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 sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information portion of this notice.

The proposed amendments and issues for comment in this notice are as follows:

(1) a proposed amendment to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to respond to two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C. § 3582(c)(2);

(2) a proposed amendment to respond to the new and expanded criminal offenses and increased statutory penalties provided by the Violence Against Women Reauthorization Act of 2013, Public Law 113–B4 (March 7, 2013), including (A) options to amend §§ 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2A6.2 (Stalking or Domestic Violence) to address statutory changes to 18 U.S.C. §§ 113, 2261, 2261A, and 2262, and (B) options to amend Appendix A (Statutory Index) to address certain offenses established or affected by that Act, including 18 U.S.C. § 113, 1153, 1597, and 2423; 8 U.S.C. § 1375a; and 47 U.S.C. § 223, and related issues for comment;

(3) a proposed amendment to the guidelines applicable to drug offenses, including (A) a detailed request for comment on whether any changes should be made to the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types; (B) a proposed amendment that illustrates one possible set of changes to the Drug Quantity Table in § 2D1.1, together with conforming changes to the chemical quantity tables in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); and (C) an issue for comment on whether the guidelines adequately address the environmental and other harms of drug production operations (including, in particular, the cultivation of marihuana) on public lands or while trespassing on private property;

(4) a proposed amendment to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to clarify how principles of relevant conduct apply in cases in which the defendant is convicted of a firearms offense (*e.g.,* being a felon in possession of a firearm) in two situations: first, when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion (but was not necessarily convicted of the second offense); and second, when the defendant unlawfully possessed a firearm and also used a firearm in connection with another offense, such as robbery or attempted murder (but was not necessarily convicted of the other offense), and related issues for comment;

(5) a proposed amendment to § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to address cases in which aliens are transported through dangerous terrain, *e.g.,* along the southern border of the United States, and related issues for comment;

(6) a proposed amendment to address differences among the circuits in the calculation of the guideline range of supervised release under § 5D1.2 (Term of Supervised Release) in two situations: first, when there is a statutory minimum term of supervised release; and second, when the instant offense of conviction is failure to register as a sex offender under 18 U.S.C. § 2250, and related issues for comment; and

(7) a proposed amendment to § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to address certain types of cases in which the defendant is subject to an undischarged term of imprisonment, including (A) a proposed change requiring the court to account for an undischarged term of imprisonment that is relevant conduct to the instant federal offense of conviction but does not result in a Chapter Two or Chapter Three increase; (B) a proposed change allowing the court to account for an undischarged state term of imprisonment that is anticipated but not yet imposed; and (C) a proposed change allowing the court to adjust the sentence if the defendant is a deportable alien who is likely to be deported after imprisonment and is serving an undischarged term of imprisonment that resulted from an unrelated offense, and related issues for comment.

DATES: (1) Written Public Comment.—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 18, 2014.

(2) Public Hearings.—The Commission plans to hold public hearings regarding the proposed amendments and issues for comment set forth in this notice. Specifically, a public hearing on Proposed Amendment 2 of this notice (relating to the Violence Against Women Act of 2013) and other issues related to the reauthorization of the Violence Against Women Act of 2013 will be held on February 13, 2014, and a public hearing on other proposed amendments will be held on March 13, 2014. Further information regarding the public hearings, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearings, will be provided by the Commission on its Web site at *www.ussc.gov.*

ADDRESSES: Public comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public_Comment@ussc.gov.* The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, (202) 502–4502, *pubaffairs@ussc.gov.*

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

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.

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(c). To the extent practicable, public comment should address each of these factors.

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.

Patti B. Saris,

Chair.

1. 1B1.10

Synopsis of Proposed Amendment: This proposed amendment responds to two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C. § 3582(c)(2) and the Commission's policy statement at § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Section 3582(c)(2) authorizes the court to reduce a defendant's term of imprisonment if the defendant's sentence was based on a sentencing range that has subsequently been lowered by the Sentencing Commission and the reduction is consistent with applicable policy statements issued by the Commission. The applicable policy statement is § 1B1.10, which provides guidance and limitations for a court in such a proceeding. Effective November 1, 2011, the Commission promulgated Amendment 750, which made a series of changes to the drug guidelines to implement the Fair Sentencing Act of 2010, and Amendment 759, which made two parts of Amendment 750 available for retroactive application. Amendment 759 also revised § 1B1.10 to provide that the new sentence may not be lower than the amended guideline range unless the original sentence was below the original guideline range because of a government motion for substantial assistance. In such a case, ''a reduction comparably less than the amended guideline range'' may be appropriate. *See* § 1B1.10(b)(2)(B). Circuits are now split over how to apply § 1B1.10(b)(2)(B) in two situations.

Original Guideline Range Above the Mandatory Minimum

First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. On resentencing pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the ''trumping'' mechanism in § 5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. *See* § 5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, *i.e.,* the guideline sentence that results after application of the ''trumping'' mechanism in § 5G1.1. *See United States* v. *Golden,* 709 F.3d 1229, 1231–33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.,* the bottom of the amended range as determined by the Sentencing Table, without application of the ''trumping'' mechanism in § 5G1.1. *See United States* v. *Wren,* 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, *United States* v. *Liberse,* 688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Bottom of Original Guideline Range Below the Mandatory Minimum

Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the ''trumping'' mechanism in § 5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum.

For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. On resentencing, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of § 5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits

are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, *i.e.,* the guideline sentence that results after application of the ''trumping'' mechanism in § 5G1.1. *See United States* v. *Glover,* 686 F.3d 1203, 1208 (11th Cir. 2012); *United States* v. *Joiner,* 727 F.3d 601 (6th Cir. 2013); *United States* v. *Johnson,* 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered.

In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.,* the bottom of the Sentencing Table guideline range. *See United States* v. *Savani,* 733 F.3d 56, 66–7 (3d Cir. 2013); *In re Sealed Case,* 722 F.3d 361, 369–70 (D.C. Cir. 2013).

The proposed amendment presents two options for responding to these conflicts:

Option 1 would generally adopt the approach of the Third Circuit in *Savani* and the District of Columbia Circuit in *In re Sealed Case.* It would amend § 1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of § 1B1.10 the amended guideline range shall be determined without regard to the operation of § 5G1.1 and § 5G1.2.

Option 2 would generally adopt the approach of the Eleventh Circuit in *Glover,* the Sixth Circuit in *Joiner,* and the Second Circuit in *Johnson,* which is also consistent with the approach of the Eighth Circuit in *Golden.* It would amend § 1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of § 1B1.10 the amended guideline range shall be determined after operation of § 5G1.1 or § 5G1.2, as appropriate.

Each option also adds commentary with examples.

Proposed Amendment

Section 1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (a)(2)(B), and (b)(1) by striking ''subsection (c)'' each place such term appears and inserting ''subsection (d)''; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c) (within which two options are provided):

''(c) *Cases Involving Mandatory Minimum Sentences and Substantial Assistance.*—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement:

[Option 1:

the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).**]**

[Option 2:

the amended guideline range shall be determined after operation of § 5G1.1 (Sentencing on a Single Count of Conviction) or § 5G1.2 (Sentencing on Multiple Counts of Conviction), as appropriate.**]**''.

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended in Notes 1(A), 2, and 4 by striking ''subsection (c)'' each place such term appears and inserting ''subsection (d)''; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4 (within which, two options are provided, corresponding to the two options provided above):

''4. *Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement:

[Option 1, continued:

the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.,* unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a

reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.**]**

[Option 2, continued:

the amended guideline range shall be determined after operation of § 5G1.1 (Sentencing on a Single Count of Conviction) or § 5G1.2 (Sentencing on Multiple Counts of Conviction), as appropriate. For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. For purposes of this policy statement, the amended guideline range is considered to be 120 to 135 months (*i.e.,* restricted by operation of § 5G1.1 to reflect the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 90 months (representing a reduction of 25 percent below the minimum of the amended guideline range of 120 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. For purposes of this policy statement, the amended guideline range is considered to be precisely 120 months (*i.e.,* restricted by operation of § 5G1.1 to reflect the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of 25 percent below the minimum of the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the minimum of the amended guideline range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.**]**''.

The Commentary to § 1B1.10 captioned ''Background'' is amended by striking ''subsection (c)'' both places such term appears and inserting ''subsection (d)''.

2. Violence Against Women Reauthorization Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Violence Against Women Reauthorization Act of 2013, Public Law 113–4 (March 7, 2013), which, among other things, provided new and expanded criminal offenses and increased penalties for certain crimes involving assault, sexual abuse, stalking, domestic violence, harassment, and human trafficking. Issues for comment are also included.

This proposed amendment and issues for comment address the issues raised by the statutory changes made by the Act in the following manner:

(A) 18 U.S.C. § 113 (Assaults Within Maritime and Territorial Jurisdiction)

Synopsis of Proposed Amendment: This part of the proposed amendment addresses changes to 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). Section 113 sets forth a range of penalties for assaults within the special maritime and territorial jurisdiction of the United States. This jurisdiction is defined by statute to include, among other things, maritime areas such as the high seas; land areas such as federal lands and buildings; federal holdings overseas such as diplomatic missions and military bases; and aircraft, vessels, and space vehicles belonging to the federal government, as well as certain other aircraft, vessels, and space vehicles. *See* 18 U.S.C. § 7. Section 113 also applies to assaults committed by Indians or non-Indians within Indian country. *See* 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act, and 18 U.S.C. § 1152, commonly referred to as the General Crimes Act.

Before enactment of the Act, section 113(a) contained seven paragraphs, (1) through (7). Each of these paragraphs applies to certain types of assault and provides a statutory maximum term of imprisonment. Most of these paragraphs are referenced in Appendix A (Statutory Index) to specific offense guidelines in Chapter Two, Part A. The Act revised certain paragraphs and added a new paragraph (8).

Sec. 113(a)(1) Assault With Intent To Commit Sexual Abuse (20-Year Maximum)

Before enactment of the Act, section 113(a)(1) applied to assault with intent to commit murder and provided a statutory maximum term of imprisonment of 20 years. Section 113(a)(1) is referenced in Appendix A to § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).

The Act expanded section 113(a)(1) so that it applies not only to assault with intent to commit murder, but also to assault with intent to commit a violation of section 2241 (Aggravated sexual abuse) or 2242 (Sexual abuse). The proposed amendment amends Appendix A so that section 113(a)(1) is also referenced to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), which is the guideline to which offenses under sections 2241 and 2242 are referenced.

Sec. 113(a)(2) Assault With Intent To Commit Certain Sex Offenses (10-Year Maximum)

Before enactment of the Act, section 113(a)(2) applied to assault with intent to commit any felony, except murder or a felony under chapter 109A, and provided a statutory maximum term of imprisonment of 10 years. Felonies under chapter 109A include violations of sections 2241, 2242, 2243 (Sexual abuse of a minor or ward), and 2244 (Abusive sexual contact). Section 113(a)(2) is referenced in Appendix A to § 2A2.2 (Aggravated Assault).

The Act expanded the scope of section 113(a)(2) by narrowing the chapter 109A exception. Section 113(a)(2) now applies to assault with intent to commit any felony, except murder or a violation of section 2241 or 2242. The effect of this change is that an assault with intent to commit a felony

violation of section 2243 or 2244 may now be prosecuted under section 113(a)(2). The proposed amendment amends Appendix A so that section 113(a)(2) is referenced not only to § 2A2.2 but also to §§ 2A3.2, 2A3.3, and 2A3.4 (*i.e.,* the guidelines to which offenses under sections 2243 and 2244 are referenced).

Sec. 113(a)(4) Assault by Striking, Beating, or Wounding (1-Year Maximum)

Section 113(a)(4) applies to assault by striking, beating, or wounding. Before the Act it provided a statutory maximum term of imprisonment of 6 months. Section 113(a)(4) is not referenced in Appendix A.

The Act increased the statutory maximum term of imprisonment to 1 year. The proposed amendment amends Appendix A to reference section 113(a)(4) to § 2A2.3 (Minor Assault).

