federal register

Tuesday
January 6, 1998

Part II

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

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. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and other provisions of law, the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. The Commission seeks comment on the proposed amendments, alternative proposed amendments, and any other aspect of the sentencing guidelines, policy statements, and commentary. The Commission may submit amendments to the Congress not later than May 1, 1998.

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates alternative proposals and that the Commission invites comment and suggestions for appropriate policy choices; for example, a proposed enhancement of [3–5] levels means a proposed enhancement of either three, four, or five levels. Similarly, a proposed enhancement of [4] levels indicates that the Commission is considering, and invites comment on, alternative policy choices. Second, the Commission has highlighted certain issues for comment and invites suggestions for specific guideline language.

DATES: Written public comment should be received by the Commission not later than March 12, 1998, in order to be considered by the Commission in the promulgation of amendments and in the possible submission of those amendments to the Congress by May 1, 1998.

The Commission has scheduled a public hearing on the proposed amendments for March 12, 1998, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002–8002. An additional public hearing focusing primarily on proposed amendments to the theft, fraud, and tax guidelines is scheduled for March 5, 1998, at the Parc Fifty-Five Hotel in San Francisco, CA, in conjunction with the American Bar Association's 1998 National Institute on White Collar Crime.

A person who desires to testify at the public hearing in Washington, D.C., should notify Michael Courlander, Public Information Specialist, at (202) 273–4590, not later than February 26, 1998. Written testimony for that hearing must be received by the Commission not later than March 5, 1998. Timely submission of written testimony is a requirement for testifying at the public hearing.

A person who desires to testify at the public hearing in San Francisco, CA, should notify Michael Courlander, Public Information Specialist, at (202) 273–4590, not later than February 19, 1998. Written testimony for that hearing must be received by the Commission not later than February 26, 1998. Timely submission of written testimony is a requirement for testifying at the public hearing.

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

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273–4590.

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

Authority: 28 U.S.C. 994(a), (o), (p), (x); Pub. L. 105–101, 2, Nov. 19, 1997, 111 Stat. 2202; Pub. L. 105–147, § 2(g), 111 Stat 2678, Dec. 16, 1997.

Richard P. Conaboy,

Chairman.

Fraud, Theft, Tax, and Related Offenses

Chapter Two

1. Synopsis of Proposed Amendment

During the 1997–98 amendment cycle, the Sentencing Commission has identified as a priority issue for consideration the definition of ''loss'' and the weight it is given in the theft, fraud, and tax guidelines. The following are two proposed options for revising the loss tables for the theft, fraud, and tax guidelines. The purpose of both options is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness. With the exception of the proposed tax tables at low dollar losses, each of the proposed tables uses two-level incremental increases in offense levels.

Option 1

(A) § 2B1.1 (Theft): The proposed loss table incorporates the two-level ''more than minimal planning'' (MMP) enhancement currently treated as a separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding $10,000; the second level from that enhancement is built in at amounts exceeding $20,000. In addition, beginning at amounts exceeding $40,000, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) § 2F1.1 (Fraud): The proposed change provides for an initial increase in the loss table from a base offense level of 6 to an offense level of 8 at more than $5,000, whereas the initial increase in the current fraud loss table is an increase from a base offense level of 6 to an offense level of 7 at more than $2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding $10,000; the second level from that enhancement is built in at amounts exceeding $20,000. In addition, beginning at $40,000, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) § 2T4.1 (Tax): For tax losses of $40,000 or less, the offense levels of the proposed tax loss table are the same as the current tax loss table. For losses of more than $40,000, the proposed increases in offense levels are the same as the increases in offense levels in the proposed theft and fraud loss tables for like monetary amounts.

Option 2

(A) § 2B1.1 (Theft): The proposed loss table incorporates the two-level MMP enhancement currently treated as a

separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding $2,000; the second level from that enhancement is built in at amounts exceeding $5,000. (Because the proposed table also changes a ''cutting point'' from $10,000 to $12,500, only one level for more than MMP is built in for amounts between $10,000 and $12,500.) In addition, beginning at amounts exceeding $12,500, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) § 2F1.1 (Fraud): The proposed loss table provides for an initial increase from a base offense level of 6 to an offense level of 8 at more than $2,000, whereas the initial increase under the current fraud loss table increases the base offense level of 6 to an offense level of 7 at more than $2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding $2,000; the second level from that enhancement is built in at amounts exceeding $5,000. (Because the proposed table also changes a ''cutting point'' from $10,000 to $12,500, only one level for MMP is built in for amounts between $10,000 and $12,500.) In addition, beginning at $12,500, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) § 2T4.1 (Tax): The proposed increases in offense levels are the same as the increases in offense levels in the proposed fraud loss tables for like monetary amounts.

Proposed Amendment:

[Option 1

[Section 2B1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $100 or less	no increase
(B) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 3
(E) More than $5,000	add 4
(F) More than $10,000	add 5
(G) More than $20,000	add 6
(H) More than $40,000	add 7
(I) More than $70,000	add 8
(J) More than $120,000	add 9
(K) More than $200,000	add 10
(L) More than $350,000	add 11
(M) More than $500,000	add 12
(N) More than $800,000	add 13
(O) More than $1,500,000	add 14
(P) More than $2,500,000	add 15
(Q) More than $5,000,000	add 16
(R) More than $10,000,000	add 17
(S) More than $20,000,000	add 18
(T) More than $40,000,000	add 19
(U) More than $80,000,000	add 20.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $10,000	add 6
(E) More than $20,000	add 8
(F) More than $40,000	add 10
(G) More than $80,000	add 12
(H) More than $200,000	add 14
(I) More than $500,000	add 16
(J) More than $1,200,000	add 18
(K) More than $2,000,000	add 20
(L) More than $7,500,000	add 22
(M) More than $20,000,000	add 24
(N) More than $50,000,000	add 26
(O) More than $100,000,000	add 28.''.

Section 2F1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.''.

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $20,000	add 6
(E) More than $40,000	add 8
(F) More than $80,000	add 10
(G) More than $200,000	add 12
(H) More than $500,000	add 14
(I) More than $1,200,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.

Section 2T4.1 is amended by striking:

''Tax Loss (Apply the Greatest)	Offense Level
(A) $1,700 or less	6
(B) More than $1,700	7
(C) More than $3,000	8
(D) More than $5,000	9
(E) More than $8,000	10
(F) More than $13,500	11
(G) More than $23,500	12
(H) More than $40,000	13
(I) More than $70,000	14
(J) More than $120,000	15
(K) More than $200,000	16
(L) More than $325,000	17
(M) More than $550,000	18
(N) More than $950,000	19
(O) More than $1,500,000	20
(P) More than $2,500,000	21
(Q) More than $5,000,000	22
(R) More than $10,000,000	23
(S) More than $20,000,000	24
(T) More than $40,000,000	25
(U) More than $80,000,000	26.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $1,700 or less	no increase
(B) More than $1,700	add 1
(C) More than $3,000	add 2
(D) More than $5,000	add 3
(E) More than $8,000	add 4
(F) More than $13,500	add 5
(G) More than $23,500	add 6
(H) More than $40,000	add 8
(I) More than $80,000	add 10
(J) More than $200,000	add 12
(K) More than $500,000	add 14
(L) More than $1,200,000	add 16
(M) More than $2,500,000	add 18
(N) More than $7,500,000	add 20
(O) More than $20,000,000	add 22
(P) More than $50,000,000	add 24
(Q) More than $100,000,000	add 26.''.]

[Option 2:

[Section 2B1.1(b)(1) is amended by striking:

''Loss (Apply the Greatest)	Increase in Level
(A) $100 or less	no increase
(B) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 3
(E) More than $5,000	add 4
(F) More than $10,000	add 5
(G) More than $20,000	add 6
(H) More than $40,000	add 7

''Loss (Apply the Greatest)	Increase in Level
(I) More than $70,000	add 8
(J) More than $120,000	add 9
(K) More than $200,000	add 10
(L) More than $350,000	add 11
(M) More than $500,000	add 12
(N) More than $800,000	add 13
(O) More than $1,500,000	add 14
(P) More than $2,500,000	add 15
(Q) More than $5,000,000	add 16
(R) More than $10,000,000	add 17
(S) More than $20,000,000	add 18
(T) More than $40,000,000	add 19
(U) More than $80,000,000	add 20.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $100 or less	no increase
(A) More than $100	add 1
(C) More than $1,000	add 2
(D) More than $2,000	add 4
(E) More than $5,000	add 6
(F) More than $12,500	add 8
(G) More than $30,000	add 10
(H) More than $70,000	add 12
(I) More than $150,000	add 14
(J) More than $350,000	add 16
(K) More than $800,000	add 18
(L) More than $2,500,000	add 20
(M) More than $7,500,000	add 22
(N) More than $20,000,000	add 24
(O) More than $50,000,000	add 26
(P) More than $100,000,000	add 28.''.

Section 2F1.1(b)(1) is amended by striking.

''Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.''.

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $12,500	add 6
(E) More than $30,000	add 8
(F) More than $70,000	add 10
(G) More than $150,000	add 12
(H) More than $350,000	add 14
(I) More than $800,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.

Section 2T4.1 is amended by striking:

''Tax Loss (Apply the Greatest)	Offense Level
(A) $1,700 or less	6
(B) More than $1,700	7
(C) More than $3,000	8
(D) More than $5,000	9
(E) More than $8,000	10
(F) More than $13,500	11
(G) More than $23,500	12
(H) More than $40,000	13
(I) More than $70,000	14
(J) More than $120,000	15
(K) More than $200,000	16
(L) More than $325,000	17
(M) More than $550,000	18
(N) More than $950,000	19
(O) More than $1,500,000	20
(P) More than $2,500,000	21
(Q) More than $5,000,000	22
(R) More than $10,000,000	23
(S) More than $20,000,000	24
(T) More than $40,000,000	25
(U) More than $80,000,000	26.'',

and inserting:

''Loss Amount (Apply the Greatest)	Offense Level Increase
(A) $2,000 or less	no increase
(B) More than $2,000	add 2
(C) More than $5,000	add 4
(D) More than $12,500	add 6
(E) More than $30,000	add 8
(F) More than $70,000	add 10
(G) More than $150,000	add 12
(H) More than $350,000	add 14
(I) More than $800,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,500,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.''.]

Issues for Comment

(A) The Commission invites comment on suggested constructions of the loss tables for the theft, property damage and destruction, and fraud guidelines other than the options proposed by this amendment. Specifically, the Commission invites commentators to suggest alternative loss tables that contain different rates of increases and different increments from those set forth in the options proposed by this amendment.

(B) The Commission invites comment on whether, in conjunction with the above proposed amendments to build into the loss tables ''more than minimal planning,'' it should add an application note in §§ 2B1.1 (Theft), 2B1.3 (Property Damage and Destruction), and 2F1.1 (Fraud) that would prohibit a downward departure if the offense involved only minimal planning and prohibit an upward departure if the offense involved ''more than minimal planning.'' For a related proposal to address cases in which there is limited or insignificant planning, see Amendment 5(B), infra.

Guidelines that Refer to Theft/Fraud Loss Tables

Chapter Two

2. Synopsis of Proposed Amendment

The following proposed amendments indicate the changes that might be called for in several guidelines that refer to the loss tables in either § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables (set forth in proposed Amendment 1, supra.) as well as an alternative monetary table that does not incorporate ''more than minimal planning'' (MMP).

The amendments are divided into Parts (A) through (G). Part (A) proposes an alternative monetary table that does not incorporate MMP. The amendments to the referring guidelines are presented in Parts (B) through (G) as follows:

(B) Those guidelines that arguably incorporate the concept of MMP into the base offense level or a specific offense characteristic.

(C) Certain pornography and obscenity guidelines.

(D) Certain copyright infringement and structuring guidelines, for which use of the proposed loss tables for fraud is also presented as an option.

(E) Trespass, for which use of the proposed theft and fraud loss tables starting at $2,000 is also presented as an option, as well as an issue for comment.

(F) Property destruction, which is proposed to be consolidated with the theft guideline (thereby mitigating the necessity for reference to the alternative monetary table).

(G) Bank gratuity, which is proposed to be consolidated with the principal gratuity guideline.

(A) The Reference Monetary Table

Synopsis of Proposed Amendment

This amendment proposes to add to the guidelines an alternative monetary

table for guidelines, other than those for theft and fraud, that currently refer to either the theft or fraud loss table and arguably incorporate a MMP type feature in either the base offense level or a specific offense characteristic. The proposed alternative monetary table does not build in MMP, but does incorporate the enhanced severity increases of the proposed fraud/theft tables (see Amendment 1, supra.) for amounts exceeding $40,000.

The use of the proposed monetary table for these guidelines in lieu of the proposed theft/fraud tables generally would (1) maintain proportionality with the proposed fraud/theft loss tables, across the range of monetary values, (2) achieve increases in severity for larger-scale referring guideline offenses, and (3) eliminate the need for a 2-level reduction in these referring guidelines to account for the fact that MMP has been incorporated into the proposed theft/fraud tables. The two options are presented to coordinate with the two loss table options in proposed Amendment 1, supra. (i.e., Option 1 presented below coordinates with Option 1 in Amendment 1, and Option 2 presented below coordinates with Option 2 in Amendment 1).

Proposed Amendment

[Option 1: Chapter Two, Part X is amended by adding at the end the following new subpart:

''6. REFERENCE MONETARY TABLE

§ 2X6.1. Reference Monetary Table

Amount (Apply the Greatest)	Increase in Level
[(A) $2, 000 or less] or	[no increase]
[(A) More than $2,000]or	[add 1]
[(A) $5,000 or less]	[no increase]
(B) More than $5,000	add 2
(C) More than $10,000	add 3
(D) More than $20,000	add 4
(E) More than $40,000	add 6
(F) More than $80,000	add 8
(G) More than $200,000	add 10
(H) More than $500,000	add 12
(I) More than $1,200,000	add 14
(J) More than $2,500,000	add 16
(K) More than $7,500,000	add 18
(L) More than $20,000,000 ...	add 20
(M) More than $50,000,000 ..	add 22
(N) More than $100,000,000	add 24.''.]

