For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1) intent to promulgate a permanent amendment to implement the No Electronic Theft (NET) Act of 1997 after any temporary, emergency guideline amendment is promulgated to implement that Act; and (2) additional proposed permanent amendments to the sentencing guidelines, policy statements, and commentary. Request for comment. Notice of public hearing.

SUMMARY: (1) The Commission is considering making permanent any temporary, emergency guideline amendment that it may promulgate to implement the NET Act. The Commission is required to promulgate an emergency guideline amendment not later than April 6, 2000. It is the intent of the Commission subsequently to make that amendment a permanent amendment to the sentencing guidelines not later than May 1, 2000.

(2) The Commission also gives notice of the following: (A) proposed amendments to §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), 2A3.4 (Abusive Sexual Contact), 2G1.1 (Promoting Prostitution or Prohibited Sexual Contact), 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), and 2G3.1 (Importing, Mailing, or Transporting Obscene Matter) in order to implement the directives to the Commission contained in the Protection of Children from Sexual Predators Act of 1998, and issues for comment; (B) proposed amendments to § 2F1.1 (Fraud and Deceit) to implement the directives contained in the Wireless Fraud Protection Act, and issues for comment; (C) proposed amendments to §§ 1B1.1 (Application Instructions), 2K2.4 (Use of Firearms During or in Relation to Certain Crimes), and 4B1.2 (Definitions of Terms Used in Section 4B1.1) to respond to amendments to 18 U.S.C. 924(c) made by Public Law 105–386, and issues for comment; (D) issue for comment regarding whether, and in what manner the Commission should address five issues of circuit conflict; and (E) proposed technical and conforming amendments to various guidelines.

DATES: (1) Proposed Permanent NET Act Amendment.— Public comment supplementary to any public comment already received on the NET Act pursuant to the notice of proposed temporary amendment (see 64 FR 72,129, Dec. 23, 1999) should be received by the Commission not later than March 10, 2000; (2) Additional proposed permanent amendments and issues for comment.—Public comment should be received by the Commission not later than March 10, 2000; (3) Public hearing.—The Commission has scheduled a public hearing for March 23, 2000, at 9:30 a.m., at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, DC 20002–8002. A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502–4590 not later than March 10, 2000. Written testimony for the hearing must be received by the Commission not later than March 16, 2000. Submission of written testimony is a requirement for testifying at the public hearing.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590. For further information concerning implementation of the NET Act, contact Kenneth Cohen, Director of Legislative Affairs: (202) 502–4523.

SUPPLEMENTARY INFORMATION: (1) Proposed Permanent NET Act Amendment.—The NET Act directs 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 intellectual property offense was committed. The NET Act, as clarified by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1998, requires the Commission to promulgate a temporary, emergency guideline amendment not later than April 6, 2000.

In December 1999, the Commission published three options for promulgating an emergency amendment to § 2B5.3 (Criminal Infringement of Copyright and Trademark) and accompanying commentary to implement the NET Act directive. See 64 FR 72,129, Dec. 23, 1999. The Commission has received, and is considering, public comment on those three options. The Commission intends to promulgate a temporary, emergency guideline amendment not later than April 6, 2000 (pursuant to the legislation), but not earlier than March 23, 2000 (the date of the public hearing).

An emergency guideline amendment must be re-promulgated as a permanent amendment or it becomes ineffective upon the expiration of the congressional review period of the Commission's next amendment report to Congress (180 days from the day the Commission submits the report to Congress). Accordingly, the Commission also intends to make permanent any temporary, emergency guideline amendment it promulgates to implement the NET Act.

Recognizing that some interested members of the public have already commented on the proposed temporary amendments, the Commission invites any other additional, supplementary comment regarding whether it should make any such amendment permanent. See 64 FR 72,129, Dec. 23, 1999.

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

(3) Public Hearing.—The scope of the hearing is expected to include: (A) the proposed amendment options to provide a temporary, emergency amendment to implement the NET Act previously published in the **Federal**

[3] 17 CFR 200.30–3(a)(12).

Register (64 FR 72129, Dec. 23, 1999); and (B) all permanent amendments that are proposed for action in this amendment cycle ending May 1, 2000 (including any emergency NET Act amendment that is proposed to be made permanent). For additional proposed amendments to the sentencing guidelines previously published by the Commission, see 64 FR 72129, Dec. 23, 1999; and 65 FR 2663, Jan. 18, 2000.

(4) Reports and other information pertaining to proposed amendments, including the proposed amendment to implement the NET Act, may be accessed through the Commission's website at *www.ussc.gov.*

Authority: 28 U.S.C. 994 (a), (o), (p); USSC Rules of Practice and Procedure 4.3, 4.4, and 4.5.

Diana E. Murphy,
Chair.

Proposed Permanent Amendment to Implement the Net Act

(1) *Synopsis of Proposed Amendment:* For further information about the Net Act and proposed amendment options to implement the NET Act, see 64 FR 72129 December 23, 1999.

Proposed Amendment: Protection of Children Against Sexual Predators Act

(2) *Synopsis of Proposed Amendment:* This proposed amendment responds to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314. The Act contained the following directives to the Commission:

(A) to provide a sentencing enhancement for offenses under Chapter 117 of title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines;

(B) to provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;

(C) to provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;

(D) to provide for appropriate enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor; and

(E) to clarify that the term ''distribution of pornography'' applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest.

The Act also required the Commission, in carrying out these directives, to ensure reasonable consistency with other guidelines, and avoid duplicative punishment under the guidelines for substantially the same offense. In addition, the Act contained two new crimes: (A) an offense, at 18 U.S.C. 2425, for the transmittal of identifying information about minors for criminal sexual purposes (which carries a 5-year statutory maximum term of imprisonment); and (B) an offense, at 18 U.S.C. 1470, for the transfer of obscene materials to minors (which carries a 10-year statutory maximum term of imprisonment).

This amendment presents options to address the new offense of transferring obscene materials to minors and to implement the directives to account for nonpecuniary distribution of child pornography and to provide enhancements for computer use and misrepresentation of identity. Issues for comment follow on how best to implement the directive to provide an enhancement for Chapter 117 offenses, to implement the directive to provide an enhancement for a pattern of activity of sexual abuse and exploitation, and to address the new offense of using interstate facilities to transmit identifying information about minors for criminal sexual purposes.

Part (A): The New Offense of Prohibiting Transfer of Obscene Materials to a Minor

Synopsis of Proposed Amendment: This amendment addresses the new offense at 18 U.S.C. 1470, which makes it unlawful to transfer obscene materials to a minor. The statutory maximum for the offense is 10 years imprisonment. The amendment proposes to reference the offense in the Statutory Index (Appendix A) to the guideline covering the importing, mailing, or transporting of obscene matter, § 2G3.1.

The amendment proposes to modify the distribution enhancement in § 2G3.1(b)(1) to define distribution of obscene matter to mean any act, including production, transportation, and possession with intent to distribute, related to (i) distribution for pecuniary gain (i.e., for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; and (iii) any knowing distribution to a minor. An additional 2-level enhancement is proposed if the offense involved the knowing transfer of obscene matter to a minor in order to entice that minor to engage in prohibited sexual conduct.

An issue for comment is presented regarding whether the distribution enhancement in § 2G3.1(b)(1) should include distribution between or among adults that does not involve the receipt, or expectation of receipt, of anything of value. An issue for comment is also presented regarding whether the current enhancement's reference to the loss table in the fraud guideline should be deleted. Currently, the distribution enhancement requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Proposed Amendment:

Section 2G3.1 is amended in the title by adding at the end '', Transferring Obscene Matter to a Minor''.

Section 2G3.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) (Apply the greatest.) If the offense involved:

(A) 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.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by [5] levels.

(C) Any distribution to a minor, increase by [5] levels. If the distribution to a minor was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct, increase by an additional [2] levels.''.

The Commentary to § 2G3.1 captioned ''Statutory Provisions'' is amended by inserting '', 1470'' after ''1466''.

The Commentary to § 2G3.1 captioned ''Application Note'' is amended by striking Application Note 1 in its entirety and inserting the following:

''1. For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to distribution of obscene matter.