Sec. 113(a)(7) Assault Resulting in Substantial Bodily Injury to Spouse, Intimate Partner, or Dating Partner (5-Year Maximum)

Before enactment of the Act, section 113(a)(7) applied to assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, and provided a statutory maximum term of imprisonment of 5 years. Section 113(a)(7) is referenced in Appendix A (Statutory Index) to § 2A2.3. Among other things, § 2A2.3 has a 4-level enhancement if the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years.

The Act expanded section 113(a)(7) so that it also applies to assault resulting in substantial bodily injury to a spouse or intimate partner or dating partner. The proposed amendment amends § 2A2.3 to broaden the scope of the 4-level enhancement. Two options are presented:

Option 1 broadens the scope of the 4-level enhancement so that it applies not only to a case in which the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years, but also to a case in which the offense resulted in substantial bodily injury to a spouse or intimate partner or dating partner.

Option 2 broadens the scope of the 4-level enhancement so that it applies to any case in which the offense resulted in substantial bodily injury.

In addition, the proposed amendment brackets the possibility of amending Appendix A to provide that offenses under section 113(a)(7) would also be referenced to § 2A6.2 (Stalking or Domestic Violence).

Sec. 113(a)(8) Assault of a Spouse, Intimate Partner, or Dating Partner by Strangling or Suffocating (10-Year Maximum)

Section 113(a)(8) is a new provision established by the Act. It applies to assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, and provides a statutory maximum term of imprisonment of 10 years.

The proposed amendment makes three changes to address section 113(a)(8). First, it amends Appendix A to reference section 113(a)(8) to § 2A2.2.

Second, as a conforming change, it amends the Commentary to § 2A2.2 to provide that the term ''aggravated assault'' includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate.

Third, the proposed amendment adds a new specific offense characteristic to § 2A2.2. Two options are presented:

Option 1 provides an enhancement of [3] to [7] levels if the bodily injury enhancement in subsection (b)(3) does not apply and the offense involved strangling, suffocating, or attempting to strangle or suffocate.

Option 2 provides an enhancement of [3] to [7] levels if the offense involves strangling, suffocating, or attempting to strangle or suffocate. It brackets the possibility of limiting the cumulative impact of the bodily injury enhancement in subsection (b)(3) and this new enhancement to [10]–[12] levels. (Note that the guideline already contains a provision limiting the cumulative impact of subsections (b)(2) and (b)(3) to not more than 10 levels.)

In addition, the proposed amendment brackets the possibility of amending Appendix A to provide offenses under section 113(a)(8) with a reference to § 2A6.2 (Stalking or Domestic Violence). Section 2A6.2 has a 2-level enhancement that applies if the offense involved an aggravating factor such as bodily injury, and a 4-level enhancement that applies if the offense involved more than one such aggravating factor. The proposed amendment amends § 2A6.2 to provide that the enhancement also applies if the offense involved strangling, suffocating, or attempting to strangle or suffocate. Two options are presented:

Option 1 would establish strangling, suffocating, or attempting to strangle or suffocate as a separate new aggravating factor. Under this option, a case that involves this factor would receive the 2-level enhancement, and a case that involves both this factor and another factor (such as bodily injury) would receive the 4-level enhancement.

Option 2 would incorporate strangling, suffocating, or attempting to strangle or suffocate within the existing aggravating factor for bodily injury. Under this option, a case that involves both bodily injury and strangling or suffocating would receive the 2-level enhancement rather than a 4-level enhancement.

Following the proposed amendment are issues for comment on whether certain other changes to the guidelines are appropriate to respond to these and other changes to section 113.

Proposed Amendment

Section 2A2.2(b) is amended by redesignating paragraphs (4) through (6) as paragraphs (5) through (7), respectively; and by inserting after paragraph (3) the following new paragraph (4) (two options are provided):

[Option 1:

''(4) If (A) subdivision (3) does not apply; and (B) the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by **[**3**]–[**7**]** levels.''**]**

[Option 2:

''(4) If the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by **[**3**]–[**7**]** levels. **[**However, the cumulative adjustments from application of subdivisions (3) and (4) shall not exceed **[**10**]–[**12**]** levels.**]]**''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended in Note 1 by striking ''or'' before ''(C)''; by inserting after ''(C)'' the following: ''strangling, suffocating, or attempting to strangle or suffocate; or (D)''; and by adding at the end the following new paragraph:

'' 'Strangling' and 'suffocating' have the meaning given those terms in 18 U.S.C. § 113.'';

and in Note 4 by striking ''(b)(6)'' and inserting ''(b)(7)''.

The Commentary to § 2A2.2 captioned ''Background'' is amended in the first paragraph by striking the comma after ''serious bodily injury'' and inserting a semicolon, and by striking the comma after ''cause bodily injury'' and inserting ''; strangling, suffocating, or attempting to strangle or suffocate;'';

and in the paragraph that begins ''Subsection'' by striking ''(b)(6)'' both places such term appears and inserting ''(b)(7)''.

Section 2A2.3 is amended as follows (two options are provided):

[Option 1:

Section 2A2.3(b)(1) is amended by inserting after ''substantial bodily injury to'' the following: ''a spouse or intimate partner, a dating partner, or''.

The Commentary to § 2A2.3 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Minor assault' means'' the following new paragraph:

'' 'Spouse,' 'intimate partner,' and 'dating partner' have the meaning given those terms in 18 U.S.C. § 2266.''**]**

[Option 2:

Section 2A2.3(b)(1) is amended by striking ''to an individual under the age of sixteen years''.**]**

Section 2A6.2 is amended as follows (two options are provided):

[Option 1:

Section 2A6.2(b)(1) is amended by striking ''(D)'' and inserting ''(E)''; by inserting after ''(C)'' the following: ''strangling, suffocating, or attempting to strangle or suffocate; (D)''; and by striking ''these aggravating factors'' and inserting ''subdivisions (A), (B), (C), (D), or (E)''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'Strangling' and 'suffocating' have the meaning given those terms in 18 U.S.C. § 113.'';

and in Notes 3 and 4 by striking ''(b)(1)(D)'' each place such term appears and inserting ''(b)(1)(E)''.**]**

[Option 2:

Section 2A6.2(b)(1)(B) is amended by inserting after ''bodily injury'' the following: ''or strangling, suffocating, or attempting to strangle or suffocate''; and by striking ''these aggravating factors'' and inserting ''subdivisions (A), (B), (C), or (D)''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'Strangling' and 'suffocating' have the meaning given those terms in 18 U.S.C. § 113.''**]**

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 113(a)(1) by adding '', 2A3.1'' at the end;

in the line referenced to 18 U.S.C. § 113(a)(2) by adding '', 2A3.2, 2A3.3, 2A3.4'' at the end;

after the line referenced to 18 U.S.C. § 113(a)(3) by inserting the following new line reference:

''18 U.S.C. § 113(a)(4) 2A2.3'';

in the line referenced to 18 U.S.C. § 113(a)(7) by adding ''[, 2A6.2]'' at the end;

and after the line referenced to 18 U.S.C. § 113(a)(7) by inserting the following new line reference:

''18 U.S.C. § 113(a)(8) 2A2.2 [, 2A6.2]''.

Issues for Comment:

1. *Offenses Involving Strangulation, Suffocation, or Attempting to Strangle or Suffocate Under Section 113(a)(8).* In light of the new offense at section 113(a)(8) made by the Act, a defendant who commits an assault of a spouse, intimate partner, or dating partner (as defined by the statute) by strangling, suffocating, or attempting to strangle or suffocate may be prosecuted under section 113 with a statutory maximum term of imprisonment of 10 years.

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases involving strangling, suffocating, or attempting to strangle or suffocate. Are the existing provisions in the guidelines, such as the enhancements for bodily injury, adequate to address these cases? If not, how should the Commission amend the guidelines to address this factor?

In particular, should the Commission provide a new enhancement of [3]–[7] levels that applies if the offense involves strangling, suffocating, or attempting to strangle or suffocate? If so, how should such an enhancement interact with the existing enhancements, such as the weapon enhancement and the bodily injury enhancement? For example, should the new enhancement be cumulative with those enhancements, or should it interact with those enhancements in some other way, *e.g.,* by applying only if the bodily injury enhancement does not apply, or by establishing a ''cap'' of [10]–[12] levels on its cumulative impact with those enhancements?

In addition, should such a new enhancement apply only to cases described in the statute (*i.e.,* cases in which the victim was a spouse, intimate partner, or dating partner), or should it apply to any cases involving strangling, suffocating, or attempting to strangle or suffocate?

Finally, should the new offense be referenced in Appendix A (Statutory Index) to the aggravated assault guideline, to the domestic violence guideline, or to both guidelines? To the extent the offense is referenced to the domestic violence guideline, how, if it all, should that guideline be amended to address cases involving strangling, suffocating, or attempting to strangle or suffocate?

2. *Supervised Release.* The Commission seeks comment on the imposition of supervised release in cases involving domestic violence, *e.g.,* cases in which the defendant was convicted of an assault offense or a domestic violence or stalking offense. Section 5D1.1 (Imposition of a Term of Supervised Release) requires the court to impose a term of supervised release only when required by statute or when a sentence of imprisonment of more than one year is imposed. Should the Commission provide additional guidance on the imposition of supervised release (or on the length of a term of supervised release) in cases involving domestic violence? How, if at all, should the Commission amend the guidelines to address the imposition of supervised release in such cases?

3. *Assault With Intent to Commit Certain Sex Offenses Under Section 113(a)(1) and (2).* In light of the changes to section 113(a)(1) and (2) made by the Act, a defendant who commits an assault with intent to commit certain sex offenses may now be prosecuted under section 113.

The Commission invites comment on offenses involving an assault with intent to commit a sex offense (as described in section 113(a)(1) and (2)) and how the guidelines should address such offenses. In particular:

(A) To what extent should an assault with intent to commit a sex offense be treated by the guidelines as a type of assault, and to what extent as a type of attempted sex offense? For example, the proposed amendment would amend Appendix A (Statutory Index) to provide references to one or more sex offense guidelines. Should the Commission instead, or in addition, provide references to one or more assault guidelines?

To the extent offenses under section 113(a)(1) and (2) are referenced to one or more sex offense guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 113(a)(1) and (2)?

Likewise, to the extent offenses under section 113(a)(1) and (2) are referenced to one or more assault guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 113(a)(1) and (2)? For example, should the Commission provide a new enhancement of [2][4][6] levels to account for an assault with an intent to commit a sex offense, or should the Commission provide a cross reference to one or more sex offense guidelines, or both?

(B) There are a variety of provisions in the guidelines that apply when the conduct involves a sex offense or

attempted sex offense. To what extent should these provisions also apply when the conduct involves an assault with intent to commit a sex offense? How, if at all, should the Commission amend the guidelines to clarify whether or not these provisions apply when the conduct involves an assault with intent to commit a sex offense? For example:

(1) Under § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in section 2241 or 2242), a cross reference to § 2A3.1 applies. *See* § 2A3.2(c)(1). If the offense involved assault with intent to commit criminal sexual abuse, should the cross reference also apply?

Similar issues arise with the cross references in §§ 2A3.2(c)(2), 2A3.4(c)(1), 2G1.1(c)(1), and 2G1.3(c)(3). How, if at all, should they be revised?

(2) Under §§ 2A3.1 and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), if the offense involved ''conduct described in'' section 2241(a) or (b) or 2242, an enhancement or a higher base offense level applies. *See* §§ 2A3.1(b)(1), 2A3.4(a). Should these provisions similarly apply if the offense involved an assault with intent to commit a violation of section 2241(a) or (b) or 2242?

Similar issues arise with the enhancements in § 2G2.1(b)(2)(A) and (B) and the accompanying commentary. How, if at all, should they be revised?

(3) Under § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint), if the victim was ''sexually exploited,'' an enhancement of 6 levels applies. *See* § 2A4.1(b)(5). Application Note 3 defines ''sexually exploited'' to include ''offenses set forth in'' sections 2241–2244, 2251, and 2421–2423. If the offense involved assault with intent to commit a sex offense under sections 2241–2244, should an enhancement of [6] levels also apply?