[Option 2: Chapter Two, Part X is amended by adding at the end the following new subpart:

''6. REFERENCE MONETARY TABLE

§ 2X6.1. Reference Monetary Table

Amount (Apply the Greatest)	Increase in Level
(A) $2, 000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $12,500	add 4
(E) More than $30,000	add 6
(F) More than $70,000	add 8
(G) More than $150,000	add 10
(H) More than $350,000	add 12
(I) More than $800,000	add 14
(J) More than $2,500,000	add 16
(K) More than $7,500,000	add 18
(L) More than $20,000,000 ...	add 20
(M) More than $50,000,000 ..	add 22
(N) More than $100,000,000	add 24.''.]

(B) Guidelines with MMP Built into the Base Offense Level or a Specific Offense Characteristic

Synopsis of Proposed Amendment

With respect to these guidelines, there are two issues: (1) the loss table to be referenced, and (2) whether the initial offense level increase from the referenced table should occur at $2,000 (the current status) or at $5,000. To be precise, the ''cutting points'' in the monetary tables occur when the monetary amount is ''more than $2,000'' or ''more than $5,000'', etc. For simplicity, this discussion generally will omit the ''more than'' modifier.

To avoid concerns about a MMP overlap, the Reference Monetary Table is used for all of these guidelines. Option 1 shows how the guideline might be amended if the Commission were to reference a monetary table for which the starting point is $5,000.

Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the loss is more than $2,000 but not more than $5,000.

Option 2 shows how the guideline might be amended if the Commission were to adopt a reference monetary table for which the starting point is $2,000. To cover the possibility that the Commission might elect, for one or more of these guidelines, to reference the new fraud loss table in spite of an arguable MMP overlap, an issue for comment is added at the end of the amendments.

Proposed Amendment:

Section 2B5.1(b) is amended by striking:

''(1) If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at § 2F1.1 (Fraud and Deceit).'', and inserting:

''(1) If the face value of the counterfeit items exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B5.1(b) is amended by striking:

''(1) If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the face value of the counterfeit items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B6.1(b) is amended by striking:

''(1) If the retail value of the motor vehicles or parts involved exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the motor vehicles or parts involved exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B6.1(b) is amended by striking:

''(1) If the retail value of the motor vehicles or parts involved exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the motor vehicles or parts (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2F1.2(b) is amended by striking:

''(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the offense.'',

and inserting:

''(1) If the gain resulting from the offense exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2F1.2(b) is amended by striking:

''(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the offense.'',

and inserting:

''(1) If the gain resulting from the offense (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B4.1(b) is amended by striking:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B4.1(b) is amended by striking:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B3.3(b) is amended by striking:

''(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the amount obtained or demanded exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B3.3(b) is amended by striking:

''(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1.'',

and inserting:

''(1) If the greater of the amount obtained or demanded (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2Q2.1(b)(3) is amended by striking:

''(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1. (Fraud and Deceit); or'',

and inserting:

''(A) If the market value of the fish, wildlife, or plants exceeded [Option1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), [but in no event more than [18] levels]; or''.

[Option 1A

Section 2Q2.1(b)(3) is amended by striking:

''(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), [but in no event more than [18] levels]; or''.]

Section 2C1.1(b)(2) is amended by striking:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded [Option 1: $5,000] [Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.1(b)(2) is amended by striking:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the gratuity exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.7(b)(1) is amended by striking:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.7(b)(1) is amended by striking:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or'',

and inserting:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2E5.1(b) is amended by striking:

''(2) Increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.'',

and inserting:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2E5.1(b) is amended by striking:

''(2) Increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.'',

and inserting:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

(C) Pornography and Obscenity

Synopsis of Proposed Amendment

Option 1 for the following pornography and obscenity guidelines references the guidelines to the alternative monetary reference table. Option 2 references the new fraud loss table. Option 3 deletes the reference to a monetary table altogether and adds invited upward departure language for large-scale commercial endeavors.

Note that, with respect to §§ 2G2.2 and 2G3.1, the floor (i.e., an increase of not less than [5] levels) for the amount of the material has been maintained. However, two effects of maintaining the floor should be mentioned: (1) The issue of the starting point for any of the proposed tables is no longer relevant (because the starting point simply does not come into play at such levels). (2) Under the current fraud loss table, the 5-level floor presupposes a retail value of at least $40,000; however, those values change depending on the particular table proposed to be used. For that reason, the 5-level enhancement is bracketed in the following options.

Proposed Amendment:

[Option 1

Section 2G2.2(b) is amended by striking:

''(2) If the offense involved distribution, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.'',

and inserting:

''(2) If the offense involved distribution, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.''.]

[Option 2

Section 2G2.2 (b)(2) is amended by striking ''corresponding to the retail value of the material, but in no event less than 5 levels'' and inserting ''(Fraud and Deceit) corresponding to the retail value of the material, but in no event less than [5] levels''.]

[Option 3

Section 2G2.2 (b)(2) is amended by striking ''the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels'' and inserting ''[5] levels''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by adding at the end the following new note:

''4. Subsection (b)(2) provides a five-level enhancement if the offense involved distribution. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [$40,000])], an upward departure may be warranted.''.]

[Option 1

Section 2G3.1(b) is amended by striking:

''(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.'',

and inserting:

''(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.''.]

[Option 2

Section 2G3.1(b)(1) is amended by striking ''corresponding to the retail value of the material, but in no event less than 5 levels'', and inserting ''(Fraud and Deceit) corresponding to the retail value of the material, but in no event less than [5] levels''.]

[Option 3

Section 2G3.1(b)(1) is amended by striking ''the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels'' following ''increase by'', and inserting ''[5] levels''.

The Commentary to § 2G3.1 captioned ''Application Note'' is amended by adding at the end the following new note:

''2. Subsection (b)(1) provides a five-level enhancement if the offense involved an act related to distribution for pecuniary gain. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [$40,000])], an upward departure may be warranted.'';

and in the caption by striking ''Note'' and inserting ''Notes''.]

[Option 1

Section 2G3.2(b) is amended by striking:

''(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.'',

and inserting:

''(2) If 6 plus the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the

volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.''.]

[Option 2

Section 2G3.2(b) is amended by striking:

''(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.'',

and inserting:

''(2) If 6 plus the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.''.]

[Option 3

The Commentary to § 2G3.2 is amended by striking subsection (b)(2); and by strking:

''Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale 'dial-a-porn' or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.'';

and by inserting:

''Application Notes:

1. Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it.

2. If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [(i.e., a commercial enterprise engaging in a volume of commerce having a value that is more than [$40,000])], an upward departure may be warranted.''.]

(D) Copyright Infringement and Structuring Transactions

Synopsis of Proposed Amendment

With respect to these guidelines, four options are presented. Option 1 shows how the guideline might be amended if the Commission were to reference an alternative monetary table for which the starting point is $5,000. Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than $2,000 but not more than $5,000. Option 2 shows how the guideline might be amended if the Commission were to adopt an alternative reference monetary table for which the starting point is $2,000.

Option 3 shows how the guideline might be amended if the Commission were to reference a fraud loss table for which the starting point is $5,000. Alternatively, Option 3A shows how, even with a reference table starting at $5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than $2,000 but not more than $5,000. Option 4 shows how the guideline might be amended if the Commission were to adopt a fraud loss table for which the starting point is $2,000.

Proposed Amendment

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items exceeded [Option 3: $5,000][Option 4: $2,000], increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

[Option 3A

Section 2B5.3(b) is amended by striking:

''(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(1) If the retail value of the infringing items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), if the value of the funds exceeded [Option 1: $5,000][Option 2: $2,000].''.

[Option 1A

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus (1) 1 level, if the value of the funds exceeded $2,000 but did not exceed $5,000; or (2) the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), if the value of the funds exceeded $5,000.''.]

Section 2S1.3 is amended by striking:

''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit), if the value of the funds exceeded [Option 3: $5,000][Option 4: $2,000].''.]

[Option 3A

Section 2S1.3 is amended by striking: ''(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.'',

and inserting:

''(a) Base Offense Level: 6 plus (1) 1 level, if the value of the funds exceeded $2,000 but did not exceed $5,000; or (2) the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit), if the value of the funds exceeded $5,000.''.]

(E) Trespass

Synopsis of Proposed Amendment

By virtue of an amendment effective November 1, 1997, the trespass guideline contains a reference to the fraud loss table to cover losses resulting from the invasion of a protected government computer. The fraud table, rather than the theft table, was chosen because it better fits with a guideline structure that provides an initial increase in offense level at $2,000. Under the proposed loss tables and accompanying reference monetary tables, a range of as many as six options are potentially viable. Those considered more likely are set forth below.

Among the issues specific to this guideline to be decided are: (1) Should the Commission maintain the $2,000 threshold for an initial increase in offense level? (2) Should the Commission treat these offenses comparably to computer offenses sentenced under the theft or fraud guidelines (which, under the proposed amendments, will be subject to a phased-in MMP enhancement)?

Options 1 and 1A assume that the Commission may elect to use the Reference Monetary Table because these computer trespass offenses may be simpler in nature than computer offenses referenced to the theft and fraud guidelines (and, thus, the additional MMP enhancement built into the theft and fraud loss tables would not be warranted). Option 1 shows how the guideline might be amended if the Commission were to refer to a Reference Monetary Table that provides an initial increase in offense level at $2,000. Alternatively, Option 1A shows how, even with a reference table starting at $5,000, the trespass guideline might be amended to provide a 1-level increase for cases in which the loss is more than $2,000 but not more than $5,000.

Options 2 and 3 assume that the Commission will (1) maintain the current $2,000 starting point for the referenced loss table, and (2) elect to use a loss table that incorporates the phased-in MMP enhancement. Option 2 references the proposed fraud loss table and assumes a Commission decision to use a loss table structure illustrated by the Option 2 loss tables. (Under this assumed choice, the fraud loss table, rather than theft, is referenced because the former starts at $2,000.) Option 3 references the proposed theft loss table and assumes a Commission decision to use a theft table that provides an initial increase at $2,000, as in the Option 1 theft loss table.

Proposed Amendment:

[Option 1

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

[Option 1A

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

[Option 2

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.]

[Option 3

Section 2B2.3(b) is amended by striking:

''(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.'',

and inserting:

''(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded $2,000, increase by the corresponding number of levels from the table in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).''.]

Issue for Comment: The Commission invites comment on the appropriate starting point for a loss table applicable to offenses sentenced under § 2B2.3 (Trespass) that involve the invasion of a protected computer described in 18 U.S.C. 1030(e)(2) (A) or (B). Specifically, should the Commission adopt a table for these offenses that starts at an amount that is lower or higher than $2,000? Since the current fraud loss table at § 2F1.1 (Fraud and Deceit) applicable to these offenses starts at $2,000, should the Commission account for any difference in offense levels that might occur between a lower or higher starting amount under a new loss table and the $2,000 starting amount under the current fraud loss table?

(F) Consolidation of Property Destruction and Theft Guidelines

Synopsis of Proposed Amendment

This amendment proposes to consolidate the property destruction guideline § 2B1.3 with the theft guideline, thereby mitigating the necessity for reference to the proposed alternative monetary table. (For a proposed amendment that consolidates the property destruction, theft, and fraud guidelines, see Amendment 3, infra.)

Proposed Amendment

Section 2B1.1 is amended in the title by adding at the end ''; Property Damage or Destruction''.

Section 2B1.1(b)(3) is amended by striking ''taken, or'' and inserting ''taken or destroyed, (B)''; by striking ''of such item'' and inserting ''or destruction of undelivered United States mail''; and by striking ''(B)'' and inserting ''(C)''.

Section 2B1.1(c) is amended by adding at the end the following new subdivision:

''(2) If the offense involved arson or property destruction by use of explosives, apply § 2K1.4 (Arson; Property Destruction by Use of Explosives) if the resulting offense level is greater than that determined above.''.

Section 2B1.1(c) is amended by striking ''Reference'' and inserting ''References''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1361, 1363,'' following ''664,''; by inserting ''1703,'' following ''1702,''; and by inserting '', 2321'' following ''2317''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a $500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure may be warranted.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the first paragraph by inserting before the first sentence the following:

''This guideline covers offenses involving theft, stolen property, and property damage or destruction.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the third paragraph by striking ''Consistent with statutory distinctions, an'' and inserting ''An''; by inserting ''or destruction'' following ''for the theft''; and by inserting ''or destruction'' following ''Theft''.

Strike § 2B1.3 in its entirety.

(G) Consolidation of Bank Gratuity and Principal Gratuity Guidelines

Synopsis of Proposed Amendment

This amendment proposes to consolidate the bank gratuity guideline, § 2C1.6 with the principal gratuity guideline § 2C1.2, thereby mitigating the necessity for reference to the proposed alternative monetary table.

Proposed Amendment

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the unlawful payment exceeded [Option 1: $5,000][Option 2: $2,000], increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.

[Option 1A

Section 2C1.2(b)(2) is amended by striking:

''(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).'',

and inserting:

''(A) If the value of the unlawful payment (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).''.]

Section 2C1.2(b)(2)(B) is amended by striking ''gratuity'' and inserting ''unlawful payment''.

The Commentary to § 2C1.2 captioned ''Statutory Provision'' is amended by striking ''Provision'' and inserting ''Provisions''; by inserting ''§ '' following ''U.S.C. § ''; and by inserting '', 212–214, 217'' following ''(1)''.

