 levels;

(C) A prior conviction resulting in a sentence of imprisonment of at least 6 months, or two prior convictions resulting in sentences of imprisonment of at least 60 days, increase by 12 levels;

(D) A prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by 8 levels;

(E) A prior conviction resulting in a sentence of imprisonment or a conviction for any other felony, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) ‘Child pornography offense’ means (I) an offense described in 18 U.S.C.

§ 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(ii) 'Offense involving sexual abuse of a child' means an offense where the victim is under 18 years of age and is any of the following: an offense described in 18 U.S.C. 2242, a forcible sex offense, statutory rape, or sexual abuse of a minor.

(iii) 'Sentence of imprisonment' has the meaning given in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(iv) 'National security offense' means an offense to which the Chapter 2M guidelines apply. 'Terrorism offense' means any offense involving, or intending to promote, a 'Federal crime of terrorism', as that term is defined in 18 U.S.C. 2332b(g)(5).

2. Definition of 'Felony'.—For purposes of subsection (b)(1)(E), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Sentences of imprisonment are counted separately if they are for offenses that are not considered 'related cases', as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

4. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

5. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History)."] Issues for Comment:

1. In April 2006, the Commission promulgated an amendment that increased the base offense level in § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) for offenses related to national security. See USSG App C (amendment 692) (effective Nov. 1, 2006). The Commission requests comment regarding whether it should increase the base offense levels in § 2L1.1(a)(2)

(providing level 23 for previous conviction for an aggravated felony) and (a)(3) (providing level 12, otherwise). Should the Commission increase the base offense levels in §§ 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport)? If so, what offense levels would be appropriate for each relevant guideline?

2. The Commission requests comment regarding the Supreme Court's decision in *Lopez v. Gonzalez*, 126 S.Ct. 625 (Dec. 5, 2006). In *Lopez*, the Supreme Court held that state drug convictions for conduct treated as a felony by the state, but as a misdemeanor under the federal Controlled Substances Act, do not constitute aggravated felonies under the Immigration and Nationality Act. Under federal criminal law, a conviction for an aggravated felony subjects an alien who unlawfully re-enters the United States to an enhanced statutory maximum penalty (see 8 U.S.C. 1326(b)(2)) and to an 8-level enhancement under the subsection (b)(1)(C) of § 2L1.2. Section 2L1.2 defines "aggravated felony" as having the same meaning given that term in 8 U.S.C. 1101(a)(43). Given that the guidelines reference the statutory definition of "aggravated felony," the Commission requests comment regarding whether the guidelines should be amended, if at all, in light of *Lopez v. Gonzalez*?

9. Issue for Comment: Reductions In Sentence Based on BOP Motion (Compassionate Release)

In April 2006, the Commission promulgated a new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), which became effective November 1, 2006. On May 15, 2006, the Commission published an issue for comment stating its intent to consider, in the 2006–2007 amendment cycle, developing further criteria and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute. See 71 FR 28062. The Commission requested comment and specific suggestions for appropriate

criteria and examples, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.

The Commission received comment pursuant to this request and hereby requests any additional comment regarding appropriate criteria and examples of extraordinary and compelling reasons. For example, should the Commission modify § 1B1.13 to provide that a reduction in a term of imprisonment should be made only if the extraordinary and compelling reason warranting the reduction involves a circumstance or condition that (i) was unknown to the court at the time of sentencing; (ii) was known to or anticipated by the court at the time of sentencing but that has changed substantially since that time; or (iii) was prohibited from being taken into account by the court at the time of sentencing but is no longer prohibited because of a change in applicable law? With respect to examples of extraordinary and compelling reasons, should the fact that the defendant is suffering from a terminal illness be a sufficient basis for a reduction, or should a reduction be limited to situations in which the defendant's terminal illness reduces the defendant's life expectancy to less than 12 months? Should examples of extraordinary and compelling reasons be limited to medical conditions, and if not, what other factors should provide a basis for a reduction under § 1B1.13? Should the Commission provide for a combination approach, allowing the court to consider more than one reason, each of which alone is not extraordinary and compelling but that, taken together, make the rationale for a reduction extraordinary and compelling? Should § 1B1.13 provide that the Bureau of Prisons may determine that, in any particular defendant's case, an extraordinary and compelling reason other than a reason identified by the Commission warrants a reduction?

10. Issues for Comment: Criminal History

1. The Commission has identified as a policy priority for this amendment cycle the continuation of its policy work on Chapter Four (Criminal History and Criminal Livelihood), in part because criminal history is among the most frequently cited reasons for a below guideline range sentence. See 71 FR 56578 (Sept. 27, 2006). The Commission has begun examining ways to improve the operation of Chapter Four.