Similar issues arise with the enhancements at §§ 2G2.2(b)(1), (3), and (5) and 2G2.6(b)(3), and the accompanying commentary. How, if at all, should they be revised?

(4) Under § 2J1.2(b)(1)(A), an enhancement applies if (among other things) the defendant was convicted under 18 U.S.C. § 1001 and the statutory maximum term of eight years' imprisonment applies because ''the matter relates to'' a sex offense under chapter 109A. If the matter relates to an assault with intent to commit such a sex offense, should this enhancement apply?

(5) Under § 4B1.5, certain provisions apply if the instant offense of conviction is a ''covered sex crime.'' That term is defined in Application Note 2 to include (among other things) an offense, perpetrated against a minor, under chapter 109A. If the offense involved an assault with intent to commit such an offense, should the definition of ''covered sex crime'' apply?

(6) Under § 5D1.2(b), certain provisions apply if the offense is a ''sex offense.'' That term is defined in Application Note 1 to include (among other things) an offense, perpetrated against a minor, under chapter 109A. If the offense involved an assault with intent to commit such an offense, should the definition of ''sex offense'' apply?

Similar issues are presented in §§ 5H1.6, 5K2.0(a)(1)(B) and (b), 5K2.13, 5K2.20(a), and 5K2.22. How, if at all, should these provisions be revised?

(B) 18 U.S.C. § 1153 (Offenses Committed Within Indian country) (''Major Crimes Act'')

Synopsis of Proposed Amendment: This part of the proposed amendment addresses changes to 18 U.S.C. § 1153 (Offenses committed within Indian country), commonly referred to as the Major Crimes Act. The Act contains a list of offenses and specifies that any Indian who commits against the person or property of another Indian or other person any of the listed offenses shall be subject to the same law and penalties as all other persons committing any of those offenses, within the exclusive jurisdiction of the United States.

Before enactment of the Act, the list of offenses in section 1153 included only four categories of assault: assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, and assault against an individual who has not attained the age of 16 years. The Act expanded the list of assault offenses to include any felony assault under section 113.

Offenses under section 1153 are referenced in Appendix A to 17 guidelines to account for the various listed offenses. These 17 guidelines include references to the three different guidelines (§§ 2A2.1, 2A2.2, and 2A2.3) to which felony assaults under section 113 are currently referenced.

Part A, above, would provide certain additional Appendix A references for offenses under section 113, including one possible reference not currently included among the 17 references for section 1153 C a reference to § 2A6.2. This part of the proposed amendment would similarly revise the Appendix A references for offenses under section 1153 by including the bracketed possibility of a reference to § 2A6.2.

An issue for comment is also included on 18 U.S.C. § 1152, commonly known as the General Crimes Act, and whether the Appendix A reference to § 2B1.5 is appropriate.

Proposed Amendment

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1153 by inserting after § 2A4.1,'' the following: ''[2A6.2,]''.

Issue for Comment

1. The Commission seeks comment on offenses under 18 U.S.C. § 1152, commonly known as the General Crimes Act. Section 1152 generally provides that the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country.

Section 1152 is referenced in Appendix A (Statutory Index) to a single guideline, § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

The Commission seeks comment on what, if any, Appendix A references are appropriate for offenses under section 1152. Is the reference to § 2B1.5 appropriate? Should the Commission provide additional Appendix A references for section 1152 and, if so, to which guidelines? In the alternative, are Appendix A references unnecessary for section 1152 and, if so, should the Commission delete section 1152 from Appendix A?

(C) 18 U.S.C. §§ 2261, 2261A, 2262 (Domestic Violence and Stalking)

Synopsis of Proposed Amendment: This part of the proposed amendment addresses statutory changes to 18 U.S.C. §§ 2261 (Interstate domestic violence), 2261A (Stalking), and 2262 (Interstate violation of protection order). Statutory changes to these provisions were made by Public Law 109B162 in 2006 and were expanded and restated by Section 107 of the Act. The proposed amendment amends the Commentary to § 2A6.2 to reflect these statutory changes.

Before these statutory changes, these offenses generally required as a jurisdictional element of the offense that the defendant travel in interstate or foreign commerce or into or out of Indian country or within the special

maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), that the defendant use the mail or any facility of interstate or foreign commerce. As a result of the statutory changes, the jurisdictional element may instead be met by presence in the special maritime and territorial jurisdiction of the United States or, in the case of a stalking offense under section 2261A(2), by using an interactive computer service, electronic communication service, or electronic communication system. The proposed amendment revises the definition of ''stalking'' in the Commentary to § 2A6.2 to conform to these statutory changes.

These statutory changes have also expanded and restated the elements of stalking offenses under section 2261A to cover a broader range of conduct. As a result of these statutory changes, section 2261A has been extended to cover placing a person under surveillance with intent to kill, injure, harass, or intimidate; and conduct that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress. The proposed amendment expands the definition of ''stalking'' in the Commentary to § 2A6.2 to reflect the expanded conduct covered by these statutory changes to section 2261A.

Proposed Amendment

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by striking the paragraph that begins '' 'Stalking' means'' and inserting the following new paragraph:

'' 'Stalking' means conduct described in 18 U.S.C. § 2261A.''

(D) 8 U.S.C. § 1375a(d) (Regulation of International Marriage Brokers)

Synopsis of Proposed Amendment: This part of the proposed amendment addresses statutory changes made by the Act to 8 U.S.C. § 1375a (Domestic violence information and resources for immigrants and regulation of international marriage brokers).

The Act revised and strengthened the regulation of international marriage brokers. Among other things, such marriage brokers are required to collect certain information about the United States client and are restricted from disclosing certain information about children and foreign national clients. A broker who knowingly violates or attempts to violate these provisions is subject to a maximum term of imprisonment of five years. *See* section 1375a(d)(5)(B)(i)(II). If the violation is not a knowing violation, the maximum term of imprisonment is one year. *See* section 1375a(d)(5)(B)(i)(I).

The Act also contains two other criminal provisions. First, a person who misuses information obtained by an international marriage broker is subject to a maximum term of imprisonment of one year. *See* section 1375a(d)(5)(B)(ii). Second, a person who knowingly and with intent to defraud another person outside the United States in order to recruit, solicit, entice, or induce that other person into entering a dating or matrimonial relationship, makes false or fraudulent representations regarding the background information required to be provided to an international marriage broker is subject to a maximum term of imprisonment of one year. *See* section 1375a(d)(5)(B)(iii).

Before enactment of the Act, criminal provisions in section 1375a were set forth in subsection (d)(3)(C) and in subsection (d)(5)(B). These criminal provisions are referenced in Appendix A (Statutory Index) to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Act revised and reorganized these criminal provisions such that all criminal provisions are set forth in subsection (d)(5)(B), as described above.

The proposed amendment responds to these changes by revising the Appendix A references for offenses under section 1375a(d). The reference for subsection (d)(3)(C) is deleted as obsolete. Offenses under subsection (d)(5)(B)(i) and (ii) continue to be referenced to § 2H3.1. Offenses under subsection (d)(5)(B)(iii) are referenced to § 2B1.1 (Theft, Property Destruction, and Fraud).

Proposed Amendment

Appendix A (Statutory Index) is amended by striking the line referenced to 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) and inserting the following new line references:

''8 U.S.C. § 1375a(d)(5)(B)(i)	2H3.1
8 U.S.C. § 1375a(d)(5)(B)(ii)	2H3.1
8 U.S.C. § 1375a(d)(5)(B)(iii)	2B1.1''.

(E) 47 U.S.C. § 223 (Obscene or Harassing Telephone Calls)

Synopsis of Proposed Amendment: This part of the proposed amendment addresses offenses under 47 U.S.C. § 223 (Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications), which were modified by the Act.

Section 223(a) sets forth a range of prohibited acts involving communication that is obscene or that is made with intent to harass, or both. A person who commits any of these acts is subject to a maximum term of imprisonment of two years. Among other things, the Act clarified that communication with the intent to annoy is not prohibited by section 223(a). Three of the prohibited acts in section 223(a) are referenced in Appendix A (Statutory Index) to § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens).

Other prohibited acts in section 223(a) are not referenced in Appendix A. The proposed amendment provides Appendix A references for these offenses.

Subsection (a)(1)(A) prohibits a communication that is obscene or child pornography, with intent to abuse, threaten, or harass another person. The proposed amendment references this offense to any one or more of three bracketed options:

§ 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens);

§ 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor); and

§ 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).

Subsection (a)(1)(B) prohibits a communication that is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age. The proposed amendment references this offense to either or both of two bracketed options: §§ 2G2.2 and 2G3.1.

Subsection (a)(2) prohibits a person from knowingly permitting a telecommunications facility under his control to be used for any activity covered by subsection (a)(1). The proposed amendment references this offense to any one or more of three bracketed options: §§ 2A6.1, 2G2.2, and 2G3.1.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 47 U.S.C. § 223(a)(1)(C) the following new line references:

''47 U.S.C. § 223(a)(1)(A).	[2A6.1][2G2.2][2G3.1]
47 U.S.C. § 223(a)(1)(B).	[2G2.2][2G3.1]'';

and by inserting after the line referenced to 47 U.S.C. § 223(a)(1)(E) the following new line reference:

''47 U.S.C. § 223(a)(2).	[2A6.1][2G2.2][2G3.1]''.

(F) 18 U.S.C. § 2423 (Transportation of Minors)

Synopsis of Proposed Amendment: This part of the proposed amendment addresses offenses under 18 U.S.C. § 2423 (Transportation of minors), which were modified by the Act.

Section 2423 contains four offenses, each of which prohibit sexual conduct with minors.

Subsection (a) prohibits transporting a minor with intent that the minor engage in prostitution or criminal sexual activity. It provides a mandatory minimum term of imprisonment of 10 years and maximum of life. It is referenced in Appendix A (Statutory Index) to § 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; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).

Subsection (b) prohibits traveling in interstate or foreign commerce for the purpose of ''illicit sexual conduct,'' which is defined in subsection (f) to mean a criminal sexual act with a minor. It provides a statutory maximum term of imprisonment of 30 years. It is referenced in Appendix A to § 2G1.3.

Subsection (c) prohibits traveling in foreign commerce and engaging in ''illicit sexual conduct''. The Act expanded this provision to also cover residing in a foreign country and engaging in ''illicit sexual conduct''. It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A. The proposed amendment would amend Appendix A to reference section 2423(c) to § 2G1.3.

Subsection (d) prohibits any person from, for the purpose of commercial advantage or private financial gain, arranging, inducing, procuring, or facilitating the travel of a person for ''illicit sexual conduct''. It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A. The proposed amendment would amend Appendix A to reference section 2423(d) to § 2G1.3.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2423(b) the following new line references:

''18 U.S.C. § 2423(c) 2G1.3
18 U.S.C. § 2423(d) 2G1.3''.

(G) 18 U.S.C. § 1597 (Unlawful Conduct With Respect to Immigration Documents)

Synopsis of Proposed Amendment: This part of the proposed amendment responds to the new Class A misdemeanor established by the Act in Chapter 77 (Peonage, Slavery, and Trafficking in Persons) of title 18. This new offense, at 18 U.S.C. § 1597(a), makes it unlawful for any person to knowingly destroy, conceal, remove, confiscate, or possess, an actual or purported passport or other immigration document of another individual—

(1) in the course of violating 18 U.S.C. § 1351 (Fraud in foreign labor contracting) or 8 U.S.C. § 1324 (Bringing in and harboring certain aliens);

(2) with intent to violate 18 U.S.C. § 1351 or 8 U.S.C. § 1324; or

(3) in order to, without lawful authority, maintain, prevent, or restrict the labor or services of the individual.

In addition, section 1597(c) prohibits knowingly obstructing, attempting to obstruct, or in any way interfering with or preventing the enforcement of this section. Section 1597 provides a statutory maximum term of imprisonment of one year.