'Distribution for pecuniary gain' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

'Minor' means an individual who has not attained the age of [18] years.

'Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. 2256(8).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 1468'' the following new line:

''18 U.S.C. 1470 2G3.1''

Issues for Comment: The Commission invites comment on whether it should include an enhancement in § 2G3.1(b)(1) for distribution of obscene matter that does not involve distribution for pecuniary gain, for anything of value, or to a minor. For example, should an enhancement be provided if an adult gives obscene matter to another adult and receives, or expects to receive, nothing in return? If so, what should be the extent of the enhancement?

The Commission invites comment regarding whether the reference in § 2G3.1(b)(1) to the loss table in the fraud guideline should be deleted. Currently, the enhancement for distribution at § 2G3.1(b)(1) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels. Should the Commission maintain the minimum 5-level increase for distribution for pecuniary gain and provide an upward departure for especially large-scale commercial enterprises?

Part (B): The New Offense of Prohibiting Transmittal of Identifying Information about a Minor for Criminal Sexual Purposes

Issue for Comment: The Commission invites comment on whether and how it should amend the guidelines to cover the new offense, at 18 U.S.C. 2425, which prohibits the use of the mail or any facility or means of interstate commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity. Should the Commission reference the new offense in the Statutory Index to the guideline covering the promotion of prohibited sexual conduct, § 2G1.1? Are there other guidelines to which the new offense might appropriately be referenced? In addition, is there aggravating and/or mitigating conduct that might be associated with the new offense, and if so, how should the guidelines take this conduct into account?

Part (C): Clarification of the Term ''Item'' in the Enhancement in § 2G2.4 for Possession of 10 or More Items of Child Pornography

Synopsis of Proposed Amendment: This amendment proposes to add commentary language to the guideline covering possession of child pornography, § 2G2.4, to clarify whether an individual computer file (as opposed to disk on which it and many other files may be located) is an ''item'' of child pornography for purposes of the enhancement in § 2G2.4(b)(2), which provides a 2-level increase if more than 10 items of child pornography are possessed. Four circuits have held that an individual computer file does qualify as an item for purposes of the enhancement. An issue for comment follows on how items should be quantified for purposes of the enhancement.

Proposed Amendment

The Commentary to § 2G2.4 is amended by adding at the end the following:

''Application Note:

1. A computer file containing a visual depiction involving the sexual exploitation of a minor shall be considered to be one item for purposes of subsection (b)(2). Accordingly, if a computer disk contains, for example, three separate files, each of which contains one or more such visual depictions, then those files would be counted as three items for purposes of that subsection.''.

Issue for Comment: The Commission invites comment on how items of child pornography should be quantified for purposes of the enhancement in § 2G2.4(b)(2), which provides a 2-level increase if more than 10 items of child pornography are possessed. Should, for example, a book or computer file containing 300 visual depictions of child pornography be counted as one item, or as three items, or as some other number of items?

Part (D): The Directive to Clarify That ''Distribution of Pornography'' Applies to the Distribution of Pornography for Both Monetary Remuneration and a Non-Pecuniary Interest

Synopsis of Proposed Amendment: This amendment addresses the Act's directive to clarify that the term ''distribution of pornography'' applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest. The amendment modifies the distribution enhancement in the pornography trafficking guideline, § 2G2.2(b)(2), to define distribution of child pornography to mean any act, including production, transportation, and possession with intent to distribute, related to (i) distribution for pecuniary gain (*i.e.,* for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; and (iii) any knowing distribution to a minor. An additional 2-level enhancement is proposed if the offense involved the knowing transfer of child pornography to a minor in order to entice that minor to engage in prohibited sexual conduct.

An issue for comment is presented regarding whether the distribution enhancement in § 2G2.2(b)(2) should include distribution between or among adults that does not involve the receipt, or expectation of receipt, of anything of value. An issue for comment is also presented regarding whether to delete the current enhancement's reference to the loss table in the fraud guideline, whether to maintain the minimum 5-level increase for distribution for pecuniary gain, and whether to provide for an upward departure for especially large-scale commercial enterprises. Currently, the enhancement for distribution at § 2G2.2(b)(2) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Proposed Amendment

Section 2G2.2(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) (Apply the greatest.) If the offense involved:

(A) 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.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by [5] levels.

(C) Any distribution to a minor, increase by [5] levels. If the distribution to a minor was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct, increase by an additional [2] levels.''.

The Commentary to § 2G2.2 is amended in Application Note 1 by striking '' 'Distribution' includes'' and

all that follows through ''intent to distribute.'' and inserting the following:

'' 'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to distribution of material involving the sexual exploitation of a minor.

'Distribution for pecuniary gain' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

'Minor' means an individual who has not attained the age of [18] years.

'Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. § 2256(8).''.

Issues for Comment: The Commission invites comment on whether it should include an enhancement in § 2G2.2(b)(2) for distribution of child pornographic material that does not involve distribution for pecuniary gain, for anything of value, or to a minor. For example, should an enhancement be provided if an adult gives child pornographic material to another adult and receives, or expects to receive, nothing in return? If so, what should be the extent of the enhancement?

The Commission also invites comment regarding whether the reference in § 2G2.2(b)(2) to the loss table in the fraud guideline should be deleted. Currently, the enhancement for distribution at § 2G2.2(b)(2) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Part (E): The Directives To Provide an Enhancement for the Use of a Computer or the Misrepresentation of the Defendant's Identity

Synopsis of Proposed Amendment: This amendment responds to the Act's directives to: (i) provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity; and (ii) provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct.

The amendment proposes to implement these directives by providing a [2]-level enhancement in the sexual abuse guidelines, §§ 2A3.1–2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, § 2G1.1, for either the use of a computer, or other means, to contact the minor electronically or the misrepresentation of a criminal participant's identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct. The amendment also contains an option, shown in brackets, to delete the language in the proposed enhancement requiring the motive to ''persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual activity''.

Although the proposed enhancement combines these two factors as alternative triggers for the enhancement, the Commission could choose to provide separate, cumulative enhancements for these two types of offense conduct.

An issue for comment follows regarding whether the Commission should add an enhancement to the child pornography production and trafficking guidelines for misrepresentation of the defendant's identity or the identity of any other participant in the criminal conduct.

Proposed Amendment

Section 2A3.1(b) is amended by adding at the end the following subdivision:

''(6) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a minor to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant's identity, increase by [2] levels.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following:

'' 'Minor' means an individual who has not attained the age of [18] years.

'Participant' has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).

'Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. § 2256(8).''.

Section 2A3.2(b) is amended by striking ''Characteristic'' and inserting ''Characteristics'; and by adding at the end the following subdivision:

''(2) If[, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically, or (B) the knowing misrepresentation of a participant's identity, increase by [2] levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by redesignating Notes 1 through 4 as Notes 2 through 5, respectively; and by inserting before Note 2, as redesignated by this Amendment, the following new Note 1:

''1. For purposes of this guideline—

'Minor' means an individual who has not attained the age of [18] years.

'Participant' has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).''.

Section 2A3.3 is amended by inserting after subsection (a) the following subsection:

''(b) Specific Offense Characteristic

(1) If[, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant's identity, increase by [2] levels.''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. For purposes of this guideline—

'Minor' means an individual who has not attained the age of [18] years.

'Participant' has the meaning given that term in Application Note 1 of the

Commentary to § 3B1.1 (Aggravating Role).

'Prohibited sexual conduct' has the meaning given that term in § 2A3.1 (Criminal Sexual Abuse).

'Ward' means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.''.

Section 2A3.4(b) is amended by adding at the end the following subdivision:

''(4) If[, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant's identity, increase by [2] levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by redesignating Notes 1 through 5 as Notes 2 through 6, respectively, and inserting before Note 2, as redesignated by this amendment the following as the new Note 1:

''1. For purposes of this guideline—

'Minor' means an individual who has not attained the age of [18] years.

'Participant' has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).''.

Section 2G1.1(b) is amended by adding at the end the following subdivision:

''(4) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant's identity, increase by [2] levels.''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after ''For purposes of this guideline—'' the following:

'' 'Minor' means an individual who has not attained the age of [18] years.

'Participant' has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).''.