The Commentary to § 2C1.2 captioned ''Application Notes'' is amended by adding at the end the following new note:

''5. An unlawful payment may be anything of value; it need not be a monetary payment.''.

The Commentary to § 2C1.2 captioned ''Background'' is amended by striking the second and third sentences as follows:

''A corrupt purpose is not an element of this offense. An adjustment is provided where the value of the gratuity exceeded $2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.'',

and inserting:

''It also applies to the offer to, or acceptance by, a bank examiner of any unlawful payment; the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve Bank; and the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.''.

Strike § 2C1.6 in its entirety.

Issues for Comment: (A) The Commission invites comment on whether any of the above guidelines proposed to be referenced to the Reference Monetary Table (§ 2X6.1) instead should be referenced to the loss table in § 2F1.1, as such table is proposed to be amended under Option 1 or Option 2 (see Amendment 1, supra.). Such an approach might be justified by an assessment that the higher penalties of this approach are warranted for a particular guideline/type of offense and/or by a determination that there is no substantial overlap in the incorporation of more-than-minimal planning into the structure of the guideline and the revised loss table.

(B) The Commission invites comment on whether, for any of the above guidelines, the increase in offense level resulting from reference to a particular monetary table should be capped at a certain number of levels. For example, in § 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), should the maximum increase in offense level resulting from use of the table in § 2X6.1 (Reference Monetary Table) to measure the market value of the fish, wildlife, or plants be limited to [18] levels? Capping the increase in offense level for any particular guideline might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.

(C) The Commission invites comment on whether, for any of the above guidelines that are currently referenced to the fraud loss table in § 2F1.1, the Commission should continue to refer the guideline to the current fraud table if the Commission adopts one of the proposed loss tables for fraud offenses under § 2F1.1. Similar to the issue of capping increases in offense levels for certain guidelines (see issue for comment (B), supra.), such an approach might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.

Sections 2B1.1 (Theft), 2B1.3 (Property Destruction), and 2F1.1 (Fraud)

3. Synopsis of Proposed Amendment

This amendment consolidates the three guidelines covering theft (§ 2B1.1), property destruction (§ 2B1.3), and fraud (§ 2F1.1). Consolidation of these guidelines is proposed in response to concerns raised at an October 15, 1997 Commission hearing on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that theft and fraud offenses are conceptually similar and that prosecutors' charging selection, rather than offense conduct, may determine which of the theft or

fraud guideline will apply in any given case. For these and other reasons the Commission is considering and invites comment on the consolidation proposal set forth below. There are several important points to note with respect to the proposal:

(A) A base offense level of level 6 has been bracketed to indicate that the Commission invites comment on alternative proposals. The current base offense level for theft and property destruction offenses is level 4, while for fraud it is level 6. The proposal provides, in subsection (b)(2), for a two-level decrease for theft and property destruction offenses in which the loss is less than $2,000.

(B) The floor of level 6 for the theft of undelivered United States mail in subsection (b)(6) will need to be deleted if the Commission decides on a base offense level of level 6 but does not include a decrease for small-scale theft and property destruction offenses.

(C) The document presents two options for the current enhancement on the violation of a judicial order, a factor that relates to a circuit conflict under consideration by the Commission. Option 1 retains the enhancement in subsection (b)(7)(B). Option 2 deletes the enhancement and substitutes an encouraged upward departure provision in Application Note 11 (in lieu of an enhancement). The encouraged upward departure is provided as an option because of the infrequency with which the current enhancement applies. In fiscal year 1996, the charitable organization enhancement and the violation of a judicial order enhancement, combined, applied in only 153 cases (3% of all fraud cases in that fiscal year).

(D) Place holders have been noted for the loss table, the loss definition, and a sophisticated concealment enhancement, all of which are dependent on other policy choices.

(E) The current application note in § 2B1.1 dealing with theft and embezzlement from unions and employee benefit or pension plans has been moved to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) where it appears to more appropriately fit.

(F) An additional cross reference to the bribery and gratuity guidelines has been added to address situations in which a fraud statute may be used (perhaps for jurisdictional reasons) to prosecute conduct the essence of which involves bribery. An issue for comment also has been included to serve as a placeholder, and invite comment on, the concept of a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute (e.g., 18 U.S.C. § 1001) is used to reach conduct that is more specifically addressed in another Chapter Two guideline.

(G) The enhancement in subsection (b)(9) involving conscious or reckless risk of serious bodily injury contains two proposed substantive changes. First, it proposes to insert the bracketed language ''of death'' prior to the term ''serious bodily injury'' because, as a practical matter, a risk of serious bodily injury is likely to also entail a risk of death. Second, an increase in the ''floor'' offense level is proposed.

(H) The enhancement in subsection (b)(10), relating to ''chop shops,'' contains two options. Option 1 would add a two-level enhancement for this conduct, in addition to the existing ''floor'' offense level of level 14. Option 2 would retain the current policy (i.e., minimum offense level of 14).

It should also be noted that the order in which the enhancements under the consolidation are placed may affect the ultimate offense level in any given case, because of the multiple offense level ''floors'' that are involved (e.g., the enhancements in subsections (b)(3) through (5) may not have an additive effect in cases affected by one of the enhancements in (b)(7) through (12), that imposes a minimum or ''floor'' offense level).

In addition to combining the theft and fraud guidelines and the above-mentioned substantive changes, this amendment also reorganizes and updates the applicable commentary. Definitions of terms, other than the definition of loss, are collected under application note 1 and are presented in alphabetical order. Otherwise, application notes generally appear in the same sequential order as the relevant enhancements appear in the guideline.

Finally, this amendment makes a number of stylistic and grammatical changes in the language of the current affected guidelines to enhance clarity and consistency (e.g., in subsection (b)(3), the language is changed from ''if the theft was from the person of another'' to ''if the offense involved theft from the person of another''. These changes are intended to be non-substantive, but it is always possible that the change will produce an unintended substantive effect.

Proposed Amendment

Chapter Two, Part B is amended in the title by inserting ''Economic'' before ''Offenses''; and by striking ''Property'' and inserting ''Theft, Property Destruction, or Fraud''.

Chapter Two, Part B, Subpart 1 is amended in the title by striking ''AND''; and by inserting at the end '', AND FRAUD''.

The Commentary to Chapter Two, Part B captioned ''Introductory Commentary'' is amended by striking ''the most''; and by inserting ''fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States),'' following ''embezzlement,''.

Chapter Two is amended by striking sections 2B1.1, 2B1.3 and 2F1.1 and inserting:

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

(a) Base Offense Level: [6]

(b) Specific Offense Characteristics

(1) LOSS TABLE—TO BE INSERTED]

[(2) If (A) the offense involved theft, embezzlement, transactions in stolen property, or property damage or destruction; and (B) the total amount of the [loss] involved in the offense was less than [$2,000], decrease by 2 levels.]

(3) If the offense involved theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

[(6) If (A)(i) undelivered United States mail was taken or destroyed, or the taking or destruction of such item was an object of the offense; or (ii) the property stolen, destroyed, received, transported, transferred, transmitted, or possessed was undelivered United States mail; and (B) the offense level as determined above is less than level 6, increase to level 6.]

[Option 1 for judicial process

(7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If

the resulting offense level is less than 10, increase to level 10.]

[Option 2 for judicial process

(7) If the offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency, increase by 2 levels. If the resulting offense level is less than 10, increase to level 10.]

[(8) PLACE HOLDER FOR SOPHISTICATED CONCEALMENT ENHANCEMENT TO REPLACE FRAUD SOC ON USE OF FOREIGN BANK ACCOUNTS OR TRANSACTIONS]

(9) If the offense involved (A) the conscious or reckless risk [of death] or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm), increase by 2 levels. If the resulting offense level is less than level [13][14], increase to level [13][14].

(10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, [Option 1: increase by 2 levels. If the resulting offense level as determined above is less than level 14, increase to level 14.] [Option 2: and (B) the offense level as determined above is less than level 14, increase to level 14.]

(11) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(12) If (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level as determined above is less than level 24, increase to level 24.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(2) If the offense involved arson or property destruction by use of explosives, apply § 2K1.4 (Arson: Property Destruction by Use of Explosives), if the resulting offense level is greater than that determined above.

[(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, part C (Offenses Involving Public Officials), as appropriate, if the resulting offense level is greater than that determined above.]

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b–6, 1644, 1983–1988, 1990c; 18 U.S.C. §§ 225, 285–289, 471–473, 500, 510, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025–1028, 1029, 1030(a)(5), 1031, 1341–1344, 1361, 1363, 1702, 1703, 1708, 1831, 1832, 2113(b), 2312–2317, 2321; 29 U.S.C. §§ 439, 461, 501(c), 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. For purposes of this guideline—

'Financial institution' means (A) any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; (B) any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; (C) any health, medical or hospital insurance association; (D) brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; (E) futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and (F) any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'health, medical, or hospital insurance association,' primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

'Firearm,' and 'destructive device' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Foreign instrumentality,' 'foreign agent,' and 'trade secret' have the meaning given those terms in 18 U.S.C. 1839 (1), (2), and (3), respectively.

'Gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.

'Theft from the person of another' means the taking, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

['Undelivered United States mail' means mail, including mail that is in the addressee's mailbox, that has not been received by the addressee or the addressee's agent.]

[2. DISCUSSION OF LOSS [including downstream damages discussion from property destruction guideline]—TO BE INSERTED]

3. Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.

4. For purposes of subsection (b)(10), a [Option 1: two-level enhancement and a] minimum measure of loss [are/is] provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or 'chop shop') to steal vehicles or vehicle parts or to receive stolen vehicles or vehicle parts. 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft.

5. For purposes of subsection (b)(11), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit,

payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of experiencing any of the conditions described in subdivisions (A) through (D) of this note.

6. For purposes of subsection (b)(12), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

7. Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.

8. [Option 1 for judicial process: The enhancements in subsection (b)(7) are alternative rather than cumulative; however, if both of the enumerated factors apply in a particular case, an upward departure may be warranted.]

9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1.

10. Sometimes offenses involving fraudulent statements are prosecuted under 18 U.S.C. 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense in which a fraudulent insurance claim was mailed might be prosecuted as mail fraud. [In certain other cases, an offense involving fraudulent statements or documents, or failure to maintain required records, may be committed in furtherance of the commission or concealment of another offense, such as embezzlement or bribery.]

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. 1028 and 1029, are also covered by this guideline. If the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply § 2L2.1 or § 2L2.2, as appropriate, rather than this guideline. [In the case of an offense involving false identification documents or access devices, an upward departure may be warranted if the actual loss does not adequately reflect the seriousness of the conduct.]

If the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than this guideline. Otherwise, in such cases, this guideline is to be applied, but a departure may be warranted.

11. If the defendant is convicted under 18 U.S.C. 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the continuing financial crimes enterprise.

[Option 2 for judicial process

12. If the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release, addressed in § 2J1.7 (Offense Committed While on Release), or a violation of probation, addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.]

13. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2) (A) or (B), an upward departure may be warranted if the defendant sought the stolen property to further a broader criminal purpose.

Background

This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[**Note**: Depending on decisions made with respect to 'loss', background commentary on loss can be added.]

Consistent with statutory distinctions, an increased minimum offense level is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the

value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of ''organized scheme'' is used as an alternative to 'loss' in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Subsection (b)(9)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322. Subsection (b)(11) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73. Subsection (b)(12) implements the instruction to the Commission in section 2507 of Public Law 101–647. Subsection (d)(2) implements the instruction to the Commission in section 805(c) of Public Law 104–132.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the second paragraph as follows:

'' 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.'';

by striking the fifth and sixth paragraphs as follows:

''In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.''.

Section 2K1.4(a)(4) is amended by striking ''§ 2B1.3 (Property Damage or Destruction)'' and inserting:

''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. 501(a)), an adjustment under this section for an abuse of a position of trust will apply.''.

Issues for Comment

(A) The Commission invites comment on whether Application Note 10 in the proposed amendment should be alternatively stated in the guideline as an explicit cross reference to apply the most applicable guideline, if the resulting offense level is greater than the offense level obtained under the proposed guideline.

(B) The Commission invites comment on whether any of the specific offense characteristics in this proposed consolidated guideline should be eliminated because of infrequency of use or other good reason. If any such factor should be eliminated, should it be replaced with commentary encouraging departure?

§§ 2B1.1 (Theft) and 2F1.1 (Fraud)

4. Synopsis of Proposed Amendment

The Sentencing Commission has identified the definition of loss in fraud and theft offenses as an issue for consideration during the 1997–98 amendment cycle. The genesis of Commission interest in many of the issues raised about the definition of loss is summarized in the Loss Issues Working Paper (10–14–97) that is part of the Commission meeting materials generated in connection with the October 15, 1997 public hearing on clarifying the definition of loss. This paper and the transcript of the public hearing on the definition of loss are available on the Commission's website (http://www.ussc.gov/) or from the Commission. Following are two proposed options for revising the definition of loss for fraud and theft offenses. Both options envision one definition of loss for both fraud and theft offenses.

Option 1 provides a dramatically simplified and shortened definition of loss that has the same core principles as those found in Option 2, but without the additional rules and guidance found in Option 2. The formulation in Option 1 arguably provides maximum discretion to sentencing judges and minimal guidance as to what should be included in, or excluded from, actual loss. Option 2 attempts to provide more guidance to courts on how to resolve issues that have arisen in the case law and elsewhere about the current definition of loss.

Both options propose adoption of a general definition that loss is the greater of the actual or intended loss, and that actual loss is defined to include ''reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).'' Adoption of this provision would provide an explicit causation standard for the determination of actual loss. Option 2 raises the possibility of limiting the

relevant harm (both actual and intended) to ''economic'' harm.

Both options provide that intended loss is the ''harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)'', with Option 2 raising the issue as to whether intended loss should be limited to those consequences ''that realistically could have occurred.''