The proposed amendment references this offense to any one or more of four bracketed options:

§ 2B1.1 (Theft, Property Destruction, and Fraud);

§ 2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers);

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

An issue for comment is also included.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1593A the following new line reference:

''18 U.S.C. § 1597 [2B1.1] [2H4.1][2L1.1][2L2.2]''.

Issue for Comment

1. The Commission seeks comment on offenses under section 1597. What guideline or guidelines are appropriate for these offenses? Which, if any, of the bracketed options in the proposed amendment should the Commission provide? Should the Commission instead provide for such offenses to be sentenced under § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline))?

To the extent the Commission does provide a reference to one or more guidelines, what changes, if any, to those guidelines would be appropriate to account for offenses under section 1597? For example, to the extent such offenses are referenced to § 2H4.1, should the Commission provide a new alternative base offense level for offenses under section 1597 to account for the fact that such offenses are Class A misdemeanors? What alternative base offense level would be appropriate?

3. Drugs

Synopsis of Proposed Amendment: In August 2013, the Commission indicated that one of its policy priorities would be ''[r]eview, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types''. *See* 78 FR 51820 (August 21, 2013). The Commission is publishing this proposed amendment and issue for comment to inform the Commission's consideration of these issues.

The proposed amendment contains three parts. Part A contains a detailed request for comment on whether any changes should be made to the Drug Quantity Table across drug types, including whether any other changes may be appropriate. Part B contains a proposed amendment that illustrates one possible set of changes to the Drug Quantity Table (together with conforming changes to the chemical quantity tables and certain clerical changes). Part C contains an issue for comment on whether the guidelines adequately address the environmental and other harms of drug production operations (including, in particular, the cultivation of marihuana) on public lands or while trespassing on private property.

(A) Request for Public Comment on Whether Any Changes Should Be Made to the Drug Quantity Table Across Drug Types, and Other Possible Changes

Issue for Comment

1. The Commission is requesting comment on whether any changes should be made to the Drug Quantity Table across drug types.

Penalty Structure of Federal Drug Laws. The penalty structure of the Drug

Quantity Table is based on the penalty structure of federal drug laws for most major drug types. That penalty structure generally establishes several tiers of penalties for manufacturing and trafficking in controlled substances, each based on the amount of controlled substances involved. *See generally* 21 U.S.C. § 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

Generally, for smaller quantities of drugs, the statutory maximum term of imprisonment is 20 years. *See* 21 U.S.C. § 841(b)(1)(C). For quantities of marihuana less than 50 kilograms, the statutory maximum term of imprisonment is 5 years. *See* 21 U.S.C. § 841(b)(1)(D). If certain aggravating factors are present (*e.g.,* if the defendant had a prior conviction for a felony drug offense, *see* 21 U.S.C. § 841(b)(1)(C), (D), or if death or serious bodily injury results from the use of the substance, *see* 21 U.S.C. § 841(b)(1)(C)), higher statutory penalties apply.

If the amount of the controlled substance reaches a statutorily specified quantity, the statutory maximum term increases to 40 years, and a statutory minimum term of 5 years applies. *See* 21 U.S.C. § 841(b)(1)(B). If the amount of the controlled substance reaches ten times that specified quantity, the statutory maximum term is life, and a statutory minimum term of 10 years applies. *See* 21 U.S.C. § 841(b)(1)(A). If certain aggravating factors are present (*e.g.,* if the defendant had one or more prior convictions for a felony drug offense, or if death or serious bodily injury results from the use of the substance), higher statutory penalties apply. *See* 21 U.S.C. § 841(b)(1)(A), (B).

Framework of the Federal Sentencing Guidelines. The Sentencing Reform Act of 1984 established the Commission's organic statute and provided that the Commission, ''consistent with all pertinent provisions of any Federal statute,'' shall promulgate guidelines and policy statements. *See* 28 U.S.C. § 994(a). It also provided that the Commission shall establish a sentencing range ''for each category of offense involving each category of defendant''. *See* 28 U.S.C. § 994(b)(1). Each sentencing range must be ''consistent with all pertinent provisions of title 18, United States Code''. *See* 28 U.S.C. § 994(b)(1). Where the guidelines call for imprisonment, the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. *See* 28 U.S.C. § 994(b)(2).

In addition, the Commission's organic statute contains a variety of directives to the Commission in promulgating the sentencing guidelines. Among other things, the Commission must ensure that the sentencing guidelines are ''formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.'' *See* 28 U.S.C. § 994(g). Thus, ''[p]ursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.'' *See* 78 FR 51820 (August 21, 2013).

Incorporation of Statutory Penalties into Drug Quantity Table. The Commission has incorporated into the Drug Quantity Table the penalty structure of federal drug laws and the relevant statutory mandatory minimum sentences and has extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. *See* § 2D1.1, comment. (backg'd.) (''The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking.''). By extrapolating upward and downward, the guidelines avoid sharp differentials or ''sentencing cliffs'' based upon small differences in drug quantities.

The drug quantity thresholds in the Drug Quantity Table have generally been set so that the drug quantity that triggers a statutory mandatory minimum penalty also triggers a base offense level that corresponds (at Criminal History Category I) to a guideline range slightly above the statutory mandatory minimum penalty. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment also triggers a base offense level of 26 (corresponding to a guideline range of 63 to 78 months), and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment also triggers a base offense level of 32 (corresponding to a guideline range of 121 to 151 months). *See* § 2D1.1, comment. (backg'd.) (''The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.,* level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.''). The Commission has stated that ''[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities.'' *See* United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at 148.

A minimum offense level of 6 and a maximum offense level of 38 are incorporated into the Drug Quantity Table across all drug types. In addition, certain higher minimum offense levels are incorporated into the Drug Quantity Table for particular drug types, *e.g.,* a minimum offense level of 12 applies if the offense involved any quantity of certain Schedule I or II controlled substances. *See, e.g.,* § 2D1.1(c)(14); § 2D1.1, comment. (n.8(D)) (''*Provided,* that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.''). Similarly, certain maximum offense levels and associated drug quantity ''caps'' are incorporated into the Drug Quantity Table for particular drug types, *e.g.,* a maximum offense level of 8 and a combined equivalent weight ''cap'' of 999 grams of marihuana apply if the offense involved any quantity of Schedule V substances. *See, e.g.,* § 2D1.1(c)(16); § 2D1.1, comment. (n.8(D)) (''*Provided,* that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.'').

Guideline Developments. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times — often in response to congressional directives — to provide greater emphasis on the defendant's conduct and role in the offense rather than drug quantity. The version of § 2D1.1 in the original 1987 *Guidelines Manual* contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. The version of § 2D1.1 now in effect contains fourteen enhancements and three downward adjustments (including the ''mitigating role cap'' provided in subsection (a)(5)), with four enhancements and one downward adjustment added effective November 1, 2010, in response to the emergency directive in the Fair Sentencing Act of 2010, Public Law 111–220.

The ''Safety Valve''. Also since the initial selection of offense levels 26 and 32, Congress has enacted the ''safety valve,'' which applies to certain non-violent drug defendants and allows the court, without any government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant ''has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan''. *See* 18 U.S.C.

§ 3553(f). This statutory provision was established by Congress in 1994 and is incorporated into the guidelines at USSG § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). In addition, § 2D1.1(b)(16) provides a 2-level reduction in the defendant's offense level if the defendant meets the ''safety valve'' criteria, regardless of whether a mandatory minimum penalty applies in the case. In the case of a defendant for whom the statutorily required minimum sentence is at least five years, the guidelines provide an offense level of not less than 17. *See* § 5G1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Because the ''safety valve'' was established after the initial selection of levels 26 and 32, its effect on plea rates and cooperation could not have been foreseen at that time. Commission data indicate that defendants charged with a mandatory minimum penalty are more likely to plead guilty if they qualify for the ''safety valve'' than if they do not. Specifically, in fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the ''safety valve'' and a plea rate of 93.9 percent if they did not.

Crack Cocaine Cases After the 2007 Amendment. In 2007, the Commission amended the Drug Quantity Table for cocaine base (''crack'' cocaine) so that the quantities that trigger mandatory minimum penalties also trigger base offense levels 24 and 30, rather than 26 and 32. *See* USSG App. C, Amendment 706 (effective November 1, 2007). At base offense level 24, the guideline range for a defendant in Criminal History Category I is 51 to 63 months, which includes the corresponding mandatory minimum penalty of 5 years (60 months); at base offense level 30, the guideline range for such a defendant is 97 to 121 months, which includes the corresponding mandatory minimum penalty of 10 years (120 months). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively.

For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under § 5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect.

In light of this information, the Commission seeks comment on whether the Commission should consider changing how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and, if so, how? For example, should the Commission amend the Drug Quantity Table across drug types so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32?

If the Commission were to amend the Drug Quantity Table across drug types, are there any circumstances that should be wholly or partially excluded from such an amendment? If so, what circumstances? For example, if the Commission were to determine that a guideline penalty structure based on levels 24 and 30, rather than based on levels 26 and 32, is appropriate, should any existing specific offense characteristics be increased, or any new specific offense characteristics be promulgated, to offset any such change for certain offenders?

If the Commission were to make changes to the guidelines applicable to drug trafficking cases, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

(B) Proposed Amendment

Synopsis of Proposed Amendment: This proposed amendment changes how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties. Specifically, it amends the table so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32. As described more fully in Part A, above, setting base offense levels at levels 24 and 30 establishes guideline ranges with a lower limit below, and an upper limit above, the statutory minimum; *e.g.,* level 30 corresponds (at Criminal History Category I) to a guideline range of 97 to 121 months, where the statutory minimum term is ten years or 120 months.

Under the proposed amendment, § 2D1.1 would continue to reflect the minimum offense level of 6 and the maximum offense level of 38 that are incorporated into the Drug Quantity Table across all drug types. It also would continue to reflect the minimum offense levels that are incorporated into the Drug Quantity Table for particular drug types, *e.g.,* the minimum offense level of 12 that applies if the offense involved any quantity of certain Schedule I or II controlled substances. *See, e.g.,* § 2D1.1(c)(14); § 2D1.1, comment. (n.8(D)) (''*Provided,* that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.''). Similarly, it would continue to reflect the maximum offense levels and associated drug quantity ''caps'' that are incorporated into the Drug Quantity Table for particular drug types, *e.g.,* the maximum offense level of 8 and the combined equivalent weight ''cap'' of 999 grams of marihuana that apply if the offense involved any quantity of Schedule V substances. *See, e.g.,* § 2D1.1(c)(16); § 2D1.1, comment. (n.8(D)) (''*Provided,* that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.'').

In the proposed amendment the various minimum and maximum offense levels and drug quantity ''caps'' are associated with new drug quantities, determined by extrapolating upward or downward as appropriate.

The proposed amendment makes parallel changes to the quantity tables in § 2D1.11, which apply to offenses involving the chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in § 2D1.1 for offenses involving the final product.

Finally, the proposed amendment makes certain clerical and conforming changes to reflect the changes to the quantity tables.

Proposed Amendment

Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

Level 38

''(1) • [90] KG or more of Heroin;
• [450] KG or more of Cocaine;
• [25.2] KG or more of Cocaine Base;

• [90] KG or more of PCP, or [9] KG or more of PCP (actual);
• [45] KG or more of Methamphetamine, or
[4.5] KG or more of Methamphetamine (actual), or
[4.5] KG or more of 'Ice';
• [45] KG or more of Amphetamine, or
[4.5] KG or more of Amphetamine (actual);
• [900] G or more of LSD;
• [36] KG or more of Fentanyl;
• [9] KG or more of a Fentanyl Analogue;
• [90,000] KG or more of Marihuana;
• [18,000] KG or more of Hashish;
• [1,800] KG or more of Hashish Oil;
• [90,000,000] units or more of Ketamine;
• [90,000,000] units or more of Schedule I or II Depressants;
• [5,625,000] units or more of Flunitrazepam.''.