Issue for Comment: The Commission invites comment regarding whether the enhancement for use of a computer in subsection (b)(3) of the child pornography production guideline, § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), should be modified to cover, in addition to the use of a computer, the misrepresentation of a criminal participant's identity to solicit a minor's participation in sexually explicit conduct to produce sexually explicit material. In addition, the Commission invites comment on whether the guideline covering trafficking child pornography, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) should also contain an enhancement for misrepresentation of a criminal participant's identity.

The Commission also invites comment regarding the appropriate scope of any enhancement for the use of a computer, or other means, to communicate electronically with a minor. Specifically, the Commission invites comment regarding whether the enhancement should incorporate the definitions of ''electronic communication'' and/or ''wire communication'' as those terms are defined in 18 U.S.C. 2510(12) and (1), respectively.

Parts (F) and (G): Issues for Comment on the Directives To Provide an Enhancement for Chapter 117 Offenses and for Sex Offenses Involving a Pattern of Activity

Due to the complexity of the issues involved in implementing the directives described in the following issues for comment, the Commission may not be able to complete all work necessary to promulgate amendments on these issues in this amendment cycle ending May 1, 2000. Recognizing the importance of responding to these directives as soon as possible but also acknowledging the possibility that the Commission may not promulgate amendments on these issues until the next amendment cycle, the Commission invites the public to comment on the following additional issues.

Part (F): Enhancement for Chapter 117 Offenses

Issues for Comment:

(1) The Protection of Children from Sexual Predators Act of 1998 directed the Commission to ''provide a sentencing enhancement for offenses under Chapter 117 of Title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines.'' The Commission invites comment on how to most appropriately implement this directive.

(2) Specifically, the Commission invites comment on whether, and to what extent, it should amend § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements proposed to be added for use of a computer, or other means, to communicate with the minor electronically and/or misrepresentation of a criminal participant's identity sufficiently provide an appropriate enhancement, or is an additional enhancement for other aggravating conduct needed?

(3) The Act also increased statutory penalties, from a maximum term of imprisonment of 10 years to a maximum term of imprisonment of 15 years, for offenses under 18 U.S.C. 2423(a), relating to the transportation of a minor with the intent to engage in illegal sexual activity, and § 2423(b), relating to travel with intent to engage in a sexual act with a juvenile. Convictions under 18 U.S.C. 2423(a) are currently referenced in the Statutory Index to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Convictions under 18 U.S.C. 2423(b) are currently referenced in the Statutory Index to §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), and 2A3.3 (Criminal Sexual Abuse of a Ward). A concern raised by Congress and prosecutors is that sentences under § 2A3.2 do not necessarily reflect the seriousness of the conduct involved and the harm done to minor victims. Although that guideline was originally intended to cover defendants who engage in consensual sex with an underage partner, it is increasingly being used to cover offenses involving more serious conduct, such as those involving force, violent threats, or incapacitating intoxicants.

In light of these concerns and the increased statutory penalties, the Commission invites comment on whether it should amend the base offense level in § 2G1.1 and/or §§ 2A3.1, 2A3.2, 2A3.3, and/or 2A3.4, to provide for an increase of 2 or 4 levels and/or provide an enhancement of 2 or 4 levels

if the offense involved conduct punishable under 18 U.S.C. 2423. Many of the cases prosecuted under 18 U.S.C. 2423 are sentenced under § 2A3.2, either directly or as a result of a cross reference to that guideline in § 2G1.1. In addition, the Commission invites comment on whether it should amend the Statutory Index (Appendix A) to reference 18 U.S.C. 2423(a) and (b) offenses to § 2A3.4 (Abusive Sexual Contact) in addition to the other guidelines currently referenced for those offenses in the Statutory Index. Alternatively, should offenses for 18 U.S.C. 2423(a) and (b) both be referenced to § 2G1.1 (Promoting Prostitution and Prohibited Sexual Conduct)?

(4) The Commission invites comment on whether it should provide an enhancement in § 2A3.2 based on the intimidation or mental coercion of the minor victim by the defendant (or another criminally responsible participant) and/or for cases in which the minor victim's ability to truly consent was affected. The Commission also invites comment on whether it should add an enhancement of 2 or 4 levels or provide for an invited upward departure in § 2A3.2, if the defendant is more than 10 years older than the minor victim, or if the offense involved incest.

(5) The Commission also invites comment on whether it should reconsider the manner in which the guidelines currently cover offenses under Chapter 117 of Title 18 (relating to transportation of minors for illegal sexual activity). Specifically, should those offenses continue to be referenced in the Statutory Index to § 2G1.1 with cross references provided in that guideline for cases more appropriately sentenced under § 2G2.1, the guideline covering production of child pornography, § 2A3.1, the guideline covering criminal sexual abuse, or §§ 2A3.2–2A3.4, the guidelines covering any other prohibited sexual conduct? Should the commentary in § 2G1.1 be amended to clarify how to determine the offense level for cases involving persuasion, inducement, enticement, coercion, and/or transportation of a minor for prohibited sexual conduct that are unaccompanied by underlying prohibited sexual conduct, as well as for cases that are accompanied by such conduct?

Part (G): Sex Offenses Involving a Pattern of Activity

Issues for Comment:

The Protection of Children from Sexual Predators Act of 1998 directed the Commission to provide an enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The Commission invites comment on how to most appropriately implement this directive. Specifically, the Commission invites comment on the following issues:

(1) Should the Commission implement the directive through an upward departure provision for a ''pattern of activity''? Specifically, should the Commission expand the kind of prior sexual offenses that would warrant application of the encouraged upward departure currently found in the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact)? The Commission could, for example, expand that definition to conform it to the statutory definition of ''prior sexual offense conviction'' found at 18 U.S.C. 2247. Currently, the upward departure provision permits consideration only of multiple acts that were prior convictions similar to the instant offense. Use of the statutory definition would allow consideration of prior convictions for offenses under Chapter 117 of Title 18 (relating to transportation for illegal sexual activity), Chapter 109A of that title (relating to sexual abuse), Chapter 110 of that title (relating to sexual exploitation of children), and under State law for offenses that would be punishable under those chapters if they had been within the Federal jurisdiction.

If the Commission were to expand the upward departure provision, should it include past conduct of the defendant that did not result in a conviction? Should the Commission include an expanded upward departure provision in § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct)?

(2) Should the Commission implement the directive by amending § 2G1.1, the guidelines covering sexual abuse, §§ 2A3.1–2A2.4, or any other guidelines, to provide an enhancement for ''pattern of activity'' similar to, or the same as, the 5-level ''pattern of activity'' enhancement currently found in § 2G2.2, the guideline covering trafficking in child pornography? If the Commission were to adopt such an approach, should the enhancement be the same as, or different from, the enhancement found in § 2G2.2? For example, should the ''pattern of activity'' enhancement include activity under chapter 117 of title 18 (relating to the transportation of minors for illegal sexual activity) in addition to conduct involving sexual abuse and sexual exploitation? What would be the appropriate extent of the enhancement?

(3) Should the Commission implement the directive by creating a new guideline in Chapter Four (Criminal History) for sexual offenders, similar to § 4B1.3 (Criminal Livelihood), which provides a minimum offense level for defendants who commit the offense as part of a pattern of criminal conduct engaged in as a livelihood? Creation of a guideline in Chapter Four would make the new provision applicable to all defendants sentenced under the guidelines, not just to defendants convicted of offenses relating to sexual abuse, sexual exploitation, or transportation for illegal sexual activity.

(4) Regardless of the approach adopted by the Commission (i.e., regardless of whether the Commission adopts an upward departure provision, an enhancement, or a provision in Chapter Four), should multiple acts of sexual misconduct that are considered for a ''pattern of activity'' relate to the offense of conviction and the relevant conduct involved in the offense? Should it include acts that formed the basis for prior convictions? Alternatively, should it include other conduct not directly related to the offense of conviction or to the relevant conduct involved in the offense, and should it include conduct that did not form the basis of a prior conviction?

(5) What types of conduct (e.g., rape, production of child pornography, enticing minors to engage in prohibited sexual conduct) should be covered by a ''pattern of activity'? Should trafficking in child pornography be covered in light of the revised statutory definition of ''prior sexual offense conviction'' found at 18 U.S.C. 2247?