As part of this process the Commission held two round-table discussions regarding criminal history

in Washington, DC, on November 1 and 3, 2006, to gather input from judges, academics, federal prosecutors, federal public defenders and other defense practitioners, probation officers, and other users of the federal sentencing guidelines. One topic of interest was the use of minor offenses (i.e., misdemeanor and petty offenses) in determining a defendant's criminal history score. Pursuant to § 4A1.2(c), sentences for misdemeanors and petty offenses ("minor offenses") are counted for criminal history purposes with a limited number of exceptions. Some minor offenses are counted only if the sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days, or the prior offense was similar to the instant offense. Examples of offenses that fall within this exception include reckless driving, disorderly conduct, driving with a suspended license, gambling, prostitution, and resisting arrest. See § 4A1.2(c)(1) for the full list of offenses in this category. Certain minor offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions (e.g., speeding), public intoxication, and vagrancy are never counted in criminal history. See § 4A1.2(c)(2). Furthermore, several circuit courts have developed varying tests to determine if a conviction falls within the list of offenses provided in § 4A1.2(c)(1) or (c)(2).

The Commission requests comment regarding the use of minor offenses in determining a defendant's criminal history score. Specifically, how reflective of the defendant's culpability are minor offenses? Should the Commission consider specifically excluding other minor offenses from the criminal history determination and, if so, which offenses should be excluded? Conversely, should the Commission consider specifically including additional minor offenses for purposes of determining a defendant's criminal category? Should the Commission include any minor offense that has a term of probation of at least one year, or a term of imprisonment of at least 30 days, or if the prior offense was similar to the instant offense (as currently provided in § 4A1.2(c)(1))?

The Commission also requests comment regarding whether there is an alternate point value that the Commission should consider assigning to minor offenses, or whether there is an alternative way of counting minor offenses for criminal history purposes. For example, should the Commission consider providing criminal history points only after a defendant has multiple convictions for minor offenses?

Should the Commission consider not assigning or assigning some alternative point value for recency and status points to minor offenses? (See § 4A1.1(d)–(e).) Alternatively, should minor offenses be used only for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)?

2. Another topic of interest among the round-table participants was the definition of "related cases" under Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History). Currently, prior sentences are considered related if there is not intervening arrest and they resulted from offenses that (A) occurred on the same occasion; (B) were part of a single common scheme or plan; or (C) were consolidated for trial or sentencing. Each of these criteria has been the subject of much litigation in the district and appellate courts, including a decision by the Supreme Court regarding the consolidation aspect of the definition. See *Buford v. United States*, 532 U.S. 59 (2001). Furthermore, a number of appellate opinions have suggested that the Commission reexamine the application of the definition of related cases when sentences are not separated by an intervening arrest. The Commission requests comment regarding the definition of "related cases." With respect to the instances described in subdivisions (A), (B), and (C), are there factors that would help the court determine whether a case is related to another case? For example, should the Commission provide a list of factors for the court to use in determining whether prior convictions are consolidated for sentencing? In general, is the current definition for related cases too restrictive and, if so, how should the definition be modified or expanded?

11. Issue for Comment: Implementation of the Telephone Records and Privacy Protection Act of 2006

The Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476, created a new offense in 18 U.S.C. 1039 pertaining to the fraudulent acquisition or disclosure of confidential telephone records. Section 4 of the Act requires the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code." The Act requires the Commission to promulgate an amendment not later than 180 days after the enactment of the Act.

The Commission requests comment regarding how best to implement this legislation, particularly in light of the mandatory consecutive penalties provided for certain forms of aggravated conduct, and keeping in mind the Commission's simplification efforts. For example, should the Commission reference this offense to § 2H3.1 as it is proposed to be amended in the Miscellaneous Laws proposed amendment? That proposed amendment expands the heading of the guideline to include the unauthorized disclosure of any private information, which would include confidential telephone records. If it should be referenced to § 2H3.1, are there additional modifications (e.g. special offense characteristics) that should be made to that guideline to implement the new offense?

12. Issue for Comment: Cocaine Sentencing Policy

The Commission identified as a policy priority for the current amendment cycle ending May 1, 2007, the "continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy", including updating the Commission's 2002 Report to Congress, Cocaine and Federal Sentencing Policy, which is available on the Commission's Web site at www.ussc.gov.

In working to address this priority, the Commission currently is updating the information contained in its 2002 Report. As part of this process, the Commission gathered information at a public hearing it held on cocaine sentencing policy on November 14, 2006. At that hearing, the Commission received testimony from the executive and judicial branches of the federal government, State and local agencies, the defense bar, medical and drug treatment experts, academics, and community interest groups. Witnesses at that hearing expressed a variety of views about the nature and characteristics of cocaine offenses and offenders and suggested a number of proposals for addressing federal cocaine penalties. Testimony of the witnesses, as well as a transcript of the public hearing, can be found on the Commission's Web site.

The Commission invites comment on any or all of the testimony received at the November 14, 2006, public hearing, including comment on any of the suggestions at that hearing or any other suggestions (such as possible changes in the Drug Quantity Table) for addressing federal cocaine penalties.

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