Section 2D1.1(c)(2) (as so redesignated) is amended to read as follows:

Level 36

''(2) • At least 30 KG but less than [90] KG of Heroin;
• At least 150 KG but less than [450] KG of Cocaine;
• At least 8.4 KG but less than [25.2] KG of Cocaine Base;
• At least 30 KG but less than [90] KG of PCP, or at least 3 KG but less than [9] KG of PCP (actual);
• At least 15 KG but less than [45] KG of Methamphetamine, or
at least 1.5 KG but less than [4.5] KG of Methamphetamine (actual), or
at least 1.5 KG but less than [4.5] KG of 'Ice';
• At least 15 KG but less than [45] KG of Amphetamine, or
at least 1.5 KG but less than [4.5] KG of Amphetamine (actual);
• At least 300 G but less than [900] G of LSD;
• At least 12 KG but less than [36] KG of Fentanyl;
• At least 3 KG but less than [9] KG of a Fentanyl Analogue;
• At least 30,000 KG but less than [90,000] KG of Marihuana;
• At least 6,000 KG but less than [18,000] KG of Hashish;
• At least 600 KG but less than [1,800] KG of Hashish Oil;
• At least 30,000,000 units but less than [90,000,000] units of Ketamine;
• At least 30,000,000 units but less than [90,000,000] units of Schedule I or II Depressants;
• At least 1,875,000 units but less than [5,625,000 units] of Flunitrazepam.''.

Section 2D1.1(c)(3) (as so redesignated) is amended by striking ''Level 36'' and inserting ''Level 34''.

Section 2D1.1(c)(4) (as so redesignated) is amended by striking ''Level 34'' and inserting ''Level 32''.

Section 2D1.1(c)(5) (as so redesignated) is amended by striking ''Level 32'' and inserting ''Level 30''; and by inserting before the line referenced to Flunitrazepam the following:

''• 1,000,000 units or more of Schedule III Hydrocodone;''.

Section 2D1.1(c)(6) (as so redesignated) is amended by striking ''Level 30'' and inserting ''Level 28''; and in the line referenced to Schedule III Hydrocode by striking ''700,000 or more'' and inserting ''At least 700,000 but less than 1,000,000''.

Section 2D1.1(c)(7) (as so redesignated) is amended by striking ''Level 28'' and inserting ''Level 26''.

Section 2D1.1(c)(8) (as so redesignated) is amended by striking ''Level 26'' and inserting ''Level 24''.

Section 2D1.1(c)(9) (as so redesignated) is amended by striking ''Level 24'' and inserting ''Level 22''.

Section 2D1.1(c)(10) (as so redesignated) is amended by striking ''Level 22'' and inserting ''Level 20''; and by inserting before the line referenced to Flunitrazepam the following:

''• 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);''.

Section 2D1.1(c)(11) (as so redesignated) is amended by striking ''Level 20'' and inserting ''Level 18''; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking ''40,000 or more'' and inserting ''At least 40,000 but less than 60,000''.

Section 2D1.1(c)(12) (as so redesignated) is amended by striking ''Level 18'' and inserting ''Level 16''.

Section 2D1.1(c)(13) (as so redesignated) is amended by striking ''Level 16'' and inserting ''Level 14''.

Section 2D1.1(c)(14) (as so redesignated) is amended by striking ''Level 14'' and inserting ''Level 12''; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

''• Less than 10 G of Heroin;
• Less than 50 G of Cocaine;
• Less than 2.8 G of Cocaine Base;
• Less than 10 G of PCP, or
less than 1 G of PCP (actual);
• Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual),
or less than 500 MG of 'Ice';
• Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
• Less than 100 MG of LSD;
• Less than 4 G of Fentanyl;
• Less than 1 G of a Fentanyl Analogue;'';

by striking the period at the end and inserting a semicolon; and by adding at the end the following:

''• 80,000 units or more of Schedule IV substances (except Flunitrazepam).''.

Section 2D1.1(c)(15) (as so redesignated) is amended by striking ''Level 12'' and inserting ''Level 10''; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking ''40,000 or more'' and inserting ''At least 40,000 but less than 80,000''.

Section 2D1.1(c)(16) (as so redesignated) is amended by striking ''Level 10'' and inserting ''Level 8''; by striking ''At least 62 but less'' and inserting ''Less''; by striking the period at the end and inserting a semicolon; and by adding at the end the following:

''• 160,000 units or more of Schedule V substances.''.

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

Level 6

''(17) • Less than 1 KG of Marihuana;
• Less than 200 G of Hashish;
• Less than 20 G of Hashish Oil;
• Less than 1,000 units of Ketamine;
• Less than 1,000 units of Schedule I or II Depressants;
• Less than 1,000 units of Schedule III Hydrocodone;
• Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
• Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
• Less than 160,000 units of Schedule V substances.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 8(A) by striking ''28'' and inserting ''26'';

in Note 8(B) by striking ''999 grams'' and inserting ''2.49 kilograms'';

in Note 8(C)(i) by striking ''22'' and inserting ''20'', by striking ''18'' and inserting ''16'', and by striking ''24'' and inserting ''22'';

in Note 8(C)(ii) by striking ''8'' both places such term appears and inserting ''6'', and by striking ''10'' and inserting ''8'';

in Note 8(C)(iii) by striking ''16'' and inserting ''14'', by striking ''14'' and inserting ''12'', and by striking ''18'' and inserting ''16'';

in Note 8(C)(iv) by striking ''56,000'' and inserting ''76,000'', by striking

''100,000'' and inserting ''200,000'', by striking ''200,000'' and inserting ''600,000'', by striking ''56'' and inserting ''76'', by striking ''59.99'' and inserting ''79.99'', by striking ''4.99'' and inserting ''9.99'', by striking ''6.25'' and inserting ''12.5'', by striking ''999 grams'' and inserting ''2.49 kilograms'', by striking ''1.25'' and inserting ''3.75'', by striking ''59.99'' and inserting ''79.99'', and by striking ''61.99 (56 + 4.99 + .999)'' and inserting ''88.48 (76 + 9.99 + 2.49)'';

in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking ''59.99'' and inserting ''79.99''; under the heading relating to Schedule III Hydrocodone, by striking ''999.99'' and inserting ''2,999.99''; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking ''4.99'' and inserting ''9.99''; and under the heading relating to Schedule V Substances by striking ''999 grams'' and inserting ''2.49 kilograms''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the paragraph that begins ''The base offense levels in § 2D1.1'' by striking ''32 and 26'' and inserting ''30 and 24''; and by striking the paragraph that begins ''The base offense levels at levels 26 and 32'' and inserting the following new paragraph:

''The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; *e.g.,* level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.''.

The Commentary to § 2D1.2 captioned ''Application Note'' is amended in Note 1 by striking ''16'' and inserting ''14'', and by striking ''17'' and inserting ''15''.

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

Level 38

''(1) [9] KG or more of Ephedrine;

[9] KG or more of Phenylpropanolamine;

[9] KG or more of Pseudoephedrine.''

Section 2D1.11(d)(2) (as so redesignated) is amended by striking ''Level 38'' and inserting ''Level 36''; and by striking ''3 KG or more'' each place such term appears and inserting ''At least 3 KG but less than 9 KG''.

Section 2D1.11(d)(3) (as so redesignated) is amended by striking ''Level 36'' and inserting ''Level 34''.

Section 2D1.11(d)(4) (as so redesignated) is amended by striking ''Level 34'' and inserting ''Level 32''.

Section 2D1.11(d)(5) (as so redesignated) is amended by striking ''Level 32'' and inserting ''Level 30''.

Section 2D1.11(d)(6) (as so redesignated) is amended by striking ''Level 30'' and inserting ''Level 28''.

Section 2D1.11(d)(7) (as so redesignated) is amended by striking ''Level 28'' and inserting ''Level 26''.

Section 2D1.11(d)(8) (as so redesignated) is amended by striking ''Level 26'' and inserting ''Level 24''.

Section 2D1.11(d)(9) (as so redesignated) is amended by striking ''Level 24'' and inserting ''Level 22''.

Section 2D1.11(d)(10) (as so redesignated) is amended by striking ''Level 22'' and inserting ''Level 20''.

Section 2D1.11(d)(11) (as so redesignated) is amended by striking ''Level 20'' and inserting ''Level 18''.

Section 2D1.11(d)(12) (as so redesignated) is amended by striking ''Level 18'' and inserting ''Level 16''.

Section 2D1.11(d)(13) (as so redesignated) is amended by striking ''Level 16'' and inserting ''Level 14''.

Section 2D1.11(d)(14) (as so redesignated) is amended by striking ''Level 14'' and inserting ''Level 12''; and by striking ''At least 500 MG but less'' each place such term appears and inserting ''Less''.

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

Level 30

''(1) *List I Chemicals*

[2.7 KG] or more of Benzaldehyde;

[60] KG or more of Benzyl Cyanide;

[600] G or more of Ergonovine;

[1.2 KG] or more of Ergotamine;

[60] KG or more of Ethylamine;

[6.6] KG or more of Hydriodic Acid;

[3.9] KG or more of Iodine;

[960] KG or more of Isosafrole;

[600] G or more of Methylamine;

[1500] KG or more of N-Methylephedrine;

[1500] KG or more of N-Methylpseudoephedrine;

[1.9 KG] or more of Nitroethane;

[30] KG or more of Norpseudoephedrine;

[60] KG or more of Phenylacetic Acid;

[30] KG or more of Piperidine;

[960] KG or more of Piperonal;

[4.8] KG or more of Propionic Anhydride;

[960] KG or more of Safrole;

[1200] KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

[3406.5] L or more of Gamma-butyrolactone;

[2.1 KG] or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.''.

Section 2D1.11(e)(2) (as so redesignated) is amended to read as follows:

Level 28

''(1) *List I Chemicals*

At least 890 G but less than 2.7 KG of Benzaldehyde;

At least 20 KG but less than 60 KG of Benzyl Cyanide;

At least 200 G but less than 600 G of Ergonovine;

At least 400 G but less than 1.2 KG of Ergotamine;

At least 20 KG but less than 60 KG of Ethylamine;

At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;

At least 1.3 KG but less than 3.9 KG of Iodine;

At least 320 KG but less than 960 KG of Isosafrole;

At least 200 G but less than 600 G of Methylamine;

At least 500 KG but less than 1500 KG of N-Methylephedrine;

At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;

At least 625 G but less than 1.9 KG of Nitroethane;

At least 10 KG but less than 30 KG of Norpseudoephedrine;

At least 20 KG but less than 60 KG of Phenylacetic Acid;

At least 10 KG but less than 30 KG of Piperidine;

At least 320 KG but less than 960 KG of Piperonal;

At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;

At least 320 KG but less than 960 KG of Safrole;

At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;

At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

List II Chemicals

33 KG or more of Acetic Anhydride;

3525 KG or more of Acetone;

60 KG or more of Benzyl Chloride;

3225 KG or more of Ethyl Ether;

3600 KG or more of Methyl Ethyl Ketone;

30 KG or more of Potassium Permanganate;

3900 KG or more of Toluene.''.

Section 2D1.11(e)(3) (as so redesignated) is amended by striking ''Level 28'' and inserting ''Level 26''; and by striking the line referenced to

Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

''At least 11 KG but less than 33 KG of Acetic Anhydride;

At least 1175 KG but less than 3525 KG of Acetone;

At least 20 KG but less than 60 KG of Benzyl Chloride;

At least 1075 KG but less than 3225 KG of Ethyl Ether;

At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;

At least 10 KG but less than 30 KG of Potassium Permanganate;

At least 1300 KG but less than 3900 KG of Toluene.''.

Section 2D1.11(e)(4) (as so redesignated) is amended by striking ''Level 26'' and inserting ''Level 24''.

Section 2D1.11(e)(5) (as so redesignated) is amended by striking ''Level 24'' and inserting ''Level 22''.

Section 2D1.11(e)(6) (as so redesignated) is amended by striking ''Level 22'' and inserting ''Level 20''.