(6) Should ''pattern of activity'' cover only certain types of offenders (e.g., pedophiles who are at a high risk of recidivism)? How should offenders who engage in incest be treated under the enhancement?

Proposed Amendment: Implementation of the Wireless Telephone Protection Act

(3) *Synopsis of Proposed Amendment:* In the Wireless Telephone Protection Act, Pub. L. 105–172, Congress directed the Commission to review and amend the sentencing guidelines, if appropriate, to provide an appropriate penalty for offenses involving the cloning of a wireless telephone (including offenses involving the attempt or conspiracy to clone a

wireless telephone). The Commission was instructed to consider eight specific factors: (A) the range of conduct covered by the offenses; (B) the existing sentences for the offense; (C) the extent to which the value of the loss caused by the offenses (as defined in the federal sentencing guidelines) is an adequate measure for establishing penalties under the federal sentencing guidelines; (D) the extent to which sentencing enhancements within the federal sentencing guidelines and the court's authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offenses; (E) the extent to which the federal sentencing guideline sentences for the offenses have been constrained by statutory maximum penalties; (F) the extent to which federal sentencing guidelines for the offense(s) adequately achieve the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2); (G) the relationship of the federal sentencing guidelines for these offenses to offenses of comparable seriousness; and (H) any other factor the Commission considers to be appropriate.

This proposal presents two amendment options to implement the directive as well as issues for comment related to: (A) the use of a cloned wireless telephone in connection with other criminal activity, and (B) how to address the apparent disparate ways in which loss is determined in cloning offenses.

Option 1 provides an enhancement for possession of cloning equipment and for manufacturing and distributing cloned telephones. The amendment proposes a two-prong enhancement with a sentencing increase of [two] levels. The first prong tracks the relevant statute, 18 U.S.C. 1029(a)(9), by explicitly covering the use or possession of any ''cloning equipment,'' which is defined to include the hardware or software described in the statute. The definition also includes any mechanism or equipment that can be used to clone a wireless telephone. The definition additionally includes a scanning device [if the device was used with the intent to defraud]. The second prong specifically covers manufacture and distribution of a cloned telecommunications instrument. The definition of a cloned telephone also tracks the language of the statute.

Option 2 also proposes a two-prong enhancement with an increase of [two] levels and applies the enhancement to all access devices. The first prong covers possession or use of equipment that is used to manufacture access devices. (The ESN/MIN of a wireless telephone is a type of access device under the statute.) Specifically, this prong provides a [two] level enhancement if the offense involves the use or possession of any ''device-making equipment.'' It broadens the statutory definition of device-making equipment (found in 18 U.S.C. 1029(e)(6)) to include not only equipment that can be used to make an access device, but also the cloning hardware or software described in § 1029(a)(9). Consistent with the statute, the definition also includes a scanning device [if the device was used with the intent to defraud].

The second prong covers distribution of any counterfeit access device, as that term is defined in 18 U.S.C. 1029(e)(2), and includes the distribution of any cloned wireless telephone.

Proposed Amendment

Option 1

Section 2F1.1(b) is amended by redesignating subdivisions (4) through (7) as subdivisions (5) through (8), respectively; and by inserting after subdivision (3) the following new subdivision (4):

''(4) If the offense involved (A) the use or possession of any cloning equipment; or (B) the manufacture or distribution of a cloned telecommunications instrument, increase by [2] levels.''.

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

''21. For purposes of subsection (b)(4)—

'Cloning equipment' means any hardware, software, mechanism, or equipment that has been, or can be, configured to insert or modify any telecommunication identifying information associated with, or contained in, a telecommunications instrument so that such telecommunications instrument may be used to obtain telecommunications service without authorization. A scanning receiver is cloning equipment [if it was used or possessed with the intent to defraud]. 'Scanning receiver,' 'telecommunications service,' and 'telecommunication identifying information' have the meaning given those terms in 18 U.S.C. 1029(e)(8), (e)(9), and (e)(11), respectively.

'Cloned telecommunications instrument' means a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 1 by striking ''(b)(4)'' and inserting ''(b)(5)''; in Note 5 by striking ''(b)(4)'' and inserting ''(b)(5)''; and in Note 6 by striking ''(b)(4)'' and inserting ''(b)(5)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 15 by striking ''(b)(5)'' each place it appears and inserting ''(b)(6)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Notes 18 and 20 by striking ''(b)(7)'' and inserting ''(b)(8)''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the sixth paragraph by striking ''(b)(5)'' and inserting ''(b)(6)''; in the seventh paragraph by striking ''(b)(6)'' and inserting ''(b)(7)''; and in the eighth and ninth paragraphs by striking ''(b)(7)'' each place it appears and inserting ''(b)(8)''.

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

''Subsection (b)(4) implements the instruction to the Commission in section 2(e) of Public Law 105–172.''.

Option 2

Section 2F1.1(b) is amended by redesignating subdivisions (4) through (7) as subdivisions (5) through (8), respectively; and by inserting after subdivision (3) the following new subdivision (4):

''(4) If the offense involved (A) the possession or use of any device-making equipment; or (B) the distribution of any counterfeit access device, increase by [2] levels.''.

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

''21. For purposes of subsection (b)(4)—

'Device-making equipment' has the meaning given that term in 18 U.S.C. 1029(e)(6) and also includes: (A) any hardware or software that can insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such telecommunications instrument may be used to obtain telecommunications service without authorization; or (B) a scanning device [if it was used or possessed with the intent to defraud]. 'Scanning device,' and 'telecommunication identifying information' have the meaning given those terms in 18 U.S.C. 1029(e)(8) and (e)(11), respectively.

'Counterfeit access device,' has the meaning given that term in 18 U.S.C. 1029(e)(2) and includes a cloned telecommunications instrument. 'Cloned telecommunications

instrument' means a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 1 by striking ''(b)(4)'' and inserting ''(b)(5)''; in Note 5 by striking ''(b)(4)'' and inserting ''(b)(5)''; and in Note 6 by striking ''(b)(4)'' and inserting ''(b)(5)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Note 15 by striking ''(b)(5)'' each place it appears and inserting ''(b)(6)''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended in Notes 18 and 20 by striking ''(b)(7)'' and inserting ''(b)(8)''.

The Commentary to § 2F1.1 captioned ''Background'' is amended in the sixth paragraph by striking ''(b)(5)'' and inserting ''(b)(6)''; in the seventh paragraph by striking ''(b)(6)'' and inserting ''(b)(7)''; and in the eighth and ninth paragraphs by striking ''(b)(7)'' each place it appears and inserting ''(b)(8)''.

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

''Subsection (b)(4) implements the instruction to the Commission in section 2(e) of Public Law 105–172.''.

Issues for Comment

(1) Option 1 provides a two-pronged enhancement in the fraud guideline, § 2F1.1. The first prong covers the use or possession of any ''cloning equipment'' (including the hardware or software described in 18 U.S.C. 1029(a)(9), any other mechanism or equipment that can be used to clone a wireless telephone, and a scanning device [if the device was used with the intent to defraud]).

As an alternative to providing this enhancement in the form of a specific offense characteristic whose applicability would have to be (at least potentially) considered in every case sentenced under this guideline (i.e., over 6,000 cases in FY 1998), the Commission invites comments on whether the loss commentary could be amended to provide a presumptive loss amount or a loss amount increase if the specified conduct is proven. More specifically, the commentary could provide that if the conduct involved ''cloning equipment,'' the loss would be not less than a presumptive amount, or that loss will be not less than the presumptive amount plus any loss otherwise determined.

The use of a presumptive loss amount might guarantee a floor offense level if the conduct occurs, even if a specific offense characteristic for that conduct is not added to the guideline. On the other hand, a presumptive loss amount increase could accomplish the same effect as a floor but would have the added advantage of providing some increment over and above the ''floor'' offense level in some cases. However, because of the way the loss table increases the offense level based on increases in loss amount, a presumptive loss increase would not guarantee a set increase in offense level across the full range of loss amounts.

The Commission invites comment on whether the use of a presumptive loss amount or a presumptive loss increase is preferable to the specific offense characteristics proposed in Option One. If so, what conduct should trigger the provision? Of the presumptive loss amount or the loss increase, which is more appropriate? What is the appropriate dollar amount for the presumptive loss provision?