The balance of the language proposed in Option 1 also appears in Option 2 but, again, without additional rules or guidance. Language is proposed to be added to the background commentary that provides an operating principle for the use of the amount of loss, namely, that it ''serves as a measure of the seriousness of the offense and the defendant's relative culpability.'' Additional language is proposed for the commentary in both options that emphasizes the fact-based nature of the determination of loss and the importance of giving appropriate deference to the sentencing court's determinations, and that invites departure where loss ''substantially understates or overstates the seriousness of the offense or the culpability of the defendant.''

In addition to the provisions summarized above, Option 2 provides added specificity in a number of areas: (A) Departures; (B) estimation of loss; (C) time of measuring loss and credits against loss; (D) interest; (E) special rules.

(A) Departures

In addition to the general language inviting departure where loss ''substantially understates or overstates the seriousness of the offense or the culpability of the defendant'', Option 2 lists a number of grounds for invited departures, most of which can be found in the current commentary. Option 2 also provides an option for including selected non-economic factors as specific offense characteristics instead of only as possible departure grounds.

(B) Estimation of Loss

Option 2 provides a nonexclusive listing of factors (most of which are in the current commentary) that a court may use in estimating loss. Two options are provided for how gain might be fashioned as such a factor: either provide for the use of gain as any other factor, or provide that it may be used if gain exceeds loss or the loss is difficult or impossible to calculate.

(C) Time of Measuring Loss and Credits Against Loss

This provision raises the issue of whether there needs to be an applicable or limiting time frame on what is to be included in loss (such as, ''at the time the offense is detected''). This provision provides, in effect, that loss is a ''net'' concept, for both fraud and theft offenses, in contrast to the current rule that expressly uses such a concept only for certain fraud-type offenses. The determination of loss is a ''net'' concept under this proposed rule in the sense that the loss amount shall be reduced by the value of certain items, including money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim before detection of the offense, valued as of the time of pledging or transfer (unless the defendant causes the reduction in the value of the collateral after pledging or the increase in the loss, after detection). Valuation as of the time of detection would eliminate the effect of most fluctuations in value of collateral from affecting the offense level.

(D) Interest

Option 2 provides two options for dealing with interest. One would respond to the circuit court decisions that allow use of, for example, bargained-for interest, and explicitly exclude interest from the determination of loss, except as a possible departure ground. The other would continue the exclusion of opportunity-cost interest but provide for inclusion of interest if it ''was bargained for by a victim as part of a transaction which is the subject of the criminal case'' or if the victim ''transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.''

(E) Special Rules

This provision provides rules for special cases, including retaining the current rules for stolen credit cards, diversion of government program benefits (proposed for modification or elimination), and Davis-Bacon Act cases. This provision proposes adding rules on sting operations (to respond to case law that excludes from intended loss amounts that were unlikely or impossible because informants or government agents were the only ''victims'') and Ponzi schemes (to choose from divergent precedent a rule that provides that loss in such cases shall be based on ''the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of this principal investment as a result of the fraudulent scheme'').

Proposed Amendment

[Option One

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking the first through fourth paragraphs of Note 2 and inserting the following:

''2. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.

Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Notes 3, 4, 5, and 15; and by redesignating Notes 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 as Notes 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively.

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 7 and inserting the following:

''7. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.

Because of the fact-based nature of the determinations, the sentencing judge is

in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 8 and 10; and by redesignating Notes 9, 11, 12, 13, 14, 15, 16, 17, and 18 as Notes 8, 9, 10, 11, 12, 13, 14, 15, and 16, respectively.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.]

[Option Two

[Non-economic Factors, Option A:

Section 2B1.1(b) is amended by adding at the end the following new subdivision:

[''(8) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.''.]

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking the first through the fourth paragraphs of Note 2 and inserting the following:

''2. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

(1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;

(2) the cost to the victim of replacing property taken, damaged, or destroyed;

(3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;

(4) the approximate number of victims and an estimate of the average loss to each victim;

(5) the scope and duration of the offense, or revenues generated by similar operations;

[Gain, Option A

[(6) the gain to criminally responsible participants from committing the offense.]

[Gain, Option B

[(6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) [Time of Measuring Loss,] Credits Against Loss. [In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).]

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

[Interest, Option A

[(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

[Interest, Option B

[(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., 'opportunity-cost interest'). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.]

(D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than $100 per card.

(4) Diversion of Government Program Benefits

[Option A

[In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.]

[Option B

[In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

[Non-Economic Factors, Option A

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) the offense endangered national security or military readiness;

(2) the offense caused a loss of confidence in an important institution;

(3) the offense endangered the solvency or financial security of one or more victims;

(4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(6) the offense involved [ten or more victims][a large number of victims;]

(7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

[Non-Economic Factors, Option B

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) a primary objective of the offense was non-monetary;

(2) the offense caused or risked substantial non-monetary harm;

(3) false statements were made for the purpose of facilitating some other crime;

(4) the offense caused physical or psychological harm or severe emotional trauma;

(5) the offense endangered national security or military readiness;

(6) the offense caused a loss of confidence in an important institution;

(7) the offense endangered the solvency or financial security of one or more victims;

(8) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(9) the offense created a serious risk of substantially greater economic harm than the loss that actually occurred;

(10) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(11) the offense involved [ten or more victims][a large number of victims;]

(12) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(13) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

(F) Appropriate Deference. Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742 (e) and (f).''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Notes 3, 4, 5, and 15; and by redesignating Notes 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 as Notes 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new notes:

[Non-Economic Factors, Option A

[''17. If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.]

[18. Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.

Under subsection (b)(7)(E), a risk of additional loss shall be considered 'substantial' if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.''.]

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

[Non-economic Factors, Option A

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

[''(7) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.''.] The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 7 and inserting the following:

''7. 'Loss' is the greater of the actual loss or the intended loss. 'Actual loss' means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Intended loss' means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

(1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;

(2) the cost to the victim of replacing property taken, damaged, or destroyed;

(3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;

(4) the approximate number of victims and an estimate of the average loss to each victim;

(5) the scope and duration of the offense, or revenues generated by similar operations;

[Gain, Option A

[(6) the gain to criminally responsible participants from committing the offense.]

[Gain, Option B

[(6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) [Time of Measuring Loss,] Credits Against Loss. [In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).]

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

[Interest, Option A

[(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

[Interest, Option B

[(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., 'opportunity-cost interest'). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.]

(D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than $100 per card.

(4) Diversion of Government Program Benefits

[Option A

[In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.]

[Option B

[In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. 276a, criminally prosecuted under 18 U.S.C. 1001), the loss is the difference between the legally required and actual wages paid.

[Non-Economic Factors, Option A

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) the offense endangered national security or military readiness;

(2) the offense caused a loss of confidence in an important institution;

(3) the offense endangered the solvency or financial security of one or more victims;

(4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(6) the offense involved [ten or more victims][a large number of victims;]

(7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

[Non-Economic Factors, Option B

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

(1) A primary objective of the offense was non-monetary;

(2) The offense caused or risked substantial non-monetary harm;

(3) False statements were made for the purpose of facilitating some other crime;

(4) The offense caused physical or psychological harm or severe emotional trauma;

(5) The offense endangered national security or military readiness;

(6) The offense caused a loss of confidence in an important institution;

(7) The offense endangered the solvency or financial security of one or more victims;

(8) The defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);

(9) The offense created a serious risk of substantially greater economic harm than the loss that actually occurred;

(10) But for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;

(11) The offense involved [ten or more victims][a large number of victims];

(12) The loss significantly exceeds the greater of the defendant's actual and intended personal gain;

(13) The loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]

(F) Appropriate Deference. Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 8 and 10; and by redesignating Notes 9, 11, 12, 13, 14, 15, 16, 17, and 18 as Notes 8, 9, 10, 11, 12, 13, 14, 15, and 16, respectively.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new notes:

[Non-Economic Factors, Option A

[''19. If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.]

[20. Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.

Under subsection (b)(7)(E), a risk of additional loss shall be considered 'substantial' if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.''.]

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting after the first paragraph the following additional paragraph:

''Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability.''.

Issues for Comment

The following issues for comment solicit input on possible changes to the definition of loss in §§ 2B1.1 and 2F1.1 to clarify the Commission's intent, resolve issues raised by case law, and aid in consistency of application.

(A) Standard of Causation

The current definition of loss in §§ 2B1.1 and 2F1.1 does not specify any standard governing the causal relationship between the offense conduct and the harm caused. The proposed definition does include such a standard, using the concept of ''reasonable foreseeability'' as the touchstone. The Commission invites comment on whether such a standard is needed and, if so, whether the proposed ''reasonable foreseeability'' standard is preferable to other alternatives, such as a ''but-for'' causation or ''proximate cause'' standard.

The Commission also invites comment on what, if any, limitations should be placed on loss amounts that are included using the new causation standard, such as whether to limit the inclusion of ''consequential damages.'' The current loss definition provides for inclusion of such damages only in contract procurement, product substitution, and certain computer crime cases. Would the creation of a causation standard obviate the need for commentary governing consequential damages? If not, in what cases, if any, should consequential damages be included, and how should they be defined and determined? For example, should language be added that specifies whether loss includes or excludes the costs of investigation and prosecution?

(B) Fair Market Value

The current definition of loss in theft and fraud uses the concept of fair market value as an important factor in determining loss. The Commission invites comment on whether this concept should be clarified to specify, for example, whether retail, wholesale, or black market value is intended, depending on the nature of the offense. In addition, the Commission invites comment on what value should be used when the black market price is different from the price on the legitimate market. See, e.g., *United States* v. *Ellerbee*, 73 F.3d 105, 108–09 (6th Cir. 1996) (using retail price of stolen compact disks instead of lower price for which thief acquired and sold them); *United States* v. *Mount*, 966 F.2d 262, 265–67 (7th Cir. 1992) (using black market price of stolen postseason baseball tickets instead of lower face value).

(C) Interest

Although the definition of loss in the theft and fraud guidelines excludes interest ''that could have been earned had the funds not been stolen,'' some courts have interpreted the definition of loss to permit inclusion in loss of the interest that the defendant agreed to pay in connection with the offense. Compare *United States* v. *Hoyle*, 33 F.3d 415, 419 (4th Cir. 1994) (''[I]nterest shall not be included to determine loss for sentencing purposes.''), cert. denied, 513 U.S. 1133 (1995), with *United States* v. *Gilberg*, 75 F.3d 15, 18–19 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan) and *United States* v. *Henderson*, 19 F.3d 917, 928–29 (5th Cir.) (''Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction.''), cert. denied, 513 U.S. 877 (1994). The Commission invites comment on whether the definition of loss should be clarified to (1) exclude all forms of interest in all cases, (2) permit inclusion of bargained-for interest and/or interest that was lost because the victim(s) removed money from an investment vehicle or instrument to provide funds to the defendant, or (3) allow consideration of interest either in all loss calculations or as a departure factor. If lost opportunity cost interest should be included, how should such interest be calculated?

(D) Credits Against Loss—Benefit Received By Victims

The current loss definition instructs the courts to reduce the loss figure by the value of payments made and collateral pledged in fraudulent loan cases, and by the value of substituted products in product substitution cases. Some courts have extended this concept to other types of cases. See, e.g., *United States* v. *Maurello*, 76 F.3d 1304, 1311–12 (3d Cir. 1996) (calculating loss by subtracting value of satisfactory legal services from amount of fees paid to bogus lawyer); *United States* v. *Reddeck*, 22 F.3d 1504, 1513 (10th Cir. 1994) (reducing loss by value of education received from bogus university). The Commission invites comment on what credits should be applied in determining an appropriate loss figure where the victim was given something of value in connection with the offense, and how such a crediting principle might be articulated. For example, what payments, if any, made by a defendant should be credited against loss? The Commission further invites comment on whether the crediting principle should be used and similarly applied in both theft and fraud offenses.

Furthermore, the current commentary also credits only those payments on a loan that have been made ''at the time the offense is discovered.'' The Commission invites comment on whether this is the most appropriate ''cutoff point'' for crediting such payments. Should the commentary include a definition of ''at the time the offense is discovered'' that would specify, for example, discovery ''by whom'' (such as by the victim or law enforcement)?

The Commission invites comment on whether there should be an adjustment or an invited departure for situations in which a defendant demonstrated the intent to make additional payments but was apprehended before he could do so.

The Commission also invites comment on whether funds that a defendant has ''misapplied'' to an account but not withdrawn should count as loss. Compare *United States* v. *Johnson*, 993 F.2d 1358, 1358–59 (8th Cir. 1993) (no), with *United States* v. *Strozier*, 981 F.2d 281, 283–85 (7th Cir. 1992) (yes).

The current loss definition calculates the value of collateral based on the net proceeds of the sale of the collateral, or if the sale has not been accomplished prior to sentencing, based on the market value of the collateral reduced by the expected cost of the sale. The Commission invites comment on whether fluctuations in the value of collateral after it is pledged should affect the loss figure, as is the case with the current rule, or whether the Commission should change the rule to value collateral as of the time of pledging, so changes in the value of collateral do not affect the loss determination. See, e.g., *United States* v. *Barrett*, 51 F.3d 86, 90–91 (7th Cir. 1995) (including in loss the drop in value of property securing fraudulently obtained loans).

The Commission also invites comment on whether special rules are necessary to govern loss calculation for Ponzi schemes, and, if so, what those rules should be.

(**Note:** a Ponzi scheme is defined as ''a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments.'' Bryan A. Garner, A Dictionary of Modern Legal Usage 671 (2d ed. 1995)).

See, e.g., *United States* v. *Holiusa*, 13 F.3d 1043, 1048 (7th Cir. 1994) (holding that loss does not include ''amounts that [the defendant] both intended to and indeed did return to investors''). Compare *United States* v. *Orton*, 73 F.3d 331, 334 (11th Cir. 1996) (holding defendant accountable only for ''the net losses of all victims who lost all or part of the money they invested'') with *United States* v. *Carrozzella*, 105 F. 3d 796, 805 (2d Cir. 1997) (holding that defendant should not be credited with amounts repaid to victims of a Ponzi scheme ''as part of a meretricious effort to maintain [the victims'] confidences.''