Section 2D1.11(e)(7) (as so redesignated) is amended by striking ''Level 20'' and inserting ''Level 18''.

Section 2D1.11(e)(8) (as so redesignated) is amended by striking ''Level 18'' and inserting ''Level 16''.

Section 2D1.11(e)(9) (as so redesignated) is amended by striking ''Level 16'' and inserting ''Level 14''.

Section 2D1.11(e)(10) (as so redesignated) is amended by striking ''Level 14'' and inserting ''Level 22''; and in each line by striking ''At least'' and all that follows through ''but less'' and inserting ''Less''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 1(A) by striking ''38'' both places such term appears and inserting ''36''; and by striking ''26'' and inserting ''24'';

and in Note 1(B) by striking ''32'' and inserting ''30''.

(C) Environmental and Other Harms Caused by Drug Production Operations (Including, in Particular, the Cultivation of Marihuana)

Issue for Comment

1. The Commission requests comment on the environmental and other harms caused by offenses involving drug production operations (including, in particular, the cultivation of marihuana). Specifically, the Commission requests comment on whether the guidelines provide penalties for these offenses that appropriately account for the environmental and other harms caused by these offenses and, if not, what changes to the guidelines would be appropriate.

A person who cultivates or manufactures a controlled substance on Federal property may be prosecuted under 21 U.S.C. § 841 and subject to the same statutory penalty structure that applies to most other drug offenses. *See* 21 U.S.C. § 841(b)(5). As discussed in Part A, the base offense level for such an offense will generally be determined under § 2D1.1 based on the type and quantity of the drug involved. The guideline also provides a range of other provisions that may apply in particular cases. For example:

(1) § 2D1.1(b)(12) provides a 2-level enhancement if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance; and

(2) § 2D1.1(b)(13) provides a tiered enhancement that includes, among other things, a 2-level enhancement if the offense involved an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, *see* § 2D1.1(b)(13)(A)(i), and a 3-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to human life or the environment, *see* § 2D1.1(b)(13)(C)(ii).

An offense involving the cultivation or production of a controlled substance may also be prosecuted under certain other statutes that take into account environmental or other harms. For example:

(A) Section 841(b)(6) makes it unlawful to manufacture a controlled substance (or attempt to do so) and knowingly or intentionally use a poison, chemical, or other hazardous substance on Federal land, and by such use (A) create a serious hazard to humans, wildlife, or domestic animals; (B) degrade or harm the environment or natural resources; or (C) pollute an aquifer, spring, stream, river, or body of water. A person who violates section 841(b)(6) is subject to a statutory maximum term of imprisonment of five years. Section 841(b)(6) is not referenced in Appendix A (Statutory Index) to any offense guideline.

(B) Section 841(d) makes it unlawful to assemble, maintain, place, or cause to be placed a boobytrap on Federal property where a controlled substance is being manufactured. A person who violates section 841(d) is subject to a statutory maximum term of imprisonment of ten years. Section 841(d) is referenced in Appendix A (Statutory Index) to § 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy). Section 2D1.9 provides a base offense level of level 23 and contains no other provisions.

The Commission seeks comment on offenses involving drug production operations, including, in particular, offenses involving the cultivation of marihuana. What conduct is involved in such offenses, and what is the nature and seriousness of the environmental and other harms posed by such offenses? What aggravating and mitigating circumstances may be present in such offenses? For example, if the offense was committed on federal property or caused environmental or other harm to federal property, should that circumstance be an aggravating factor? If the offense was committed while trespassing on private property or caused environmental or other harm while trespassing on private property, should that circumstance be an aggravating factor?

Do the provisions of § 2D1.1 and § 2D1.9, as applicable, adequately account for the conduct, the environmental and other harms, and the aggravating and mitigating circumstances? If not, how should the Commission amend the guidelines to account for the conduct, the environmental and other harms, and the aggravating and mitigating circumstances? Should the Commission provide a new specific offense characteristic, cross reference, or departure provision? If so, what should the new provision provide? Alternatively, should the Commission increase the amount, or the scope, of the existing specific offense characteristics, such as those in subsections (b)(12) and (b)(13)? If so, what should the new amount or scope of such provisions be?

4. Felon in Possession

Synopsis of Proposed Amendment: This proposed amendment clarifies how principles of relevant conduct apply in cases in which the defendant is convicted of a firearms offense (*e.g.,* being a felon in possession of a firearm) in two situations: First, when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion (but was not necessarily convicted of the second offense); and second, when the defendant unlawfully possessed a firearm and also used a firearm in connection with another offense, such as robbery or attempted murder (but was not necessarily convicted of the other offense).

Circuits appear to be following a range of approaches in determining how the relevant conduct guideline, § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)),

interacts with the firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), in such cases.

Consider, for example, a case in which the defendant, a convicted felon, possesses a shotgun (a violation of 18 U.S.C. § 922(g)) on one occasion and possesses a handgun (another violation of section 922(g)) on another occasion. The defendant is convicted of a single count, for the unlawful possession of the shotgun. The court determines that the defendant also used the handgun in connection with a robbery.

In such a case, the court must determine, among other things, whether to apply the specific offense characteristic at subsection (b)(6)(B) or the cross reference at subsection (c)(1), or both. Under subsection (b)(6)(B), if a defendant possesses any firearm in connection with another offense, the defendant may receive a 4-level enhancement and a minimum offense level of 18. Similarly, under subsection (c)(1), if the defendant possesses any firearm in connection with another offense, the defendant may be cross referenced to another offense guideline applicable to the defendant's other offense conduct.

As with other specific offense characteristics and cross references in the *Guidelines Manual,* the scope of these provisions is determined based on subsections (a)(1) through (a)(4) of the relevant conduct guideline, § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)):

(a)(1) acts and omissions ''that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense'', *see* § 1B1.3(a)(1);

(a)(2) ''solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction'', *see* § 1B1.3(a)(2);

(a)(3) ''all harm that resulted from the acts and omissions . . . , and all harm that was the object of such acts and omissions'', *see* § 1B1.3(a)(3); and

(a)(4) ''any other information specified in the applicable guideline'', *see* § 1B1.3(a)(4).

When the Defendant Used the Firearm in Connection With Another Offense

One application issue arises when the defendant unlawfully possessed a firearm and used the firearm in connection with another offense, and the court must determine whether the ''in connection with'' offense under subsections (b)(6)(B) and (c)(1) satisfies the requirements of the relevant conduct guideline.

In several circuits, when a felon in possession defendant possessed a firearm in connection with another offense, the courts apply a subsection (a)(2) relevant conduct analysis and consider whether the other offense is a ''groupable'' offense under § 3D1.2(d); if the other offense is not a ''groupable'' offense, the increase under subsection (b)(6)(B) and the cross reference under subsection (c)(1) do not apply. *See, e.g., United States* v. *Horton,* 693 F.3d 463, 478–79 (4th Cir. 2012) (felon in possession used a firearm in connection with a murder, but the murder is not relevant conduct under subsection (a)(2) analysis because murder does not group); *Settle,* 414 F.3d at 632–33 (attempted murder); *United States* v. *Jones,* 313 F.3d 1019, 1023 n.3 (7th Cir. 2002) (murder); *United States* v. *Williams,* 431 F.3d 767, 772–73 & n.9 (11th Cir. 2005) (aggravated assault). These circuits do not appear to preclude subsection (b)(6)(B) or (c)(1) from applying to the defendant under a subsection (a)(1) relevant conduct analysis. The Third Circuit also applies a subsection (a)(2) relevant conduct analysis in such a case but does not require the other offense to be a ''groupable'' offense. *See United States* v. *Kulick,* 629 F.3d 165, 170 (3rd Cir. 2010) (in felon in possession case, cross reference to extortion guideline may apply under subsection (a)(2) relevant conduct analysis even though extortion does not group). The Fifth Circuit, in contrast, has held that the court does not perform any relevant conduct analysis in determining the scope of subsections (b)(6)(B) and (c)(1). *United States* v. *Gonzales,* 996 F.2d 88, 92 n.6 (5th Cir. 1993). *See also United States* v. *Outley,* 348 F.3d 476 (5th Cir. 2003) (''section 1B1.3 does not restrict the application of section 2K2.1(c)(1)'').

When the Defendant Unlawfully Possessed One Firearm on One Occasion and a Different Firearm on Another Occasion

A second application issue arises when the defendant unlawfully possessed one firearm on one occasion and a different firearm on another occasion, and the court must determine whether both firearms fall within the scope of ''any firearm'' under subsections (b)(6)(B) and (c)(1).

The circuits appear to agree that the use of the term ''any firearm or ammunition'' in subsections (b)(6)(B) and (c)(1) indicates that they apply to any firearm ''and not merely to a particular firearm upon which the defendant's felon-in-possession conviction is based.'' *United States* v. *Mann,* 315 F.3d 1054, 1055–57 (8th Cir. 2003). *See also United States* v. *Jardine,* 364 F.3d 1200, 1207 (10th Cir. 2004); *United States* v. *Williams,* 431 F.3d 767, 769–71 (11th Cir. 2005). But there are different approaches among the circuits as to what, if any, limiting principles apply. For example, the Sixth Circuit has indicated that there must be a ''clear connection'' between the different firearms because of relevant conduct principles under § 1B1.3. *See United States* v. *Settle,* 414 F.3d 629, 632–33 (6th Cir. 2005), and most other circuits to consider the question have agreed. However, the Fifth Circuit has held that relevant conduct principles do not apply, but the other firearm ''must at least be related'' to the firearm in the count of conviction because of the ''overall context'' of § 2K2.1. *United States* v. *Gonzales,* 996 F.2d 88, 92 n.6 (5th Cir. 1993). *See also United States* v. *Outley,* 348 F.3d 476 (5th Cir. 2003) (''section 1B1.3 does not restrict the application of section 2K2.1(c)(1)'').

The proposed amendment provides two options for clarifying the operation of the firearms guideline in these situations.

Option 1 amends subsections (b)(6)(B) and (c)(1) to limit their application to firearms and ammunition identified in the offense of conviction. It makes conforming changes to the Commentary. Included among those conforming changes is an example of how the relevant conduct principles operate in a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense with that same firearm. The example provides:

> Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under § 1B1.3(a)(4) (''any other information specified in the applicable guideline'').

Option 2 amends the Commentary to § 2K2.1 to clarify that subsections (b)(6)(B) and (c)(1) are not limited to firearms and ammunition identified in the offense of conviction. For a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense

with that firearm, it provides the same example provided by Option 1. For a case in which the defendant is convicted of being a felon in possession of a firearm and also committed another offense with a different firearm, it provides an additional example. In such a case, the court must, as a threshold matter, determine whether the two felon in possession offenses are relevant conduct to each other. Specifically, it provides the following example:

Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. *See* § 1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly, subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.

Several issues for comment are also provided.

Proposed Amendment

Section 2K2.1 is amended as follows (two options are provided):

[Option 1:

Section 2K2.1(b)(6)(B) is amended by inserting after ''firearm or ammunition'' both places such term appears the following: ''identified in the offense of conviction''.

Section 2K2.1(c)(1) is amended by inserting after ''firearm or ammunition'' both places such term appears the following: ''identified in the offense of conviction''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 14 by striking ''*'In Connection With'.*—'' and inserting ''*Application of Subsections (b)(6)(B) and (c)(1).*—'';

in Note 14(A) by inserting after ''firearm or ammunition'' the following: ''identified in the offense of conviction'';

in Note 14(B) by inserting after ''a firearm'' both places such term appears the following: ''identified in the offense of conviction'';

and in Note 14 by adding at the end the following:

'' (E) *Relationship Between the Instant Offense and the Other Offense.*—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* § 1B1.3(a)(1)–(4) and accompanying commentary. For example:

Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under § 1B1.3(a)(4) ('any other information specified in the applicable guideline').**]**

[Option 2:

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 14 by striking ''*'In Connection With'.*—'' and inserting ''*Application of Subsections (b)(6)(B) and (c)(1).*—'';

and by adding at the end the following:

'' (E) *Relationship Between the Instant Offense and the Other Offense.*—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* § 1B1.3(a)(1)–(4) and accompanying commentary. For example:

(i) Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A used the shotgun in connection with a robbery. Under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level. The use of the shotgun in connection with the robbery is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under § 1B1.3(a)(4) ('any other information specified in the applicable guideline').