(2) The second prong of the proposed enhancement in Option 1 covers the manufacture and distribution of a cloned telecommunications instrument. The Commission invites comment on whether the provision should apply to all telecommunications instruments, or whether it should be limited more closely to the provisions of the Wireless Telephone Protection Act and apply only if the applicable offense conduct actually involves cloned wireless telephones.

In addition, the Commission invites comment regarding whether the second prong of the enhancement in Option 1 (relating to manufacturing cloned telecommunications instruments) should be limited to situations that involved manufacturing or distributing cloned telephones. This limitation might be justified because of the potential overlap between the first prong of the enhancement (relating to the use or possession of cloning equipment) and the broader version of the second prong.

(3) Option 2 covers possession or use of equipment that is used to manufacture access devices. (For example, the mobile identification number/electronic serial number (''MIN/ESN'') of a wireless telephone is a type of access device under 18 U.S.C. 1029). This proposal provides a [two] level enhancement if the offense involves the use or possession of any ''device-making equipment,'' broadening the statutory definition of device making equipment (found in 18 U.S.C. 1029(e)(6)) to include not only equipment that can be used to make an access device, but also the cloning hardware or software described in 18 U.S.C. 1029(a)(9). Consistent with the statute, the definition also includes a scanning device [if the device was used with the intent to defraud].

The Commission invites comment regarding whether the proposed enhancement should apply to all access devices or to only certain types of access devices.

(4) The Commission invites comment, generally, regarding whether the use of a cloned wireless telephone in connection with other criminal activity should warrant more serious punishment than the commission of the same offense without the involvement of a cloned telephone. The Commission also invites comment regarding whether the possession of a cloned wireless phone should warrant more serious punishment.

If so, the Commission invites comment regarding whether an adjustment should be added to Chapter Three that would apply to the use of a cloned wireless telephone in connection with any other offense or to the possession of a cloned wireless telephone. If so, what should the magnitude of the increase for such an adjustment be (e.g., two or four levels)? Alternatively, should a specific offense characteristic be added to one or more Chapter Two guidelines (such as § 2D1.1 or § 2F1.1)? If so, which guidelines should be amended to include the enhancement? What should the magnitude of the enhancement be (e.g., two or four levels)? If such an amendment were made, how should it affect the proposed enhancement of [two] levels for manufacturing or distribution of cloned wireless telephones in Option One, or for manufacturing or distribution of counterfeit access devices in Option Two?

The Commission also invites comment regarding whether a cross reference should be added to § 2F1.1 (and/or other relevant guidelines) that would sentence the defendant convicted of an offense involving the use or transfer of a cloned wireless telephone at the level for the offense for which the telephone was used. Such a cross reference would create the possibility that a defendant could be convicted of a less serious offense (such as an offense involving a cloned telephone that caused a small loss) but have the sentence increased to the level based on the more serious conduct that was implicated by the telephone use (such as drug trafficking) proven by a preponderance of the evidence. This

option could be implemented on its own, or in combination with some other provision.

(5) The Commission also invites comment regarding: (A) whether language should be added to the definition of loss in the commentary to § 2F1.1 to make clear that unused ESN/MIN pairs (or any or all access devices) are to be considered in determining intended loss; (B) whether a minimum or presumptive value should be established for each ESN/MIN pair or cloned wireless telephone (or any or all access devices) and, if so, (i) which should be established (a minimum or presumptive value), and (ii) what should the minimum or presumptive value be (e.g., [$500, $750, $1,000]) (and whether it should vary depending on the type of access device); and (C) whether the definition of loss should provide more specific guidance (and, if so, what guidance) as to how to determine intended loss in cases involving access devices, in general, and ESN/MIN pairs, in particular. For example, guidance could be provided that when a case involves one or more used ESN/MIN pairs (or access devices) and one or more unused pairs, the losses incurred in connection with the former should be used to determine an average loss per pair; that average loss amount could be multiplied by the number of used and unused pairs to determine the intended loss.

(6) The Commission invites comment on whether any action the Commission might take to implement the directive in the Wireless Telephone Protection Act (such as adopting either of the options described herein) should be coordinated and/or consolidated with action the Commission might take to implement the directive in the Identity Theft and Assumption Deterrence Act (such as adopting either of the options described in the proposed amendment for identity theft which can be found in 65 FR 2265 (January 18, 2000)). Specifically, the Commission invites comment on the potential interactions and/or overlap between the proposed options on identity theft and on telephone cloning. For example, to the extent that an unauthorized identification means can be a counterfeit access device, application of the enhancement proposed in Option 2 and an identity theft enhancement may, in some situations, be double-counting the same conduct. Such double-counting potentially might occur in the case of a defendant who uses device making equipment to make a credit card (an unauthorized identification means) in the name of an individual victim.

Note that there is an issue for comment in the published materials regarding possible amendments in response to the Identity Theft and Assumption Deterrence Act, regarding the possible promulgation of an amendment that would broaden the current rule in the commentary to § 2B1.1 regarding the minimum loss rule for credit cards ($100 each) to access devices, generally, and increase the minimum loss amount to $1,000 for each access device. See 65 FR 2668 (January 18, 2000).

Proposed Amendment: Firearms

(4) *Synopsis of Proposed Amendment:* Public Law 105–386 amended 18 U.S.C. 924(c) to: (A) add ''possession in furtherance of the crime'' to the list of acts for which a defendant can be convicted under the statute; (B) replace fixed terms of imprisonment (e.g., 5 years) with mandatory minimum terms of imprisonment (e.g., not less than 5 years); (C) provide tiered sanctions depending on how the firearm was used (e.g., brandished or discharged); and (D) provide a statutory definition of ''brandish.''

The principal parts of this proposed amendment are as follows:

(A) It amends § 1B1.1 (Application Instructions) to provide the definition of ''brandish'' used in 18 U.S.C. 924(c). There are two major differences between the statutory definition and the guideline definition of ''brandish.'' First, the statutory definition does not require that the firearm be displayed, or even visible, while the current guideline definition does. Second, the statutory definition requires that a firearm actually be present, while the guideline definition, which applies to any dangerous weapon, applies to toys and fakes (because the definition of ''dangerous weapon'' includes such items). The amendment proposes to apply the definition to any dangerous weapon.

(B) In response to the statutory change from fixed terms of imprisonment to mandatory minimum terms, the proposal amends § 2K2.4 to clarify that the ''term required by statute,'' with respect to 18 U.S.C. 844(h), 924(c), and 929(a), is the minimum term specified by the statute. The proposed amendment also provides for an encouraged upward departure if the minimum term does not adequately address the seriousness of the offense. Examples of when a departure may be warranted are provided.

There is also an issue for comment regarding whether the Commission should provide a cross-reference to the guideline for the underlying offense when there is no conviction for that underlying offense and the offense level for that underlying offense is greater than the minimum term required by statute.

(C) It resolves a circuit conflict regarding whether, when a defendant is convicted of both section 924(c) and the underlying offense, the court can apply a weapon enhancement when imposing the sentence for the underlying offense. Specifically, the proposal amends Application Note 2 of § 2K2.4 to clarify that, with respect to the guideline for the underlying offense, ''the underlying offense'' includes both the offense of conviction and any relevant conduct for which the defendant is accountable under § 1B1.3. Accordingly, the amended Note instructs the court not to apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for the underlying offense. The proposed amendment also provides examples of when this rule would (and would not) apply.

The legislation also specifically added brandishing to the conduct covered by 18 U.S.C. 924(c). This proposed amendment provides a conforming amendment to Application Notes 2 and 4 and the Background Commentary of § 2K2.4 to add brandishing to the list of specific offense characteristics that are not applied with respect to the sentencing for the underlying offense.

(D) It amends § 4B1.2 to clarify that a section 924 count is not considered an ''instant offense'' for purposes of the career offender guideline. It also clarifies, in § 2K2.4, that because the sentence in this guideline is determined by the relevant statute and imposed independently, Chapters Three and Four do not apply.

(E) It provides an issue for comment regarding whether the Commission should consider including a section 924(c) count as an instant offense of conviction for purposes of the career offender guideline.