(E) Diversion of Government Benefits

The Commission invites comment on how loss should be determined in fraud cases involving the diversion or misuse of government program benefits and kickbacks. For example, what is the loss in a case in which a doctor acquires a patient by paying a kickback in return for a referral, provides necessary medical care, and is then paid for his services using Medicare funds? Does the current or proposed commentary adequately cover such cases?

(F) Gain

Courts have disagreed about when the current loss definition allows an offender's gain to be used in lieu of loss. Compare *United States* v. *Kopp*, 951 F.2d 521, 530 (3d Cir. 1991) (holding that gain cannot be used if loss is measurable even if loss is zero), with *United States* v. *Haddock*, 12 F.3d 950, 960 (10th Cir. 1993) (allowing gain to be used as alternative at all times). The Commission invites comment on whether and in what circumstances gain should be used in lieu of loss, whether gain should play a part in the loss calculation, and whether there should be some adjustment or departure if gain differs significantly from the loss figure. The Commission also invites comment on how gain might be calculated; e.g., should there be a ''net gain'' concept, or a distinction between a defendant's personal gain and the gain resulting from all offense conduct?

(G) Intended loss: Under the current loss definition, intended loss is used when it is greater than actual loss. The proposed definition extends this concept to theft cases as well. The Commission invites comment on whether the current rules should be changed to provide that loss is to be based on actual loss, with intended loss available only as a possible ground for departure, or whether some downward adjustment for defendants whose actual loss is greater than their intended loss is warranted.

Furthermore, courts have disagreed over whether intended loss should be limited by concepts of ''economic reality'' or impossibility. Compare *United States* v. *Moored*, 38 F.3d 1419, 1425 (6th Cir. 1994) (focusing on loss that defendant ''realistically intended''), with *United States* v. *Lorenzo*, 995 F.2d 1448, 1460 (9th Cir.) (''[T]he amount of [intended] loss * * * does not have to be realistic.''), cert. denied, 510 U.S. 881 (1993). The Commission invites comment on whether, if the substance of the current rule is to be retained, intended loss should be limited by concepts of ''economic reality'' or impossibility, such as in a government sting operation where there can be no loss, or in a false insurance claims case in which the defendant submits a claim for an amount in excess of the fair market value of the item.

(H) Risk of Loss

Under the current loss definition, a defendant might obtain a loan by fraudulent means but be accountable for zero loss because of pledged collateral and payments made prior to discovery. A defendant in an investment scam might likewise be accountable for zero loss because the risky investments he made were fortuitously profitable. The Commission invites comment on whether the definition of loss should be revised to include the concept of risk of loss, or, alternatively, whether the guideline should be amended to provide a higher minimum offense level (e.g., a floor offense level of [12 to 16]) or an added enhancement (e.g., an enhancement of [2–4] levels), so as to ensure higher punishment levels for defendants who expose their victims to the possibility of a loss, although their offenses may result in low actual loss figures. If any such amendments are warranted, what role should risk of loss play in determining the offense level? See § 2F1.1, comment. (n. 7(b)).

(I) Loss Amounts That Over- or Understate the Significance of the Offense

The Commission invites comment on whether to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense. See § 2F1.1, comment. (n. 10). More specifically, the Commission invites comment on whether to specify that where the loss amount included through § 1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived (or intended) by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic (e.g., calling for a reduction of [2–4] levels) or special rule in the definition of loss to reduce the offense level in such cases.

(J) Additional Special Rules

The Commission invites comment on whether there is any unique category of cases, other than those mentioned above, for which a special rule for determining loss is necessary or desirable. For example, the current loss definition in § 2F1.1 has a special rule for Davis-Bacon Act cases. Should that rule be maintained, and, similarly, are there other types of cases for which a special loss determination is warranted?

Theft, Fraud and Tax Related Issues

5. Synopsis of Proposed Amendment

The following amendments (described in Parts (A) through (D)) address issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal planning (MMP) enhancement.

(A) Deletion of More-than-Minimal-Planning (MMP) Enhancement

Synopsis of Proposed Amendment

Deletion of the MMP enhancement involves the following issues and guideline modifications:

i. Removal from § 1B1.1 (Application Instructions) of certain commentary describing features of MMP that are no longer applicable in view of the proposed amendments to the theft and fraud loss tables.

The language to be deleted is principally that which describes the ''repeated acts'' and ''concealment'' prongs of MMP. The definitional commentary for the ''planning'' prong of MMP needs to be retained because a MMP enhancement will continue to be a specific offense characteristic under the Aggravated Assault and Burglary guidelines. The example in the last sentence of Application Note 4, which currently refers to the cumulative application of the MMP adjustment from the fraud guideline and an aggravating role adjustment, could be replaced with a similar illustration from, e.g., the Burglary guideline, or the sentence could be deleted entirely. The amendment language shown below deletes the sentence.

ii. Removal of the MMP enhancement from the Theft and Property Destruction guidelines, with conforming commentary changes.

The two-level MMP enhancement exists in the Theft guideline (§ 2B1.1) as an alternative to a four-level enhancement for being in the business of receiving and selling stolen property. The latter enhancement is assumed to incorporate MMP. Hence, when the two-level MMP factor is deleted (and incorporated into the loss table), the remaining enhancement for fencing stolen property needs to be adjusted from a four-level to a two-level enhancement. This particular specific offense characteristic (SOC) was applied in 57 (1.8%) of the 1996 theft cases and 40 (1.2%) of the 1995 theft cases.

iii. Removal of the MMP enhancement from the Fraud guideline, with conforming commentary changes in § 2F1.1 and the Multiple Count guidelines.

The MMP enhancement in the Fraud guideline currently exists as an alternative to a comparable, two-level enhancement for ''a scheme to defraud more than one victim.'' In carrying through the decision to delete a separate MMP enhancement and fold it into the loss table, the Commission conceivably could elect to retain the enhancement for multiple victims. According to the Commission's Intensive Study Sample (ISS) assessment, an estimated 10 percent of all fraud cases involve more than one victim. However, because victim information currently is not well identified in the sentencing documents the Commission customarily receives, it is likely that the actual number of multiple victim cases is substantially higher. Thus, retention of the multiple victim enhancement may effectively retain the MMP enhancement in a substantial number of cases.

The background commentary also is modified to reflect the view that loss is a better measure of offense seriousness than whether the offense involved minimal or greater planning.

Proposed Amendment: The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) in the first paragraph by striking the last sentence as follows:

'' 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the second paragraph as follows:

'' 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.''

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(f) by striking the last two paragraphs as follows:

''In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 4 in the second paragraph by striking the last sentence as follows:

''For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively.''.

Section 2B1.1(b)(4) is amended by striking subdivision (A) as follows:

''(A) If the offense involved more than minimal planning, increase by 2 levels; or''.

Section 2B1.1(b)(4)(B) is amended by striking ''(B)''; and by striking ''4'' and inserting ''2''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by striking '' 'More than minimal planning,' ''; and by striking '' 'firearm' '' and inserting '' 'Firearm' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 13 as follows:

''13. If subsection (b)(6) (A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by redesignating Notes 14, 15, and 16 as Notes 13, 14, and 15, respectively.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the first paragraph by striking the last sentence as follows:

''Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by striking the second paragraph as follows:

''The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.''.

Section 2B1.3(b) is amended by striking subdivision (3) as follows:

''(3) If the offense involved more than minimal planning, increase by 2 levels.''.

The Commentary to § 2B1.3 captioned ''Application Notes'' is amended by striking Note 1 as follows:

''1. 'More than minimal planning' is defined in the Commentary to § 1B1.1 (Application Instructions).'';

and by redesignating Notes 2 through 4 as Notes 1 through 3, respectively.

Section 2F1.1(b) is amended by striking subdivision (2) as follows:

''(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Notes 2 and 3 as follows:

''2. 'More than minimal planning' (subsection (b)(2)(A)) is defined in the Commentary to § 1B1.1 (Application Instructions).

3. 'Scheme to defraud more than one victim,' as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, 'victim' refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.'';

by striking Note 18 as follows:

''18. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.' '';

and by redesignating Notes 4 through 17 as Notes 2 through 15, respectively.

The Commentary to § 2F1.1 captioned ''Background'' is amended by striking the second and third paragraphs as follows:

''Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.'',

and inserting:

''The Commission has determined that, ordinarily, the sentences of defendants convicted of fraud offenses should reflect the nature and magnitude of the economic harm caused by their crimes. Accordingly, the amount of loss caused by an offense is a principal factor in determining the offense level under this guideline.''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 3 by striking the last sentence as follows:

''In addition, the adjustment for 'more than minimal planning' frequently will apply to multiple count convictions for property offenses.''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 by striking ''$2,000'' wherever it appears and inserting ''$3,000''; and in the fourth sentence by striking ''$4,800'' and inserting ''$5,800''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 by striking in the sixth sentence by striking ''; 1 level is'' and inserting ''[Option 1: and 2 levels are]; [Option 2: and 4 levels are]''; and by striking ''; and 2 levels are added because the conduct involved repeated acts with some planning (§ 2F1.1(b)(2)(A))''.

The ''Illustrations of the Operation of the Multiple-Count Rules'' after guideline 3D1.5 is amended in illustration 2 in the last sentence by striking ''9'' and inserting ''[Option 1: 8]; [Option 2: 10]''.

(B) Reduction for Cases Involving Limited or Insignificant Planning

Synopsis of Proposed Amendment

The Commission's Practitioners' Advisory Group has suggested the following 2-level reduction in the theft and fraud guideline for cases that involve only limited or insignificant planning in the event that the more than minimal planning enhancement is built into the theft and fraud loss tables. For a related proposal, see Amendment 1(C), supra.

Proposed Amendment: Section 2B1.1(b) is amended by adding at the end the following new subdivision:

''(8) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. The term 'limited or insignificant planning' means planning that is necessary for commission of the offense in a simple form.''.

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

''(7) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''19. The term 'limited or insignificant planning' means planning that is necessary for commission of the offense in a simple form.''.

(C) Sophisticated Concealment Enhancement.

Synopsis of Proposed Amendment

This amendment adds an enhancement in the fraud and theft guidelines similar to the existing ''sophisticated means'' enhancement in the tax guidelines. This amendment also entails some modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a ''floor'' offense level of 12 to both the new and existing enhancements.

i. Addition of ''Sophisticated Concealment'' enhancement to Theft and Fraud guidelines.

Two options are proposed to add an enhancement for sophisticated concealment to the theft and fraud guidelines. Option 1 treats ''committing the offense from outside the United States'' as a separate and alternative enhancement to other forms of sophisticated concealment. Option 2 treats ''committing the offense from outside the United States'' as one form of sophisticated concealment.

ii. Modification of ''Sophisticated Means'' enhancement in tax guidelines.

This amendment modifies the tax guidelines' sophisticated means SOC. In April, 1997, the Commission considered modifications that were designed to provide a floor offense level of 12, enhance the precision of the language, and address a circuit conflict. The conflict involved the issue of whether the sophisticated means enhancement applies based on the personal conduct of the defendant (see *United States* v. *Kraig,* 99 F.3d 1361 (6th Cir. 1996)), or the overall offense conduct for which the defendant is accountable (see *United States* v. *Lewis,* 93 F.3d 1075 (2d Cir. 1996)). The modifications take into account the latter view because that

view appears more consistent with the usual relevant conduct attribution rules.

The sophisticated means enhancement was applied in 103 (16.6%) tax evasion (§ 2T1.1) cases sentenced in FY 1996 and 82 (16.1%) of such cases sentenced in FY 1995. The identical enhancement in the other two tax guidelines (§§ 2T1.4, 2T3.1) was not applied in FY 1995 or FY 1996.

Two options are presented. Option 1 is substantially similar to the modifications considered by the Commission in April, 1997, with minor, non-substantive modifications in the commentary. Option 2 eliminates the element of ''greater planning than a routine tax-evasion case'' and generally conforms the SOC to the ''sophisticated concealment'' language prepared for the theft and fraud guidelines. However, the definition of ''sophisticated concealment'' does not include ''committing the offense from outside the United States'' because it seems unlikely that a tax offense would be perpetrated from outside the United States to avoid detection or prosecution. Under this option, the planning concept is deleted because that element arguably would be built into the offense level if the Commission adopts one of the proposed loss table amendments, both of which propose using a tax loss table that is the same as, or substantially similar to, the fraud loss table that is amended to phase in more than minimal planning. Without the planning element, the ''harm'' that is sought to be captured is the complex scheme designed to make the offense difficult to detect. Finally, Option 2 retains the floor offense level of 12.

Proposed Amendment: Section 2B1.1(b) is amended by redesignating subdivisions (5) through (7) as subdivisions (6) through (8); and by inserting the following new Note 5:

''(5) If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''17. For purposes of subsection (b)(5), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

[Option 1

Section 2F1.1(b)(5) is amended by striking:

''If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.'',

and inserting:

''If (A) any part of the offense was committed from outside the United States, or (B) the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

19. For purposes of subsection (b)(5)(A), United States'' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

''For purposes of subsection (b)(5)(B), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

[Option 2

Section 2F1.1(b)(5) is amended by striking:

''If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.'',

and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''19. For purposes of subsection (b)(5), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, commission of the offense from outside the United States, or the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

[Option 1

Section 2T1.1(b)(2) is amended by striking ''existence'' and inserting ''offense''; by inserting ''its'' following ''or''; by striking ''of the offense''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 4 by striking ''An'' and inserting ''The''; by striking ''be applied'' and inserting ''apply''; by striking ''where the defendant used offshore'' and inserting ''if the offense involved the use of foreign''; by inserting ''or foreign transactions'' following ''accounts''; and by inserting '', to conceal the offense or its extent'' following ''entities''.