(ii) Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. *See* § 1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly, subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.''**]**

Issues for Comment

1. The Commission invites comment on cases in which the defendant is convicted of a firearms offense (*e.g.,* being a felon in possession of a firearm) but also engaged in other offense conduct with a firearm, such as robbery or attempted murder. The firearms guideline accounts for such conduct through the operation of subsections (b)(6)(B) and (c)(1), and the proposed amendment would clarify the operation of these provisions.

Does the proposed amendment adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in these cases? If not, how should the Commission revise the proposed amendment to better clarify the operation of subsections (b)(6)(B) and (c)(1) in these cases?

2. In addition, the Commission seeks comment on the operation and scope of subsections (b)(6)(B) and (c)(1). Are there inconsistencies in how these provisions are applied? Should the Commission consider narrowing or clarifying the scope of these provisions, particularly in cases in which the defendant was convicted of possessing one firearm but also used another firearm in connection with another offense? Should the cross reference in subsection (c)(1) be deleted?

5. 2L1.1

Synopsis of Proposed Amendment: This amendment responds to concerns that have been raised about cases in which aliens are transported through dangerous terrain, *e.g.,* along the southern border of the United States. The Commission has heard that the guidelines may not adequately account for the harms that may be involved in such cases. For example, aliens transported through such terrain may face the risk of starvation, dehydration, or exposure, ranch property may be damaged or destroyed, and border patrol search and rescue teams may need to be involved.

Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6) for reckless endangerment, which provides for a 2-level increase and a minimum offense level of 18 if the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The application note for subsection (b)(6) explains that reckless conduct to which subsection (b)(6) applies includes a wide variety of conduct, and provides as

examples ''transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition''.

One case that illustrates these concerns is *United States* v. *Mateo Garza,* 541 F.3d 2008 (5th Cir. 2008), in which the Fifth Circuit held that the reckless endangerment enhancement at § 2L1.1(b)(6) does not *per se* apply to transporting aliens through the South Texas brush country, and must instead be applied based on the specific facts presented to the court. The Fifth Circuit emphasized that it is not enough to say, as the district court had, that traversing an entire geographical region is inherently dangerous, but that it must be dangerous on the facts presented to and used by the district court. The Fifth Circuit identified such pertinent facts from its prior case law as the length of the journey, the temperature, whether the aliens were provided food and water and allowed rest periods, and whether such aliens suffered injuries and death. *See, e.g., United States* v. *Garcia-Guerrero,* 313 F.3d 892 (5th Cir. 2002). Additional facts that have supported the enhancement include: whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey. *See e.g., United States* v. *Chapa,* 362 Fed. App'x 411 (5th Cir. 2010); *United States* v. *De Jesus-Ojeda,* 515 F.3d 434 (5th Cir. 2008); *United States* v. *Hernandez-Pena,* 267 Fed. App'x 367 (5th Cir. 2008); *United States* v. *Rodriguez-Cruz,* 255 F.3d 1054 (9th Cir. 2001).

The proposed amendment adds to the existing parenthetical that currently provides examples of the ''wide variety of conduct'' to which this specific offense characteristic could apply, ''or guiding persons through, or abandoning persons in, dangerous terrain without adequate food, water, clothing, or protection from the elements''.

An issue for comment is also included.

Proposed Amendment

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 5 by striking ''or'' before ''harboring'', and by inserting after ''inhumane condition'' the following: '', or guiding persons through, or abandoning persons in, dangerous terrain without adequate food, water, clothing, or protection from the elements''.

Issue for Comment

1. The Commission seeks comment on cases in which individuals guide persons through, or abandon persons in, dangerous terrain (*e.g.,* on the southern border of the United States). Are there aggravating or mitigating factors in such cases that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account? Specifically:

(A) The Commission has heard concern that § 2L1.1 may not be adequate in cases in which aliens are transported through desert-like terrain. Such transport, it has been argued, is inherently dangerous in that aliens may lack adequate food, water, and clothing for the climate and length of the journey, and guides may become lost or abandon the aliens whom they lead. Similar risks may be associated with transporting aliens through mountainous regions. *See, e.g., United States* v. *Rodriguez-Cruz,* 255 F.3d 1054 (9th Cir. 2001). Do these factors support a *per se* application of the enhancement at subsection (b)(6)? Instead, should the guideline account for these factors in some other way? If so, how should the Commission amend the guidelines to take these factors into account?

(B) Concern has also been raised that, in cases in which individuals guide aliens through private lands, ranch property may be damaged or destroyed. Should this guideline account for such damage? If so, how should the Commission amend the guidelines to take this into account?

(C) The Commission has also heard that some alien transportation cases involve the rescue of aliens by special border patrol search and rescue teams. Should this guideline account for the added resources required for these search and rescue missions? If so, how should the Commission amend the guidelines to take this into account?

6. 5D1.2

Synopsis of Proposed Amendment: This proposed amendment addresses differences among the circuits in the calculation of the guideline range of supervised release under § 5D1.2 (Term of Supervised Release) in two situations: First, when there is a statutory minimum term of supervised release, and second, when the instant offense of conviction is failure to register as a sex offender under 18 U.S.C. § 2250.

Section 5D1.2(a) sets forth general rules for determining the guideline range of supervised release. The guideline range is *two to five years,* for a Class A or B felony (*i.e.,* a statutory maximum of 25 or more years); *one to three years,* for a Class C or D felony (*i.e.,* a statutory maximum of five or more years but less than 25 years); and *one year,* for a Class E felony or a Class A misdemeanor (*i.e.,* a statutory maximum of one or more years but less than five years). *See* § 5D1.2(a)(1)–(3); 18 U.S.C. § 3559 (Sentencing classification of offenses).

Section 5D1.2(b) operates for certain offenses to replace the top end of the guideline range calculated under subsection (a) with a life term of supervised release. Those offenses are (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; and (2) a sex offense (as defined in the Commentary to '5D1.2).

Section 5D1.2(c) states: ''The term of supervised release imposed shall be not less than any statutorily required term of supervised release.''

A. When a Statutory Minimum Term of Supervised Release Applies

First, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when there is a statutory minimum term of supervised release. These cases involve the meaning of subsection (c) and its interaction with subsection (a).

The Seventh Circuit held that when there is a statutory minimum term of supervised release, the statutory minimum term becomes the bottom of the guideline range (replacing the bottom of the range provided by (a)) or, if it equals or exceeds the top of the guideline range provided by subsection (a), becomes a guidelines ''range'' of a single point at the statutory minimum. *United States* v. *Gibbs,* 578 F.3d 694, 695 (7th Cir. 2009). Thus, if subsection (a) provides a range of three to five years, but the statute provides a range of five years to life, the ''range'' is precisely five years. *Gibbs* involved a drug offense for which 21 U.S.C. § 841(b) required a supervised release term of five years to life. *See also United States* v. *Goodwin,* 717 F.3d 511, 519–20 (7th Cir. 2013) (applying *Gibbs* to a case involving a failure to register for which 18 U.S.C. § 3583(k) required a supervised release term of five years to life).

These cases are in tension with the approach of the Eighth Circuit in *United States* v. *Deans,* 590 F.3d 907, 911 (8th Cir. 2010). In *Deans,* the range calculated under subsection (a) was two to three years of supervised release. However, the relevant statute, 21 U.S.C.

§ 841(b)(1)(C), provided a range three years to life. Under the Seventh Circuit's approach in *Gibbs,* the guidelines ''range'' would appear to be precisely three years. Without reference to *Gibbs,* the Eighth Circuit in *Deans* indicated that the statutory requirement ''trumps'' subsection (a), and the guideline range becomes the statutory range—three years to life. 590 F.3d at 911. Thus, the district court's imposition of five years of supervised release ''was neither an upward departure nor procedural error.'' *Id.*

Part A provides two options for resolving these differences. Option 1 adopts the approach of the Seventh Circuit in *Gibbs* and *Goodwin.* Option 2 adopts the approach of the Eighth Circuit in *Deans.* Each option amends the commentary to provide examples of how subsection (c) would operate.

B. When the Defendant Is Convicted of Failure To Register as a Sex Offender

Second, there appear to be differences among the circuits in how to calculate the guideline range of supervised release when the defendant is convicted under 18 U.S.C. § 2250 (*i.e.,* for failing to register as a sex offender). When a defendant is convicted of such an offense, the court is required by statute to impose a term of supervised release of at least five years and up to life. *See* 18 U.S.C. § 3583(k).

There appears to be an application issue about when, if at all, such an offense is a ''sex offense'' for purposes of subsection (b) of § 5D1.2. If a failure to register is a sex offense, then subsection (b) specifically provides for a term of supervised release of anywhere from the minimum provided by subsection (a) to the maximum provided by statute (*i.e.,* life), and a policy statement contained within subsection (b) recommends that the maximum be imposed. *See* § 5D1.2(b), p.s. Another effect of the determination is that, if a failure to register is a ''sex offense,'' the guidelines recommend that special conditions of supervised release also be imposed, such as participating in a sex offender monitoring program and submitting to warrantless searches. *See* § 5D1.3(d)(7).

Application Note 1 defines ''sex offense'' to mean, among other things, ''an offense, perpetrated against a minor, under'' chapter 109B of title 18 (the only section of which is section 2250). Circuits have reached different conclusions about the effect of this definition.

The Seventh Circuit has held that a failure to register can never be a ''sex offense'' within the meaning of Note 1. *United States* v. *Goodwin,* 717 F.3d 511, 518–20 (7th Cir. 2013). The court in *Goodwin* reasoned that there is no specific victim of a failure to register, and therefore a failure to register is never ''perpetrated against a minor'' and can never be a ''sex offense''—rendering the definition's inclusion of offenses under chapter 109B ''surplusage''. 717 F.3d at 518. In an unpublished opinion, the Second Circuit has determined that a failure to register was not a ''sex offense''. *See United States* v. *Herbert,* 428 Fed. App'x 37 (2d Cir. 2011). In both cases, the government argued for these outcomes, confessing error below.

There are unpublished decisions in other circuits that have reached different results, without discussion. In those cases, the defendant had a prior sex offense against a minor, and the circuit court determined that the failure to register was a ''sex offense''. *See United States* v. *Zeiders,* 440 Fed. App'x 699, 701 (11th Cir. 2011); *United States* v. *Nelson,* 400 Fed. App'x 781 (4th Cir. 2010).

Part B responds to the application issue by amending the commentary to '5D1.2 to clarify that offenses under section 2250 are not ''sex offenses''. An issue for comment seeks comment on supervised release for offenses under section 2250, including what term should be provided by the supervised release guidelines and whether there are distinctions among section 2250 offenses that should be accounted for in the supervised release guidelines (*e.g.,* in the length or conditions of supervised release).

Proposed Amendment

(A) When a Statutory Minimum Term of Supervised Release Applies

The Commentary to § 5D1.2 captioned ''Application Notes'' is amended by adding at the end the following new Note 6 (two options are provided):

[Option 1:

''6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines. For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum—a life term of supervised release—be imposed.''**]**

[Option 2:

''6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the term of supervised release provided by the guidelines. In such a case, the range provided by statute supersedes the range provided by subsection (a). For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is three years to life.''**]**

(B) When the Defendant Is Convicted of Failure To Register as a Sex Offender

The Commentary to § 5D1.2 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '''Sex offense' means'', in subparagraph (A), by striking clause (ii) and redesignating clauses (iii) through (vi) as clauses (ii) through (v), respectively; and in subparagraph (B) by striking ''(vi)'' and inserting ''(v)''.