(F) It makes minor technical and conforming amendments to §§ 3D1.1 and 5G1.2 to conform these guidelines to the new mandatory minimum provisions of 18 U.S.C. 924(c).

Proposed Amendment

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(c) by striking ''that the weapon was pointed or waved about, or displayed in a threatening manner'' and inserting ''that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate

that person, regardless of whether the weapon was directly visible to that person''.

Section 2K2.4(a) is amended by striking ''that'' and inserting ''the minimum term''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following paragraphs:

''Sections 924(c) and 929(a) have a statutory maximum of life imprisonment. Accordingly, the court has the authority to impose a sentence above the minimum term specified if the minimum term does not adequately capture the seriousness of the offense. For example, an upward departure may be warranted if (A) the guideline for the underlying offense does not account for an aggravating factor; or (B) the defendant was not convicted of the underlying offense. Examples of factors that may warrant an upward departure include the following:

(A) the offense involved multiple firearms;

(B) the offense involved a stolen firearm or a firearm with an obliterated serial number;

(C) the offense involved serious bodily injury;

(D) the defendant is a prohibited person at the time of the offense. 'Prohibited person' has the same meaning given that term in § 2K2.1, Application Note 6.

(E) the seriousness of the defendant's criminal history is not adequately considered because the defendant was not convicted of the underlying offense.

Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the sentence for each offense is determined by the statute and is imposed independently. See §§ 3D1.1, 5G1.2.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 2 by striking the first paragraph in its entirety and inserting the following:

''If a defendant is convicted of an underlying offense in conjunction with any of the statutes covered by this guideline, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for the underlying offense. A sentence under § 2K2.4 covers any explosive or weapon enhancement both for the underlying offense of conviction and for any other conduct for which the defendant may be accountable under § 1B1.3 (Relevant Conduct). For example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a different firearm from the one for which the defendant was convicted under section 924(c), do not apply any weapon enhancement in the guideline for the underlying offense; (B) in an ongoing drug trafficking offense, the defendant possessed firearms other than the one for which the defendant was convicted under section 924(c), do not apply any weapon enhancement in the guideline for the underlying offense. However, if a defendant is convicted of two bank robberies involving weapons, but is convicted of a section 924(c) offense in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the section 924(c) offense.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 4 in the third sentence by inserting ''brandishing,'' after ''possession,''

The Commentary to § 2K2.4 captioned ''Background'' is amended by striking ''18 U.S.C. §§ '' and inserting ''Sections'' by inserting ''of title 18, United States Code,'' following ''929(a)'' by striking ''penalties for the conduct proscribed.'' and inserting ''terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment.'' and by inserting ''brandishing,'' after ''use,''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by striking the eighth paragraph in its entirety and inserting:

''A prior conviction under 18 U.S.C. 924(c) is a ''prior felony conviction'' for purposes of applying § 4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a ''crime of violence'' or ''controlled substance offense.'' (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under § 4A1.2 (Definitions and Instruction for Computing Criminal History)).''.

The Commentary to § 4B1.2 captioned ''Application Notes is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively, and by inserting before Note 3, as redesignated by this Amendment, the following new Note 2:

''2. Pursuant to §§ 2K2.4, 3D1.1, and 5G1.2(a), a sentence for a conviction under 18 U.S.C. 924(c) is determined by the statute and is imposed independently of any other sentence. Accordingly, if the instant offense of conviction is a conviction under 18 U.S.C. 924(c), or if the instant offense of conviction includes convictions for both § 924(c) and the underlying offense, § 4B1.1 does not apply to the § 924(c) count.''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended in Note 1 by inserting ''minimum'' after ''mandatory'' each place it appears.

The Commentary to § 5G1.2 is amended in the fourth paragraph, by striking the second sentence in its entirety and inserting:

See, *e.g.,* 18 U.S.C. 924(c) (specifying mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively to any other term of imprisonment).''.

Issues for Comment

(1) Several guidelines provide an enhancement that applies ''if the firearm was brandished, displayed or possessed.'' See, *e.g.,* § 2B3.1 (Robbery); § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). Given that the proposed amendment defines ''brandished'' to mean, in part, that ''all or part of the weapon was displayed,'' the Commission invites comment regarding whether, if the Commission adopts this amendment, it should make a conforming amendment to delete ''displayed'' from this enhancement as unnecessary.

(2) The Commission invites comment regarding whether it should amend § 2K2.4 to provide a cross reference to the guideline for the underlying offense when the defendant was not convicted of the underlying offense in either state or federal court and the offense level for the underlying offense is greater than the sentence provided in § 2K2.4 (*i.e.,* the minimum term required by statute)? Such amendment would also specify that the cross reference does not apply when the defendant has been convicted of the underlying offense.

(3) The proposed amendment clarifies that under current guideline application: (A) Chapters Three and Four do not apply to any sentence imposed under § 2K2.4 because the sentence is determined by the relevant statute (18 U.S.C. 844(h), 924(c), or 929(a)) and is imposed independently; and (B) because Chapter Four does not apply, the career offender guideline, § 4B1.1, does not apply when the instant offense of conviction is a section 924(c) offense. Notwithstanding current guideline application, the Commission invites comment on whether it should amend the guidelines to provide that a conviction under 18 U.S.C. 924(c) is an instant offense for career offender purposes.

If the Commission should make such an amendment, how should it be

accomplished? The Commission could, for example, develop a new guideline for 18 U.S.C. 924(c) offenses (and similar offenses) which would eliminate the current requirement that the sentence on a section 924(c) count be imposed independently and that the count be excluded from the grouping rules. See § 3D1.1. If a new guideline were developed, what should the Commission consider with respect to specific offense characteristics, cross reference provisions, and departure provisions? As an alternative to a new guideline, the Commission could provide a ''special rule'' that would apply whenever a section 924(c) defendant is also a career offender. Such a rule could provide that the offense level for the defendant's conduct is to be determined by § 4B1.1. The effect of this rule would be that the defendant's offense level, regardless of whether the defendant also is convicted of the underlying offense, would always begin at offense level 37, with a guideline range of 360-life. To satisfy the statute's requirement that the sentence be imposed consecutively to any other count, the rule could provide any of the following variations when the offense involves multiple count(s): (A) A sentence within the range of 360-life is imposed consecutive to the final guideline sentence for the additional counts; (B) the minimum term required by statute (*e.g.,* 5 years) is imposed consecutive to the final guideline sentence; or (C) the section 924(c) count is grouped with the underlying offense and the final guideline sentence is structured so that a portion of the total punishment, corresponding to the minimum term required by the statute, is imposed consecutive to the remainder of the guideline sentence. (Note that the guidelines currently use the approach in (C) when the offense involves a conviction for failure to appear and for the underlying offense. See § 2J1.6 (Failure to Appear by Defendant), comment. (n. 3).)

Issue for Comment: Circuit Conflicts

(5) *Issue for Comment:* The Commission requests public comment on whether, and in what manner, it should address by amendment the following circuit court conflicts:

(A) Whether for purposes of downward departure from the guideline range a ''single act of aberrant behavior'' (Chapter 1, Part A, § 4(d)) includes multiple acts occurring over a period of time. Compare *United States* v. *Grandmaison,* 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word ''single'' to refer to the crime committed; therefore, ''single acts of aberrant behavior'' include multiple acts leading up to the commission of the crime; the district court should review the totality of circumstances); *Zecevic* v. *U.S. Parole Comm'n,* 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances); *United States* v. *Takai,* 941 F.2d 738 (9th Cir. 1991) (''single act'' refers to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime); *United States* v. *Pena,* 930 F.2d 1486 (10th Cir. 1991) (aberrational nature of the defendant's conduct and other circumstances justified departure); with *United States* v. *Marcello,* 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); *United States* v. *Glick,* 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not ''single act of aberrant behavior''); *United States* v. *Williams,* 974 F.2d 25 (5th Cir. 1992) (a single act of aberrant behavior is generally spontaneous or thoughtless); *United States* v. *Carey,* 895 F.2d 318 (7th Cir. 1990) (single act of aberrant behavior contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning); *United States* v. *Garlich,* 951 F.2d 161 (8th Cir. 1991) (fraud spanning one year and several transactions was not a ''single act of aberrant behavior''); *United States* v. *Withrow,* 85 F.3d 527 (11th Cir. 1996) (a single act of aberrant behavior is not established unless the defendant is a first-time offender and the crime was a thoughtless act rather than one which was the result of substantial planning); *United States* v. *Dyce,* 78 F.3d 610 (D.C. Cir.), amd on reh. 91 F.3d 1462 (D.C. Cir. 1996) (same).