Section 2T1.4(b)(2) is amended by striking ''existence'' and inserting ''offense''; by inserting ''its'' following ''or''; by striking ''of the offense'' following ''extent''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.4 captioned ''Application Notes is amended in Note 3 by striking ''§ 2T1.4(b)(2)'' and inserting ''subsection (b)(2)''; by striking ''An'' and inserting ''The''; by striking ''be applied'' and inserting ''apply''; by striking ''where the defendant used offshore'' and inserting ''if the offense involved the use of foreign''; by inserting ''or foreign transactions'' following ''accounts''; and by inserting '', to conceal the offense or its extent'' following ''entities''.

Section 2T3.1(b)(1) is amended by striking ''nature or existence of the offense'' and inserting ''offense or its extent''; and by adding at the end the following new sentence:

''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. 'Sophisticated means,' as used in subsection (b)(1), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine

duty-evasion case. The enhancement would apply, for example, if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.''.]

[Option 2

Section 2T1.1(b)(2) is amended by striking ''If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.'',
and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. 'Sophisticated means,' as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.'',
and inserting:

''4. For purposes of subsection (b)(2), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

Section 2T1.4(b)(2) is amended by striking ''If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.'',
and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. 'Sophisticated means,' as used in § 2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.'',
and inserting:

''3. For purposes of subsection (b)(2), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.

Section 2T3.1(b)(1) is amended by striking ''If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.'' and inserting:

''If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by adding at the end the following new note:

''3. For purposes of subsection (b)(1), 'sophisticated concealment' means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate 'sophisticated concealment.' ''.]

(D). Financial Institution, Personal Profit Enhancement

Synopsis of Proposed Amendment

Proposals considered by the Commission in April, 1997 would have modified an enhancement for defendants who personally and substantially profit from financial institution fraud. This enhancement is contained in the theft, commercial/bank bribery, and fraud guidelines. In view of the substantial increases in the loss table for large-scale offenses, it is proposed to adhere somewhat more closely to the minimum dictates of this congressionally-directed enhancement, which requires a minimum offense level of 24 (approximately a five-year sentence) for defendants who derive more than $1 million in ''gross receipts'' from specified financial institution offenses. Thus, the amendment would delete the four-level increase currently required under the enhancement while retaining the minimum offense level of 24. This would avoid unwarranted double counting for offenses involving loss amounts in excess of $2.5 million (equivalent to level 24 under the new loss table options). Although the effect of the enhancement would be moderated somewhat, it would continue to apply to a broader spectrum of cases than required under the congressional directive.

The amendment also addresses significant interpretive problems regarding the meaning of the current guideline phrase ''affected a financial institution and the defendant derived more than $1 million in gross receipts from the offense.'' The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted).

The amended commentary would address the confusion about the meaning of the phrase ''affected a financial institution'' by deleting that problematic language. The new language would make clear that the enhancement applies when the offense is perpetrated against, and the money is derived from, one or more financial institutions.

Additionally, the definition for ''gross receipts'' would be amended to clarify that ''gross receipts from the offense'' includes property under the control of, or in the custody of, the financial institution for a second party, e.g., a depositor. The background commentary would also be amended to reflect the Commission's intent to implement the congressional directive in a broader fashion than required.

Because this SOC exists in the alternative to another SOC (regarding causing or threatening the institution's solvency), it is not possible to ascertain from the monitoring data exactly how frequently it has been applied. However, the data indicate that one or the other SOC was applied in 8 (.2%) FY 1995 theft cases, and 12 (.4%) of FY 1996 theft cases; with respect to fraud cases, the SOC was applied in 38 (.6%) of FY 1995 cases and in 50 (.8%) of FY 1996 cases. The SOC was not applied in any commercial/bank bribery cases during either fiscal year.

Proposed Amendment: Section 2B1.1(b)(6) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'', and inserting a comma; by redesignating subdivision (7) as subdivision (8); and by inserting the following as new subdivision (7):

''(7) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by inserting before the first sentence the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by striking ''from the offense,'' before ''as used in''; by striking ''(6)(B)'' and inserting ''(7)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the sixth paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (7)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101–647, respectively''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Section 2F1.1(b)(6) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'' and inserting a comma; and by adding at the end the following new subdivision:

''(7) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2F1.1 captioned ''Aplication Notes'' is amended in Note 16 by inserting before the first sentence the following:

''For purposes of subsection (b)(7), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 16 by striking ''from the offense,'' before ''as used in''; by striking ''(6)(B)'' and inserting ''(7)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the seventh paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (7)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101 647, respectively''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Section 2B4.1(b)(2) is amended by striking ''—'' after ''offense''; by striking ''(A)'' before ''substantially''; by striking ''; or (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,'' and inserting a comma; and by adding at the end the following new subdivision:

''(3) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.''.

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended in Note 5 by inserting before the first sentence the following:

''For purposes of subsection (b)(3), 'gross receipts' means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. 982(a)(4), 1344.''.

The Commentary to § 2B4.1 is captioned ''Application Notes'' is amended in Note 5 by striking ''from the offense,'' before ''as used in'' ; by striking ''(2)(B)'' and inserting ''(3)''; by striking ''generally'' before ''means''; and by striking the last sentence as follows:

'' 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).''.

The Commentary to § 2B4.1 captioned ''Background'' is amended in the seventh paragraph by striking ''Subsection'' and inserting ''Subsections''; by striking ''(A)'' and inserting ''and (3)''; by striking ''implements'' and inserting ''implement''; by striking ''instruction'' and inserting ''instructions''; and by inserting at the end before the period ''and Section 2507 of Public Law 101 647, respectively''.

The Commentary to § 2B4.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101–647.''.

Telemarketing Fraud

6. Issue for Comment

The Commission is examining the characteristics of telemarketing fraud offenses, the statutory enhancement for telemarketing fraud at 18 U.S.C. 2326, and whether current adjustments in § 2F1.1 (Fraud), § 3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in § 5K2.0–§ 5K2.18 (Other Grounds for Departures) provide adequate punishment for defendants convicted of telemarketing fraud offenses.

In conjunction with its examination, the Commission invites comment on the following issues:

(A) Telemarketing Fraud Generally

Should telemarketing fraud offenses be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss? What types of harms unique to telemarketing fraud are not adequately addressed by the guidelines? Should § 2F1.1 be amended to provide an increase of [2–8] levels to correspond to the application of the statutory enhancement in 18 U.S.C. 2326?

(B) Multiple Victims

Do the guidelines adequately address fraud offenses that impact multiple victims? If not, how should they be amended to address this concern? Should, for example, the fraud guideline include a table providing tiered offense level increases that correspond to the

number of victims involved in the offense? If so, what are the appropriate offense level increases and corresponding ranges of number of victims? Should such an enhancement be based on the total number of victims or the number of vulnerable victims? If the enhancement is based on vulnerability, is it more appropriate to amend § 3A1.1 to reflect multiple victims?

(C) Revictimization

Commission analysis indicates that telemarketing fraud often involves repeat victimization of persons previously victimized, typically through ''reloading'' (a process in which a telemarketing offender targets victims whose names are included on lists of individuals previously contacted and victimized) or ''recovery services'' schemes (a process in which an offender poses as a government agent or other individual in a position to help the victim recover, for a fee, the losses incurred as a result of the initial telemarketing scheme). Commission analysis further indicates that district courts often enhance the sentence under § 3A1.1 (Vulnerable Victim) in these cases. Does § 3A1.1 adequately address revictimization concerns? To ensure consistent application of this enhancement, should the Commission amend the guideline or commentary to ensure that § 3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization? Alternatively, should the Commission promulgate additional specific offense characteristics addressing this aspect of telemarketing fraud?

(D) Departures

Currently, Application Note 10 of § 2F1.1 encourages upward departures when monetary loss inadequately measures the harm and seriousness of fraudulent conduct. Should some of the listed departure factors be converted into specific offense characteristics? For example, should the fact that ''the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma'' (subsection (c)), or ''the offense involved the knowing endangerment of the solvency of one or more victims''(subsection (f)), or other factors be made into specific enhancements under the fraud guideline? Is so, what offense level weight should be assigned to these factors? In addition, should the Commission promulgate any currently specified grounds for departure listed in Chapter 5K as specific offense characteristics? If so, what weight should be given these factors?

(E) Sophisticated means. Elsewhere in these proposed amendments, the Commission has (1) included, on a phased-in basis, an enhancement for more-than-minimal planning in proposed revisions of the loss table applicable for fraud offenses, and (2) proposed a new enhancement for ''sophisticated concealment'' conduct (defined to include perpetrating an offense from outside U.S. borders). In this regard, the Senate-passed version of a telemarketing fraud bill (H.R. 1847, 105th Cong., 1st Sess.) directs the Commission to ''provide an additional appropriate sentencing enhancement if [sic] offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.'' The Commission invites comment on whether the proposed amendments adequately address concerns expressed in the congressional directive. If not, how should the enhancement be augmented to most effectively implement such a potential directive?

(F) Other Factors

Are there additional factors that the Commission should address, either by specific offense characteristics, guideline commentary, or departure provisions, to provide appropriate punishment for telemarketing offenses?

7. Circuit Conflicts

Synopsis of Proposed Amendment

The Commission has identified the resolution of several circuit conflicts for consideration this year. Parts (A) through (J) present particular circuit conflicts under consideration.

(A) Aberrant Behavior

Synopsis of Proposed Amendment

The amendment addresses the circuit conflict regarding whether the aberrant behavior departure is limited to only spontaneous and thoughtless acts. Compare *United States* v. *Marcello*, 13 F.3d 752 (3d Cir. 1994); *United States* v. *Glick*, 946 F.2d 335 (4th Cir. 1991); *United States* v. *Williams* 974 F.2d 25 (5th Cir. 1991), cert. denied, 507 U.S. 934 (1993); *United States* v. *Carey*, 895 F.2d 318 (7th Cir. 1990) with *United States* v. *Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *United States* v. *Takai*, 941 F.2d 738 (9th Cir. 1991). The proposal removes the departure from Chapter One and creates a guideline in Chapter Five that limits the departure to a spontaneous and thoughtless act.

Proposed Amendment

Chapter One, Part A, is amended in subdivision 4(d) in the last paragraph by striking the last sentence as follows:

''The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.''.

Chapter Five, Part K, is amended by adding at the end the following new policy statement:

''§ 5K2.19 Single Act of Aberrant Behavior (Policy Statement). If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A 'single act of aberrant behavior' means a spontaneous and thoughtless act. This definition does not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.''.

(B) Misrepresentation with respect to Charitable Organizations

Synopsis of Proposed Amendment

The amendment addresses the circuit conflict regarding whether an employee of a charity or governmental agency who misapplies or embezzles funds misrepresents that he was acting ''on behalf of the agency'' within the meaning of the two-level enhancement under § 2F1.1(b)(3)(A). Compare *United States* v. *Frazier*, 53 F.3d 1105 (10th Cir. 1995) with *United States* v. *Marcum*, 16 F.3d 599 (4th Cir.) cert. denied, 513 U.S. 845 (1994). The proposed amendment provides enhancements for both (1) the legitimate employee of a charitable, educational, religious or political organization, or government agency who commits a fraud by misrepresenting to an individual outside the organization or agency that the defendant is acting on behalf of the employer organization or agency; and (2) the defendant who commits a fraud by pretending to be an employee or authorized agent of a charitable, educational, religious or political organization, or government agency.

Proposed Amendment

Section 2F1.1(b)(3) is amended by striking:

''the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, education, religious or political organization, or a government agency,'', and inserting:

''(A)(i) the defendant is an employee or authorized agent of a charitable, education, religious or political organization, or a government agency, who used that employment or position

as an authorized agent under false pretenses to victimize an individual who is not an employee of that organization or agency; (ii) the offense involved a misrepresentation that the defendant was an employee or authorized agent of a charitable, educational, religious or political organization, or a government agency;'';

and by inserting ''the offense involved a'' following ''(B)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.'',

and inserting a new Note 4 as follows:

''4. Subsection (b)(3)(A) provides enhancements for a defendant's use of false pretenses to take advantage of a victim's charitable motives, or trust in government agencies. The enhancement in (b)(3)(A)(i) applies if (a) the defendant is a legitimate employee of a charitable, educational, religious or political organization, or a government agency, (b) the false pretense was that the defendant was acting for the interest or benefit of the organization or agency when, in fact, the defendant was acting for personal gain; and (c) the offense victimizes an individual who is not an employee of that organization or agency. For example, this enhancement would apply in a case in which the president of a charitable organization skims proceeds from a public bingo game which the president conducts under the false pretenses of raising money solely for the charitable organization. [If this enhancement applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).]

The enhancement in (b)(3)(A)(ii) applies if (A) the defendant is not a legitimate employee of a charitable, education, religious or political organization or a government agency, and (B) the misrepresentation was that the defendant was an employee or authorized agent of an organization or agency referred to in (a).

Because the enhancements in (b)(3)(A) apply in the case in which a defendant uses false pretenses to take advantage of charitable motives or trust in government agencies, clauses (i) and (ii) do not apply if the defendant simply embezzles money from the employer organization or agency or otherwise commits a fraud directed at the organization or agency. However, such a defendant who holds a position of public or private trust will be subject to an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the first, second, and third sentences as follows:

''Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm.''.