Issue for Comment

1. The Commission seeks comment on supervised release for defendants convicted under section 2250. Under section 2250(a), a defendant who fails to register as a sex offender shall be imprisoned for not more than 10 years. Under section 2250(c), an individual who fails to register under section 2250(a) and commits a crime of violence shall be imprisoned for not less than 5 years and not more than 30 years, in

addition to and consecutive to the punishment for violating section 2250(a).

First, the Commission seeks comment on what length term of supervised release the guidelines should provide for offenses under section 2250. When a defendant is convicted of such an offense, the court is required by statute to impose a term of supervised release of at least five years and up to life. *See* 18 U.S.C. § 3583(k). What term of supervised release should the guidelines provide? In particular, should the guidelines provide for a term of supervised release of:

(A) not less than five years and up to life;

(B) not less than five years and up to life, with a life term recommended;

(C) precisely five years; or

(D) some other option?

Second, the Commission seeks comment on whether there are distinctions among section 2250 offenses that should be accounted for in the supervised release guidelines (*e.g.,* in the length or conditions of supervised release). In particular:

(i) Should a defendant convicted under section 2250(c) be treated differently from a defendant convicted under section 2250(a)? For example, should the guidelines provide a longer term of supervised release for an offense under section 2250(c) than for an offense under section 2250(a)? If so, how much longer? Should the guidelines provide more conditions of supervised release for an offense under section 2250(c) than for an offense under section 2250(a)? If so, what conditions?

(ii) Should a defendant who was convicted of a sex offense against a minor, and was then convicted of failing to register that conviction, be treated differently from a defendant who was convicted of a sex offense against an adult? For example, should the guidelines provide a longer term of supervised release for a defendant whose underlying sex offense was against a minor than for a defendant whose underlying sex offense was against an adult? If so, how much longer? Should the guidelines provide more conditions of supervised release for a defendant whose underlying sex offense was against a minor than for a defendant whose underlying sex offense was against an adult? If so, what conditions?

(iii) Specifically for defendants convicted under section 2250(c), should a defendant whose ''crime of violence'' under section 2250(c) was committed against a minor be treated differently from a defendant whose ''crime of violence'' was committed against an adult? For example, should the guidelines provide a longer term of supervised release for a defendant whose ''crime of violence'' was against a minor than for a defendant whose ''crime of violence'' was against an adult? If so, how much longer? Should the guidelines provide more conditions of supervised release for a defendant whose ''crime of violence'' was against a minor than for a defendant whose ''crime of violence'' was against an adult? If so, what conditions?

7. 5G1.3

Synopsis of Proposed Amendment: This proposed amendment addresses cases in which the defendant is subject to an undischarged term of imprisonment. The guideline applicable to this is § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment), which provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

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

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

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

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

The proposed amendment is in three parts, each of which amend § 5G1.3. The first part addresses cases in which a defendant is subject to an undischarged term of imprisonment that is relevant conduct but does not result in a Chapter Two or Three increase. The second part addresses the adjustment of sentences for defendants subject to anticipated state terms of imprisonment. The third part addresses cases in which certain deportable aliens are subject to undischarged terms of imprisonment. Although these three parts revise the same guideline in overlapping ways, the Commission seeks comment on each of them independently. They are presented not as alternatives to each other but rather as independent proposals that could, if appropriate, be adopted in combination.

(A) Accounting for Undischarged Terms of Imprisonment That Are Relevant Conduct But Do Not Result in Chapter Two or Chapter Three Increases

Synopsis of Proposed Amendment: Part A amends § 5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the provisions of § 1B1.3(a)(1), (a)(2), or (a)(3), whether or not it also formed the basis for a Chapter Two or Chapter Three increase. Conforming changes are made to the application notes as well.

An issue for comment is also included.

Proposed Amendment

Section 5G1.3(b) is amended by striking ''and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2(A) by striking ''(i)'' and by striking ''; and (ii)'' and all that follows through ''offense.'' and inserting a period;

in Note 2(B) by striking ''increased the Chapter Two or Three offense level for the instant offense but''; and

in Note 2(D) by striking ''40'' and inserting ''55'', and by striking ''55'' and inserting ''70''.

Issue for Comment

1. The Commission seeks comment on the application of § 5G1.3(b) as it relates to the relevant conduct rules in § 1B1.3 and any Chapter Two or Three offense level increases that may apply at sentencing. Specifically, the proposed amendment would amend § 5G1.3(b) to delete the requirement that the prior

offense form the basis for a Chapter Two or Chapter Three increase, but would maintain the requirement that the prior offense be relevant conduct under the provisions of only certain subsections of the relevant conduct rules, namely subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3. Should the proposed amendment also allow application of § 5G1.3(b) if the prior offense was relevant conduct under subsection (a)(4) of § 1B1.3, relating to ''any other information specified in the applicable guideline''? Such an amendment would, for instance, authorize a court to apply § 5G1.3(b) where the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), a circumstance not currently covered because the aggravated felony is not relevant conduct under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3.

(B) Adjustment for an Anticipated State Term of Imprisonment

Synopsis of Proposed Amendment: Part B amends § 5G1.3 to provide for an adjustment to a federal sentence in cases in which there is an anticipated, but not yet imposed, state term of imprisonment. Similar to § 5G1.3(b), the new subsection (c) allows a court to adjust the federal sentence for any anticipated state term of imprisonment if subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct). The proposed amendment brackets for comment whether a sentencing court shall or whether it may adjust such a defendant's sentence for any anticipated period of imprisonment. The proposed amendment also brackets for comment whether the other offense must also be the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), or whether, as in Part A, this requirement should be removed. An issue for comment is also included.

Proposed Amendment

Section 5G1.3 is amended in the heading by adding at the end ''*or Anticipated State Term of Imprisonment*''.

Section 5G1.3 is amended by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

''(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) **[**and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)**]**, the court **[**may**][**shall**]** adjust the sentence for any anticipated state term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively; by inserting after Note 2 the following new Note 3:

''3. *Application of Subsection (c).*— Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant may be sentenced in state court and will serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) **[**and was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)**]**, the court **[**may**][**shall**]** adjust the sentence for the period of time anticipated to be served in state custody. To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any such adjustment be clearly stated on the Judgment in a Criminal Case Order as an adjustment pursuant to § 5G1.3(c), rather than as a credit for time served.'';

in Note 4 (as so redesignated) by striking ''*(c)*'' and inserting ''*(d)*'';

in each of subparagraphs (A), (B), (C), (D), and (E) by striking ''(c)'' each place such term appears and inserting ''(d)'';

and in subparagraph (E) by striking ''subsection (b)'' and inserting ''subsections (b) and (c)''.

Issue for Comment

1. The Commission seeks comment on whether there are cases in which a federal court anticipates that a period of time spent by the defendant in pretrial custody in connection with the anticipated state sentence will not be credited to the federal sentence by the Bureau of Prisons. How, if at all, should the guidelines account for such cases? Should the guidelines allow the federal court to adjust the sentence for that period of time? Should the guidelines provide a departure provision to account for such cases?

(C) Sentencing of Deportable Aliens With Unrelated Terms of Imprisonment

Synopsis of Proposed Amendment: Part C amends § 5G1.3 by adding a new subsection (c) to provide for an adjustment if a defendant is a deportable alien who is likely to be deported after imprisonment and the defendant is serving an undischarged term of imprisonment that resulted from an unrelated offense. The proposed amendment brackets for comment whether a sentencing court shall or whether it may adjust such a defendant's sentence for any period of imprisonment already served on the undischarged term. It also brackets for comment whether the new subsection (c) should apply notwithstanding whether either subsection (a) or (b) of § 5G1.3 would ordinarily apply to the defendant, or whether subsection (c) only applies if subsection (a), relating to offenses committed while serving a sentence of imprisonment, does not otherwise apply to the defendant. The proposed amendment also adds a new application note to the commentary to § 5G1.3 describing the new subsection (c) and providing an example of its application.

The proposed amendment further amends § 5K2.23 to provide that if a defendant who is a deportable alien who is likely to be deported after imprisonment has completed serving a term of imprisonment and the proposed subsection (c) of § 5G1.3 would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense, a departure is warranted. The commentary to § 5G1.3 is also amended in Note 4 (related to downward departures) to reflect the change to § 5K2.23.

An issue for comment is also included requesting comment on whether the proposed amendment should instead amend § 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide for a downward departure.

Proposed Amendment

Section 5G1.3 is amended by redesignating subsection (c) as subsection (d), and by inserting after subsection (b) the following new subsection (c):

''(c) Notwithstanding subsection**[**s (a) and**]** (b), if the defendant is a deportable alien who is likely to be deported after imprisonment and is serving an undischarged term of imprisonment that resulted from an unrelated offense, the court **[**may**][**shall**]** adjust the sentence for any period of imprisonment already served on the undischarged term if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2(A) by striking ''subsection (c)'' and inserting ''subsections (c) and (d)'';

by redesignating Notes 3 and 4 as Notes 4 and 5, respectively;

by inserting after Note 2 the following new Note 3:

''3. *Application of Subsection (c).*—

(A) *In General.*—Subsection (c) applies in cases in which the defendant is a deportable alien who likely will be deported after imprisonment and the defendant is serving an undischarged term of imprisonment for an unrelated offense. In such a case, the court [may][shall] adjust the defendant's sentence to account for any time already served on the undischarged term.

(B) *Example.*—The following is an example in which subsection (c) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense for illegal reentry after conviction for an aggravated felony. The defendant received a ten-month sentence of imprisonment for an unrelated state offense and has served four months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 18–24 months (Chapter Two offense level of 16 based on base offense level of 8 and 8-level increase for aggravated felony; 3-level reduction for acceptance of responsibility; final offense level of 13; Criminal History Category III). The court determines that the defendant is a deportable alien who likely will be deported after imprisonment and a sentence of 18 months provides the appropriate total punishment. Because the defendant has already served four months on the unrelated state charge as of the date of sentencing on the instant federal offense, a sentence of 14 months achieves this result.'';

in Note 4 (as so redesignated) by striking ''*(c)*'' and inserting ''*(d)*;''

in each of subparagraphs (A), (B), (C), (D), and (E) by striking ''(c)'' each place such term appears and inserting ''(d)'';

and

in subparagraph (E) by striking ''subsection (b)'' and inserting ''subsections (b) and (c)'';

and in Note 5 by inserting after ''subsection (b)'' the following: ''or (c)''.

Section 5K2.23 is amended by inserting after ''subsection (b)'' the following: ''or (c)''.

Issue for Comment

1. The Commission seeks comment on whether the guidelines should instead address this issue by adding a downward departure provision. For instance, several courts have fashioned a downward departure for those defendants still subject to undischarged state sentences to account for the delay between when an illegal reentry defendant is ''found'' by immigration authorities and when such a defendant is brought into federal custody. *See, e.g., United States* v. *Sanchez-Rodriguez,* 161 F.3d 556, 563–64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in indicting and sentencing the defendant with illegal reentry, he lost the opportunity to serve a greater portion of his state sentence concurrently with his federal sentence); *United States* v. *Barrera-Saucedo,* 385 F.3d 533, 537 (5th Cir. 2004) (holding that ''it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody''); *see also United States* v. *Los Santos,* 283 F.3d 422, 428–29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable).

Should the Commission include a downward departure in '2L1.2 (Unlawfully Entering or Remaining in the United States) similar to those approved by the circuit courts above? Examples of such a downward departure are the following:

Example 1:

Departure Based on Unrelated State Sentence.—There may be cases in which the defendant is a deportable alien who likely will be deported after imprisonment and is serving [or has served] a sentence for an unrelated state crime. In such a case, a departure may be warranted to account for the time the defendant has already served in state custody.

Example 2:

Departure Based on Unrelated State Sentence.—There may be cases in which the defendant is a deportable alien who likely will be deported after imprisonment and is serving [or has served] a sentence for an unrelated state crime. In such a case, a departure may be warranted to account for the defendant's lost opportunity to serve a greater portion of his state sentence concurrently with his federal sentence.

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