If the Commission were to adopt the view that a downward departure for aberrant behavior is limited to spontaneous and thoughtless acts, it could, for example, eliminate the suggested departure language from Chapter One of the Guidelines Manual and establish a departure provision in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) for spontaneous and thoughtless acts that do not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.

The Commission is interested in exploring an alternative approach to the majority and minority views to resolve the circuit conflict regarding departure for a ''single act of aberrant behavior.'' Assuming the guidelines permit a departure for aberrant behavior, what guidance should the Commission give the court in determining the appropriateness of granting a departure in a given case. For example, should such a departure be precluded for a defendant convicted of certain offenses, such as crimes of violence (see 28 U.S.C. 994(j) that provides that ''guidelines are to reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.* * *''). What other factors should the Commission articulate to guide the court in determining the appropriateness of a departure in a particular case?

(B) Whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. Compare *United States* v. *Chandler,* 125 F.3d 892, 897–98 (5th Cir. 1997) (''First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section most 'applicable to the offense of conviction.' '' Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); *United States* v. *Locklear,* 24 F.3d 641 (4th Cir. 1994) (In finding that § 2D1.2 does not apply to convictions under 21 U.S.C. 841, the court relied on the fact that the commentary to § 2D1.2 lists as the ''Statutory Provisions'' to which it is applicable 21 U.S.C. 859, 860, and 861, but not 841. ''[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by § 2D1.1, but rather to define the base offense level for violations of 21 U.S.C. 859, 860 and 861.''); *United States* v. *Saavedra,* 148 F.3d 1311 (11th Cir. 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to his offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense

characteristics, and any cross-references); with *United States* v. *Clay,* 117 F.3d 317 (6th Cir.), cert. denied, 118 S. Ct. 395 (1997) (applying § 2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. 841 (but not convicted of any statute referenced to § 2D1.2) based on underlying facts indicating defendant involved a juvenile in drug sales); *United States* v. *Oppedahl,* 998 F.2d 584 (8th Cir. 1993) (applying § 2D1.2 to defendant convicted of conspiracy to distribute and possess with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of school); *United States* v. *Robles,* 814 F. Supp. 1249 (E.D. Pa), aff'd (unpub.), 8 F.3d 814 (3d Cir. 1993) (court looks to relevant conduct to determine appropriate guideline).

If the Commission were to choose to clarify that the enhanced penalties in § 2D1.2 only apply in circumstances in which the defendant is convicted of an offense referenced to that guideline in the Statutory Index (Appendix A), the Commission could amend the Introduction to the Statutory Index to make clear that, for every statute of conviction, courts must apply the offense guideline referenced for the statute of conviction listed in the Statutory Index (unless the case falls within the limited exception for stipulations set forth in § 1B1.2 (Applicable Guidelines)) and that courts may not decline to use the listed offense guideline in cases that could be considered atypical or outside the heartland. See *United States* v. *Smith*, 186 F.3d 290 (3d Cir. 1999) (determined that fraud guideline, § 2F1.1, was most appropriate guideline rather than the listed guideline of money laundering, § 2S1.1); *United States* v. *Brunson*, 882 F. 2d 151, 157 (5th Cir. 1989) (''It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an 'atypical' case.''); *United States* v. *Hemmington*, 157 F.3d 347 (5th Cir. 1998) (affirmed trial court's departure from the money laundering guidelines to the fraud guideline).

Alternatively, or in combination with this approach, the Commission could delete § 2D1.2 and add an enhancement to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) either (A) for the real offense conduct of making drug sales in protected locations or involving protected individuals; or (B) for a conviction for such conduct.

(C) Whether the fraud guideline enhancement for ''violation of any judicial or administrative order, injunction, decree, or process'' (§ 2F1.1(b)(4)(B)) applies to falsely completing bankruptcy schedules and forms. Compare *United States* v. *Saacks*, 131 F.3d 540 (5th Cir. 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of § 2F1.1(b)(3)(B)); *United States* v. *Michalek*, 54 F.3d 325 (7th Cir. 1995) (bankruptcy fraud is a ''special procedure''; it is a violation of a specific adjudicatory process); *United States* v. *Lloyd*, 947 F.2d 339 (8th Cir. 1991) (knowing concealment of assets in bankruptcy fraud violates ''judicial process''); *United States* v. *Welch*, 103 F.3d 906 (9th Cir. 1996) (same); *United States* v. *Messner,* 107 F.3d 1448 (10th Cir. 1997) (same); *United States* v. *Bellew*, 35 F.3d 518 (11th Cir. 1994) (knowing concealment of assets during bankruptcy proceedings qualifies as a violation of a ''judicial order''); with *United States* v. *Shadduck*, 112 F.3d 523 (1st Cir. 1997) (falsely filling out bankruptcy forms does not violate judicial process since the debtor is not accorded a position of trust).

See also *United States* v. *Carrozella*, 105 F. 3d 796 (2d Cir. 1997) (district court erred in enhancing the sentence for violation of judicial process where the defendant filed false accounts in probate court).

(D) Whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal. Compare *United States* v. *Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998) (post-conviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may consider it as a possible ground for downward departure at resentencing); *United States* v. *Core*, 125 F.3d 74, 75 (2d Cir.1997) (''We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.'') cert. denied, 118 S. Ct. 735 (1998); *United States* v. *Sally*, 116 F.3d 76, 80 (3d Cir. 1997) (holding that ''post-offense rehabilitations efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure.''); *United States* v. *Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999); *United States* v. *Green*, 152 F.3d 1202, 1207 (9th Cir. 1998) (same); *United States* v. *Brock*, 108 F.3d 31 (4th Cir. 1997) (recognizing extraordinary post-offense rehabilitation as a basis for a downward departure); with *United States* v. *Sims*, 174 F.3d 911 (8th Cir. 1999) (district court lacks authority at resentencing following an appeal to depart on ground of post-conviction rehabilitation which occurred after the original sentencing; refuses to extend holding regarding departures for post-offense rehabilitation to conduct that occurs in prison; departure based on post-conviction conduct infringes on statutory authority of the Bureau of Prisons to grant good-time credits.)

The Commission also invites comment on whether to distinguish between departures for post-offense rehabilitation (see §§ 3E1.1, comment. (n. 1(g) and 5K2.0) and post-sentence rehabilitation and, if so, what guidance the Commission should provide. It should be noted that a departure for post-sentencing rehabilitation is only available if there is a resentencing.

(E) Whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case. Compare *United States* v. *Figaro*, 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); *United States* v. *Kim*, 896 F.2d 678 (2d Cir. 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); *United States* v. *Baird*, 109 F.3d 856 (3d Cir.), cert. denied, 118 S. Ct. 243 (1997) (allowing upward departure based on dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct; cites *United States* v. *Watts*, 519 U.S. 148 (1997)); *United States* v. *Cross*, 121 F.3d 234 (6th Cir. 1997) (allowing upward departure based on dismissed conduct; citing *Watts*); *United States* v. *Ashburn*, 38 F.3d 803 (5th Cir. 1994) (allowing upward departure based on dismissed conduct); *United States* v. *Big Medicine*, 73 F.3d 994 (10th Cir. 1995) (allowing departure based on uncharged conduct) with *United States* v. *Ruffin*, 997 F.2d 343 (7th Cir. 1993) (error to depart based on counts dismissed as part of plea agreement); *United States* v. *Harris*, 70 F.3d 1001 (8th Cir. 1995) (same); *United States* v. *Lawton*, 193 F.3d 1087 (9th Cir. 1999) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing).