(C) Violation of Judicial Process

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order or process within the meaning of the two-level enhancement under § 2F1.1(b)(3)(B). Two options are presented. Option One adopts the majority view and defines the scope of the enhancement to include fraudulent court filings. See *United States* v. *Michalek*, 54 F.3d 325 (7th Cir. 1995); *United States* v. *Lloyd*, 947 F.2d 339 (8th Cir. 1991)(per curiam); *United States* v. *Welch*, 103 F.3d 906 (9th Cir. 1996)(per curiam); *United States* v. *Messner*, 107 F.3d 1448 (10th Cir. 1997); *United States* v. *Bellew*, 35 F.3d 518 (11th Cir. 1994)(per curiam). In Option One, ''violation of a judicial order'' is interpreted broadly to mean an abuse of judicial proceedings (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.) Option Two adopts the minority view and defines the scope of the enhancement to exclude fraudulent court filings. See *United States* v. *Shadduck*, 112 F.3d 523 (1st Cir. 1997); *United States* v. *Carrozella*, 105 F.3d 796 (2d Cir. 1997). In this option, ''violation of a judicial order'' is interpreted narrowly to mean a violation of a command or order issued to a specific person or party (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.)

Proposed Amendment

[Option (1)(a) Enhancement provision:

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 by striking:

''This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and by adding at the end the following new paragraphs:

''This enhancement also applies if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.

This enhancement does not apply to conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by adding at the end the following new sentence:

''Similarly, a defendant who violates a special judicial process deserves additional punishment because the defendant is taking advantage of a judicial proceeding to gain an undeserved advantage.''.]

[Option (1)(b) Upward departure provision: Section 2F1.1(b)(3) is amended by striking ''(A)''; and by striking ''or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''If the defendant committed a violation of any judicial or administrative order, injunction, decree, or process, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding and the defendant had knowledge of that prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.

An upward departure pursuant to this note also may be warranted if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

[Option (2)(a) Enhancement provision: The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 in the by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''Subsection (b)(3)(B) provides an enhancement if the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such an official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative warning, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply to conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

[Option 2(b) Upward departure provision: Section 2F1.1(b)(3) is amended by striking ''(A)''; and by striking ''or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 5 in the by striking:

''Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).'',

and inserting:

''An upward departure may be warranted if the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. The failure to comply with such a warning demonstrates aggravated criminal intent that may deserve a sentence outside the guideline range. If it is established that an entity

the defendant controlled was a party to the prior proceeding and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines(e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)) is not authorized under this note.''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the fourth paragraph by striking the last sentence as follows:

''A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.''.]

(D) Grouping Failure to Appear Count with Underlying Offense

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare *United States* v. *Agoro,* 996 F.2d 1288 (1st Cir. 1993); *United States* v. *Flores,* 23 F.3d 408 (6th Cir. 1994)(unpublished) with *United States* v. *Packer,* 70 F.3d 357 (5th Cir. 1995), cert. denied, 117 S.Ct. 75 (1996). The proposal maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies in the guidelines. Specifically, the proposal (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. 3146 (Penalty for failure to appear) and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) adds a paragraph stating that the method outlined for determining sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; and (3) adds departure provision if offense conduct involves multiple obstructive behavior.

Proposed Amendment

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in Note 3 in paragraph two by striking:

''Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under § 3D1.2(c). Note that although 18 U.S.C. 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30–37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.'',

and inserting:

''Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under § 3D1.2(c). (Note that 18 U.S.C. 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§ 3D1.1–3D1.5 apply. See § 3D1.1(b), comment. (n.1), and § 3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. 3146(b)(2).)''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended by redesignating Note 4 as Note 5 and inserting the following as new Note 4:

''4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under § 3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 6 by striking ''Where'' and inserting ''If''; and by striking ''where'' both places it appears and inserting ''if''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 7 in the first sentence by striking ''Where'' and inserting ''If''; by striking ''both of the'' and inserting ''both of an''; by inserting ''e.g., 18 U.S.C. 3146 (Penalty for failure to appear); 18 U.S.C. 1621 (Perjury generally))'' following ''obstruction offense''; and by striking ''the underlying'' and inserting ''an underlying''.

Section 3D1.1(b) is amended by striking the first sentence as follows:

''Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§ 3D1.2–3D1.5.'',

and inserting:

''Exclude from the application of §§ 3D1.2–3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment.''.

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

''1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See § 5G1.2(a).'',

and inserting:

''1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under USSG § 2B3.1 is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. 924(c), the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See § 5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. 3146 (Penalty for failure to appear); 18 U.S.C. 924(a)(4) (regarding penalty for 18 U.S.C. 922(q)(possession or discharge of a firearm in a school zone)). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''mandates imposition of a consecutive sentence'' and inserting ''(A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''; id., comment.(n.1)'' following ''§ 3D1.1(b)''.

Section 5G1.2(a) is amended by striking ''mandates imposition of a consecutive sentence'' and inserting ''(1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment''; and by inserting ''by the statute'' following ''determined''.

The Commentary to § 5G1.2 is amended in the last paragraph by striking:

''Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts.'',

and inserting:

''Subsection (a) applies if a statute (a) specifies a term of imprisonment to be imposed; and (b) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count.'';

by inserting '', e.g.,'' following ''See''; and by adding at the end the following:

''Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to § 2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.''.

(E) Imposters and the Abuse of Trust Adjustment

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the abuse of position of trust adjustment in § 3B1.3 applies to imposters. The majority view defines the scope of the adjustment to include imposters. See *United States* v. *Gill*, 99 F.3d 484 (1st Cir. 1996); *United States* v. *Queen*, 4 F.3d 925 (10th Cir. 1993), cert. denied, 510 U.S. 1182 (1994). The minority view defines the scope of the enhancement to exclude imposters. See *United States* v. *Echevarria*, 33 F.3d 175 (2d Cir. 1994). The proposed amendment provides that the abuse of position of trust adjustment applies to the imposter who indicates that he legitimately holds a position of trust when in fact he does not and gives two examples of such circumstances.

Proposed Amendment

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended in Note 1 in the third sentence by inserting ''public or private'' following ''position of''; in the fourth sentence by striking ''would apply'' and inserting ''applies''; and in the last sentence by striking ''would'' and inserting ''does.''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by redesignating Note 2 as Note 3 and inserting the following as new Note 2:

''2. This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.''.

The Commentary to § 3B1.3 captioned ''Background'' is amended by inserting after the first sentence the following:

''The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold

a position of public or private trust when, in fact, they do not.''.

Issue for Comment: The Commission invites comment on whether, in reference to the above proposed amendment, it should amend § 3B1.3 to provide that the adjustment does not apply to an imposter (i.e., an individual who poses as an individual in a position of public or private trust).

(F) Instant Offense and Obstruction of Justice

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether the term ''instant offense'', as used in the obstruction of justice guideline, § 3C1.1, includes obstructions that occur in cases closely related to the defendant's case or only those specifically related to the ''offense of conviction''. Three options are presented. Option One (a), the majority view, defines the scope of the adjustment broadly to apply to obstructions of justice in closely related cases. See *United States* v. *Powell*, 113 F.3d 464 (3d Cir.), cert. denied, 118 S.Ct. 454 (1997); *United States* v. *Walker*, 119 F.3d 403 (6th Cir.), cert. denied, __ S. Ct. __, 1997 WL 739733, (U.S., Dec. 15, 1997); *United States* v. *Acuna*, 9 F.3d 1442 (9th Cir. 1993); *United States* v. *Bernaugh*, 969 F.2d 858 (10th Cir. 1992). Option One (b) is a variation of the majority view, which (1) clarifies the temporal element of the obstruction guideline (that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction); and (2) instructs that the obstruction must relate to either the defendant's offense of conviction or to a closely related case, such as that of a co-defendant. Option Two, the minority view, defines the scope of the adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. See *United States* v. *Perdomo*, 927 F.2d 111 (2d Cir. 1991); *United States* v. *Partee*, 31 F.3d 529 (7th Cir. 1994).

Proposed Amendment

[Option 1(a): The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Notes 2 through 9, respectively; and by inserting the following as new Note 1:

''1. For purposes of this guideline—

'Instant offense' means the offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4(b), as redesignated, by inserting before the semicolon the following:

''during the investigation, prosecution, or sentencing of the defendant's instant offense (see definition in Application Note 1)''.]

[Option 1(b): Section 3C1.1 is amended by inserting ''(A)'' following ''justice''; by inserting ''the course of'' following ''during'' and by inserting ''of conviction, and (B) the obstructive conduct related to the defendant's offense of conviction or a closely related offense'' following ''instant offense''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Note 2 through 9, respectively; and by inserting the following as new Note 1:

''1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to the defendant's offense of conviction or a closely related case, such as that of a co-defendant.''.]

[Option 2: Section 3C1.1 is amended by inserting ''of conviction'' following ''instant offense''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended by redesignating Notes 1 through 8 as Note 2 through 9, respectively; and by inserting the following as new Note 1:

''1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related solely to the defendant's instant offense of conviction.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4, as redesignated, in the last paragraph by striking ''where'' and inserting ''of conviction if''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 5(a), as redesignated, by inserting ''of conviction'' after ''instant offense''.]

(G) Failure to Admit Drug Use While on Pretrial Release

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether lying to a probation officer about drug use while out on bail warrants the obstruction of justice adjustment. Compare *United States* v. *Belletiere*, 971 F.2d 961 (3d Cir. 1992); *United States* v. *Thompson*, 944 F.2d 1331 (7th Cir. 1994), cert. denied, 502 U.S. 1097 (1992) with *United States* v. *Garcia*, 20 F.3d 670 (6th Cir. 1994), cert. denied, 513 U.S. 1159 (1995). The amendment adopts the majority view and excludes from application of § 3C1.1 a defendant's denial of drug use while on pre-trial release.

Proposed Amendment

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4 in the first sentence of the first paragraph by striking ''enhancement'' and inserting ''adjustment''; and by inserting ''or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility))'' following ''guideline range''; in the second sentence by striking ''enhancement'' and inserting ''adjustment''; and by adding at the end the following new subdivision:

''(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).''.

(H) Meaning of ''Incarceration'' for Computing Criminal History

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualifies as ''incarceration'' in determining the defendant's subsequent criminal history score. Two options are presented. Option One (the Sixth Circuit view) includes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release in the definition of incarceration in determining the defendant's subsequent criminal history score. See *United States* v. *Rasco*, 963 F.2d 132 (6th Cir.), cert denied, 506 U.S. 883 (1992). Option Two (the Ninth Circuit view) excludes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release from the definition of incarceration in determining the defendant's subsequent criminal history score. See *United States* v. *Latimer*, 991 F.2d 1509 (9th Cir. 1992).

Proposed Amendment

[Option 1: The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 8 by striking ''Section'' and inserting ''Sections''; by striking ''establishes'' and inserting

''establish''; by inserting ''the offense of conviction and'' following ''includes''; by striking ''. See'' and inserting ''within the scope of''; by striking ''(Relevant Conduct)'' following ''§ 1B1.3'' and by adding at the end the following new paragraph:

''Consistent with subsection (k) and Application Note 11 of this guideline, a term of imprisonment imposed upon revocation of probation, parole, or supervised release is considered part of the original sentence of imprisonment, even if the term of imprisonment imposed upon revocation was served in home detention, a community treatment center, or a halfway house. For example, for purposes of determining the applicable time period under § 4A1.2(e)(1), a prior sentence of imprisonment that is not within the 15-year time period nevertheless will be countable if the defendant (A) was placed on probation, parole, or supervised release for that offense and (B) was sentenced to a term of imprisonment for revocation of the probation, parole, or supervised release within 15 years of the defendant's commencement of the instant offense.''.]

[Option 2: The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 8 by striking ''Section'' and inserting ''Sections''; by striking ''establishes'' and inserting ''establish''; and by adding at the end the following new paragraphs:

''For purposes of subsection (d)(2), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation of probation, parole, or supervised release, are not within the meaning of 'sentence to confinement.'

For purposes of subsection (e), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation or probation, parole, or supervised release, are not with the meaning of 'sentence of imprisonment.' ''.]

(I) Diminished Capacity

Synopsis of Proposed Amendment

This amendment addresses the circuit conflict regarding whether a diminished capacity departure is precluded if the defendant committed a ''crime of violence'' as that term is defined in the career offender guideline. Four options are presented.

Option One (the majority view) defines the scope of the departure narrowly to exclude all offenses that would be crimes of violence under the career offender guideline. See *United States* v. *Poff,* 926 F.2d 588 (7th Cir.)(en banc), cert. denied, 502 U.S. 827 (1991); *United States* v. *Maddelena,* 893 F.2d 815 (6th Cir. 1989), cert. denied, 502 U.S. 882 (1991); *United States* v. *Mayotte,* 76 F.3d 887 (8th Cir. 1996); *United States* v. *Borrayo,* 898 F.2d 91 (9th Cir. 1989); *United States* v. *Rosen,* 896 F.2d 789 (3d Cir. 1990); *United States* v. *Dailey,* 24 F.3d 1323 (11th Cir. 1994). Option Two (the minority view) defines the scope of the departure broadly to allow consideration of the facts and circumstances surrounding the commission of the crime in determining whether a defendant is dangerous. See *United States* v. *Chatman,* 986 F.2d 1446 (D.C. Cir. 1993); *United States* v. *Weddle,* 30 F.3d 532 (4th Cir. 1994). Option Three (a variation of the minority view) defines the scope of the departure to exclude cases that involve actual violence or a serious threat of violence. Option Four defines the scope of the departure broadly by removing the ''nonviolent offense'' limitation.

Proposed Amendment

[Option 1: Section 5K2.13 is amended by striking ''a non-violent offense'' and inserting ''an offense other than a crime of violence''; by striking ''lower'' before ''sentence''; and by inserting ''below the applicable guideline range'' following ''sentence''.

Section 5K2.13 is amended by adding at the end the following new Commentary:

Commentary

Application Note

1. 'Crime of violence' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.]

[Option 2: Section 5K2.13 is amended by striking ''lower'' before ''sentence''; by inserting ''below the applicable guideline range'' following ''sentence''; and by striking:

''to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need to protect the public'',

and inserting:

''In determining whether an offense is non-violent, the court should consider the totality of the facts and circumstances of the offense. If the facts and circumstances of the offense or the defendant's criminal history indicate the defendant is dangerous such that there is a need for incarceration to protect the public, a departure under this policy statement is not warranted. If a departure is warranted, the departure should reflect the extent to which reduced mental capacity contributed to the commission of the offense.''.]

[Option 3: Section 5K2.13 is amended by striking the text in its entirety as follows:

''If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.'',

and inserting:

''A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note

1. For purposes of this policy statement—

'Significantly reduced mental capacity' means the defendant is unable to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.''.]

[Option 4: Section 5K2.13 is amended by striking ''a non-violent'' and inserting ''the''; by striking ''lower'' before ''sentence''; by inserting ''below the applicable guideline range'' following ''sentence''; by striking ''provided that the defendant's criminal history does not'' and inserting ''unless the nature and circumstances of the offense or the defendant's criminal history''.]

Issue for Comment: The Commission invites comment on whether Policy Statement 5K2.0 (Grounds for Departure) should be amended to

incorporate the analysis and holding of the United States Supreme Court decision in Koon v. United States, 116 S.Ct. 2035 (1996). If so, how should the policy statement be amended to accomplish this objective?

Homicide

Chapter Two, Part A

8. Issue for Comment (Homicide)

In 1997, the Commission undertook an in-depth examination of the manslaughter guidelines, § 2A1.3 (Voluntary Manslaughter), and § 2A1.4 (Involuntary Manslaughter), and the statutory penalties for these offenses, to determine whether the guideline and/or statutory penalties need to be adjusted. The Commission formed a staff working group to analyze data on manslaughter cases sentenced under the guidelines, to review how states have sentenced manslaughter cases, and to assess the appropriate relationship (particularly with respect to offense levels) of the manslaughter guidelines to the other homicide guidelines; i.e., those for first and second degree murder, §§ 2A1.1 and 2A1.2. The Commission also held a public hearing on November 12, 1997, to address the issue of appropriate sentences for manslaughter offenses. As a consequence of that hearing and the preliminary analyses of the Working Group, the Commission has expanded the investigation to include the sentencing guidelines applicable to other forms of homicide.

In connection with its further review and possible amendment of the homicide guidelines, the Commission requests comment on the following issues:

(A) Second Degree Murder (§ 2A1.2)

(1) Are the guideline penalties for this offense appropriate relative to those for voluntary manslaughter, assault, and other violent offenses? Specifically, should the base offense level under § 2A1.2 be increased from level 33 and, if so, by what amount?

(2) Should § 2A1.2 be amended to add specific offense characteristics for any aggravating or mitigating factors and, if so, what factors? Alternatively, should an application note encouraging departure be added for any such factors?

(B) Voluntary Manslaughter (§ 2A1.3)

(1) Are the guideline penalties for this offense appropriate relative to those for second degree murder, aggravated assault, assault with intent to kill, and other violent offenses?

Specifically, should the base offense level under § 2A1.3 be increased and, if so, by what amount? For example, one option would be to increase the base offense level from level 25 (i.e., a guideline range of 57–71 months for a defendant in criminal history category I with no adjustments) to level 28 (i.e., a guideline range of 78–97 months for such a defendant).

(2) Should a specific offense characteristic, or an application note encouraging an upward departure, be added to account for prior violent conduct, such as a pattern of domestic abuse?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(C) Involuntary Manslaughter (§ 2A1.4)

(1) The Commission's examination of sentencing data indicate that the heartland of involuntary manslaughter is alcohol-related vehicular homicide. Currently under the guideline, a base offense level of level 14 (i.e., 15–21 months for a defendant in criminal history category I with no adjustments) applies to such reckless conduct. The Commission invites comment on whether the guideline penalties for this and other forms of involuntary manslaughter are appropriate relative to those for other offenses.

Specifically, should the base offense level applicable to reckless conduct or, alternatively, vehicular homicides, be increased and, if so, by what amount? For example, one option would be to increase the base offense level for reckless conduct to level 17 (i.e., 24–30 months for a defendant in criminal history category I with no adjustments).

(2) Should specific offense characteristics be added for (i) prior offenses for driving under the influence of alcohol that are not counted in criminal history; (ii) driving without a license (in a jurisdiction where a license is required), or driving with a revoked or suspended license; (iii) multiple deaths; (iv) causing a substantial risk of harm to innocent ''bystanders''; or (v) ''road rage'' that proximately resulted in the vehicular homicide? Alternatively, should an application note be added encouraging upward departure for any of these factors?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(4) In addition to, or in lieu of, proposed amendments to the Involuntary Manslaughter guideline, the Commission invites comment on alternative approaches that, arguably, may be more effective in preventing vehicular homicide offenses. For example, should steps be taken to punish more severely and/or uniformly the underlying conduct of driving under the influence of alcohol or drugs (DUI)? What actions might the Commission take that would most effectively address these contributing problems?

(D) Closely Related Guidelines:

If the Commission amends any of the guidelines referenced above in the manner indicated, should it also amend other homicide or closely related guidelines (e.g., § 2A1.5 (Conspiracy or Solicitation to Commit Murder), § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder)) in order to maintain proportionality among penalties for the offenses covered by these guidelines? If so, how should such guidelines be amended?

Legislative Amendments

Electronic Copyright Infringement

9. Issue for Comment

The No Electronic Theft Act, Public Law 105–147, was recently enacted to provide a statutory basis to prosecute and punish persons who, without authorization and without realizing financial gain or commercial advantage, electronically access copyrighted materials or encourage others to do so. The Act includes a directive to the Commission to (A) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (B) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.

Each of the statutes mentioned in the congressional directive currently are referenced to § 2B5.3 (Criminal Infringement of Copyright or Trademark). That guideline provides for incrementally greater punishment when the retail value of the infringing items exceeded $2,000. However, when copyrighted materials are infringed upon by electronic means, there is no ''infringing item'', as would be the case with counterfeited goods. Therefore, the Commission must determine how to value the infringed upon items in order to implement the congressional directive to take into account the retail value and quantity of the items with respect to which the offense was

committed. The Commission invites comment on how § 2B5.3 (Criminal Infringement of Copyright or Trademark) should be amended to best effectuate the congressional directives.

An approach suggested by the Department of Justice is set forth below. The Commission invites comment on this and alternative proposals.

Department of Justice Proposed Amendments to § 2B5.3:

The text of § 2B5.3 is amended to read as follows: ''(a) Base offense level: [6]

(b) Specific Offense Characteristic

(1) If the loss to the copyright or trademark exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).''.

The Commentary to § 2B5.3 captioned ''Application Note'' is amended in Note 1 by striking:

'' 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).'',

and inserting:

''A court may calculate the 'loss to the copyright or trademark owner' in any reasonable manner. In determining 'loss to the copyright or trademark owner,' the court may consider lost profits, the value of the infringed upon items, the value of the infringing items, the injury to the copyright or trademark owner's reputation, and other associated harms.''.

The Commentary to § 2B5.3 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; and by adding at the end the following new note:

''2. In some cases, the calculable loss to the victim understates the true harm caused by the offense. For example, a defendant may post copyrighted material to an electronic bulletin board or similar online facility, making it easy for others to illegally obtain and further distribute the material. In such an instance, it may not be possible to determine or even estimate how many copies were downloaded, or how much damage the defendant's conduct ultimately caused. In such cases, an upward departure may be warranted. See Chapter Five, Part K (Departures).''.

The Commentary to § 2B5.3 captioned ''Background'' is amended in the first paragraph by striking ''value of the infringing items'' and inserting ''loss to the copyright or trademark owner''; and by striking ''loss or''.

Offenses Against Property of National Cemetery

10. Synopsis of Proposed Amendment

This amendment implements the directive to the Commission in the Veteran's Cemetery Protection Act of 1997. That Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery.

Proposed Amendment

Section 2B1.1(b) is amended by adding at the end the following new subdivision:

''(8) If the offense involved theft of property from a national cemetery, increase by [2] levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by adding at the end the following new paragraph:

''Subsection (b)(8) implements the instruction to the Commission in Section 2 of Public Law 105 101.''.

Section 2B1.3(b) is amended by redesignating subdivision (3) as subdivision (4) and inserting the following as the new subdivision (3):

''(3) If property of a national cemetery was damaged or destroyed, increase by [2] levels.''

The Commentary to § 2B1.3 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following new paragraph:

'' 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.''.

The Commentary to § 2B1.3 captioned ''Background'' is amended by inserting the following as the first paragraph:

''Subsection (b)(3) implements the instruction to the Commission in Section 2 of Public Law 105–101.''.

Section 2K1.4 (b) is amended by striking ''Characteristic'' and inserting ''Characteristics'' and by adding at the end the following new subdivision:

''(2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by [2] levels.''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended by adding at the end the following new note and background commentary:

''4. 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

Background: Subsection (b)(2) implements the directive to the Commission in Section 2, Public Law 105–101.''.

Issue for Comment: The Commission invites comment on whether, in addition to the increases provided in the proposed amendments to guidelines § 2B1.1, 2B1.3, and 2K1.4, these guidelines also should be amended to provide a minimum or ''floor'' offense level for a crime that involves theft, vandalism, or destruction of property of a national cemetery.

Expansion of Prohibited Person in Firearm Guideline

11. Synopsis of Proposed Amendment

This is a two part amendment. First, this amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, 1997 (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists what a person not licensed under 18 U.S.C. 923 must include in a statement to the handgun importer, manufacturer, or dealer, is amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. 921(a) to define ''misdemeanor crime of domestic violence''.

Violations of 18 U.S.C. 922(d) and (g) are covered by the firearms guideline, § 2K2.1. The new provisions at section 922(d) (sale of a firearm to a ''prohibited person'') and section 922(g) (transporting, possession, and receipt of a firearm by a ''prohibited person'') affect Application Note 6 of § 2K2.1, which defines ''prohibited person''. The proposed amendment amends Application Note 6 to include a person convicted of a misdemeanor crime of domestic violence within the scope of ''prohibited person''. It also defines ''misdemeanor crime of domestic violence'' by reference to the new statutory definition of that term.

Second, this amendment increases the base offense level for a defendant who knowingly sells to a prohibited person. This proposal is presented in response to a proposed directive contained in juvenile justice legislation approved by the Senate Judiciary Committee early in 1997. That legislation is likely to be considered by the Senate early in 1998. The House of Representatives passed two juvenile justice bills in 1997; however, no House passed bill includes this specific proposal, which originated with the Department of Justice. The legislative provision would require the Commission to increase the base offense level for offenses subject to the firearms guideline, § 2K2.1, to assure that a person who transferred a firearm and who knew that the transferee was a prohibited person is subject to the same base offense level as the transferee.

This proposal amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline to carry out the legislative provision described above. The pertinent base offense level structure under the current firearms guideline is as follows:

(1) A base offense level of 14 applies if the defendant is a prohibited person.

(2) A base offense level of 12 applies to a defendant who transferred a firearm to a prohibited person (and to a variety of other firearms offenses).

(3) A base offense level of 20 applies if the defendant is a prohibited person and the offense involved certain modified shotguns, other unusual weapons, or semiautomatic assault weapons.

(4) A base offense level of 18 applies to a defendant who transferred such a weapon to a prohibited person.

The proposed amendment makes level 14 (instead of level 12) applicable to a defendant who knowingly transfers a firearm to a prohibited person and makes level 20 (instead of level 18) applicable to a defendant who transfers a weapon described in paragraph (3) above to a prohibited person.

Note that the pending legislative directive would require the specified offense level increases only in those cases in which the defendant transferor knew that the transferee was a prohibited person. The draft amendment presented below also raises the policy option, shown in brackets, of whether the same, heightened offense levels should apply if the transferor lacked actual knowledge but did have ''reasonable cause to believe'' that the transferee was a prohibited person. The latter, less demanding mental state suffices for conviction under the relevant statute (18 U.S.C. 922(d)).

Proposed Amendment

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by striking ''or'' before ''(vi)''; and by inserting the following before the period:

''; or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33)''.

Section 2K2.1(a)(4) is amended by striking ''the defendant''; by inserting ''the defendant'' after ''(A)''; by striking ''is a prohibited person, and'' after ''(B)''; and in subdivision (B) by inserting the following before the semicolon:

''; and the defendant (i) is a prohibited person; or (ii) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person''.

Section 2K2.1(a)(6) is amended by inserting ''(A)'' after ''defendant''; and by inserting ''; or (B) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person'' before ''; or''.

Conditions of Probation and Supervised Release

12. Synopsis of Proposed Amendment

This is a three-part amendment that corrects a number of omissions arising out of the 1996–97 reworking of the guidelines related to conditions of probation, § 5B1.3, and supervised release, § 5D1.3.

First, the amendment adds to § 5B1.3 a condition of probation regarding deportation, in response to § 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That section amended 18 U.S.C. 3563(b) to add a new discretionary condition of probation, reflected in the amendment below, with respect to deportation.

Second, this amendment deletes the reference in the supervised release guideline to ''just punishment'' as a reason for the imposition of curfew as a condition of supervised release. The need to provide ''just punishment'' is not included in 18 U.S.C. 3583(c) as a factor to be considered in imposing a term of supervised release.

Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are policy statements of the Commission, not binding guidelines.

Proposed Amendment

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

''(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.''.

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

''(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.''.

Section 5D1.3(e)(5) is amended by striking ''to provide just punishment for the offense,''.

Section 5B1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5B1.3(e) is amended in the title by adding at the end ''(Policy Statement)''.

Section 5D1.3(c) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(d) is amended by inserting ''(Policy Statement)'' before ''The following''.

Section 5D1.3(e) is amended in the title by adding at the end ''(Policy Statement)''.

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