The Commission also invites comment on whether the Commission should provide more guidance about what conduct can or cannot be considered for departure under the guidelines. More specifically, the Commission invites comment on whether to provide that departures are only permissible for conduct detailed in § 1B1.3(a)(1), (2), and (3). The implication of such a provision would

be that, most significantly, departures would be permissible only with respect to conduct that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, that is not accounted for in a guideline enhancement. Departures would be prohibited for other conduct, such as dismissed or uncharged bank robberies that are not included in relevant conduct because they are not the subject of an offense of conviction.

Proposed Amendment: Technical Amendments Package

(6) *Synopsis of Proposed Amendment*—This proposed amendment makes technical and conforming changes to various guidelines as follows:

(A) It corrects a typographical error in the counterfeiting guideline, § 2B5.1, by inserting a missing word in subsection (b)(2).

(B) It corrects a typographical error in the Chemical Quantity Table at § 2D1.11 regarding certain quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms.

(C) It corrects an omission that was made during the prior Commission's final deliberations on amendments to implement the Comprehensive Methamphetamine Control Act of 1996 (the ''Act''), Pub. L. 104–237. Specifically, the proposal amends §§ 2D1.11 (Listed Chemicals) and 2D1.12 (Prohibited Equipment) to add an enhancement for environmental damage associated with methamphetamine offenses. The prior Commission intended to amend these guidelines in this manner, but due to a technical oversight, the final amendment did not implement that intent.

The Act directed the Commission to determine whether the guidelines adequately punish environmental violations occurring in connection with precursor chemical offenses under 21 U.S.C. 841(d) and (g) (sentenced under § 2D1.11), and manufacturing equipment offenses under 21 U.S.C. 843(a)(6) and (7) (sentenced under § 2D1.12). On February 25, 1997, the Commission published two options to provide an increase for environmental damage associated with the manufacture of methamphetamine, the first by a specific offense characteristic, the second by an invited upward departure. See 62 FR 8487 (Feb. 25, 1997). Both options proposed to make amendments to §§ 2D1.11, 2D1.12, and 2D1.13. Additionally, although the directive did not address manufacturing offenses under 21 U.S.C. 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. 994(a) to ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly. Accordingly, the published options also included amendments to § 2D1.1.

The published options were revised prior to final action by the Commission. However, in the revision that was presented to the Commission for promulgation in late April 1997, amendments to §§ 2D1.11 and 2D1.12 were mistakenly omitted from the option to provide a specific offense characteristic, although that revision did refer to §§ 2D1.11 and 2D1.12 in the synopsis as well as included amendments to these guidelines in the upward departure option. (The revision did not include any amendments to guideline § 2D1.13, covering record-keeping offenses, because, upon further examination, it seemed unlikely that offenses sentenced under this guideline would involve environmental damage.) Accordingly, when the commissioners voted to adopt the option providing the specific offense characteristic for §§ 2D1.1, 2D1.11, and 2D1.12, their vote effectively was limited to what was before them, i.e., an environmental damage enhancement for § 2D1.1 only. This amendment corrects that error.

(D) It updates the Statutory Provisions of the firearms guideline, § 2K2.1, to conform to statutory re-designations made to 18 U.S.C. 924 (and already conformed in Appendix A (Statutory Index)).

(E) It updates the guidelines for conditions of probation, § 5B1.3, and supervised release, § 5D1.3. Effective one year after November 26, 1997, 18 U.S.C. 3563(a) and 3583(a) were amended to add a new mandatory condition of probation requiring a person convicted of a sexual offense described in 18 U.S.C. 4042(c)(4) (enumerating several sex offenses) to report to the probation officer the person's address and any subsequent change of address, and to register as a sex offender in the state in which the person resides. See section 115 of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Pub. L. 105–119). Because the effective date of this change was later than the effective date of the last Guidelines Manual (November 1, 1998), the Commission did not amend the relevant guidelines, § 5B1.3 (Conditions of Probation) and § 5D1.3 (Conditions of Supervised Release) to reflect the new condition. However, the Commission did provide a footnote in each guideline setting forth the new condition and alerting the user as to the date on which the condition became effective. This proposal amends §§ 5B1.3 and 5D1.3 to include the sex offender condition as a specific mandatory condition in both guidelines rather than in a footnote.

Proposed Amendment

Section 2B5.1(b)(2) is amended by inserting ''level'' following ''increase to''.

Section 2D1.11(d) is amended in subdivision (9) by striking ''At least 1.44 G but less than 1.92 KG of Isosafrole;'' and inserting ''At least 1.44 KG but less than 1.92 KG of Isosafrole;''; and by striking ''At least 1.44 G but less than 1.92 KG of Safrole;'' and inserting ''At least 1.44 KG but less than 1.92 KG of Safrole;''.

Section 2D1.11(d) is amended in subdivision (10) by striking ''Less than 1.44 G'' before ''of Isosafrole;'' and inserting ''Less than 1.44 KG''; and by striking ''Less than 1.44 G'' before ''of Safrole;'' and inserting ''Less than 1.44 KG''.

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

''(3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.''.

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

''8. Under subsection (b)(3), the enhancement applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1

(Restitution) and in fashioning appropriate conditions of supervision under § 5B1.3 (Conditions of Probation) and § 5D1.3 (Conditions of Supervised Release).''.

Section 2D1.12(b) is amended by adding at the end the following:

''(2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.''.

The Commentary to 2D1.12 captioned ''Application Notes'' is amended by adding at the end the following:

''3. Under subsection (b)(2), the enhancement applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under § 5B1.3 (Conditions of Probation) and § 5D1.3 (Conditions of Supervised Release).''.

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by striking ''(e), (f), (g), (h), (j)–(n)'' and inserting ''(e)–(i), (k)–(o)''.

Section 5B1.3(a) is amended by striking the asterisk after ''Conditions''; in subdivision (8) by striking the period after ''§ 3563(a))'' and inserting a semi-colon; and by adding at the end the following:

''(9) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.'';

and by striking the note at the end of the § 5B1.3 in its entirety as follows:

***Note:** Effective one year after November 26, 1997, section 3563(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of probation:

(9) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.''.

Section 5D1.3(a) is amended by striking the asterisk after ''Conditions''; in subdivision (6) by striking the period after ''§ 3013'' and inserting a semi-colon; and by adding at the end the following:

''(7) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.'';

and by striking the note at the end of § 5D1.3 in its entirety as follows:

***Note:** Effective one year after November 26, 1997, section 3583(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of supervised release:

(7) a defendant convicted of a sexual offense as described in 18 U.S.C. 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.''.

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DEPARTMENT OF STATE

[Public Notice 3215]

Advisory Committee on International Communications and Information Policy; Meeting Notice

The Department of State is announcing the next meeting of its Advisory Committee on International Communications and Information Policy. The Committee provides a formal channel for regular consultation and coordination on major economic, social and legal issues and problems in international communications and information policy, especially as these issues and problems involve users of information and communication services, providers of such services, technology research and development, foreign industrial and regulatory policy, the activities of international organizations with regard to communications and information, and developing country interests.

The guest speaker at the meeting will be The Honorable Gregory Rohde, Assistant Secretary and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce. Mr. Rohde will discuss priorities for his agency in the area of telecommunications policy.

This meeting will be held on Wednesday, March 8, 2000, from 9:30 a.m.–12:30 p.m., in Room 1107 of the Main Building of the U.S. Department of State, located at 2201 ''C'' Street, N.W., Washington, D.C. 20520. (Please note that this meeting is being held in place of the January 20 meeting which had been postponed due to inclement weather.) Members of the public may attend these meetings up to the seating capacity of the room. While the meeting is open to the public, admittance to the State Department Building is only by means of a pre-arranged clearance list. In order to be placed on the pre-clearance list, please provide your name, title, company, social security number, date of birth, and citizenship to Timothy C. Finton at <fintontc @state.gov>. All attendees for this meeting must use the 23rd Street entrance. One of the following valid ID's will be required for admittance: any U.S. driver's license with photo, a passport, or a U.S. Government agency ID. Non-U.S. Government attendees must be escorted by State Department personnel at all times when in the StateDepartment building.

For further information, contact Timothy C. Finton, Executive Secretary of the Committee, at (202) 647–5385 or <fintontc @state.gov>.

Dated: February 4, 2000.

Timothy C. Finton,

Executive Secretary.

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