UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. Additionally, issues for comment follow proposed amendments 1, 2, and 4.

The specific amendments proposed in this notice are summarized as follows: (1) Proposed amendment to provide a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks; (2) proposed amendment to change statutory references in Appendix A (Statutory Index) to the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1 through 78dd–3, from § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); (3) proposed amendment to provide special rules in § 4B1.1 (Career Offender) for determining and imposing a guideline sentence in the case of a defendant who is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a career offender under §§ 4B1.1 and 4B1.2 (Definitions of Terms Used in Section 4B1.1); (4) proposed amendment to expand the persons who may qualify as an official victim for purposes of the enhancement in § 3A1.2 (Official Victim); (5) proposed amendment to (A) eliminate the additional one-level reduction in § 3E1.1(b)(1) that applies if the defendant timely provides complete information to the government concerning the defendant's own involvement in the offense; and (B) resolve a circuit conflict regarding whether the court may deny a reduction for acceptance of responsibility under § 3E1.1 if the defendant commits a new offense unrelated to the offense of conviction; and (6) proposed amendment to make technical and conforming amendments to various guideline provisions.

DATES: Written public comment should be received by the Commission not later than February 4, 2002.

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

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590.

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

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

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

Diana E. Murphy,

Chair.

1. Synopsis of Proposed Amendment

This amendment proposes to add to Chapter Two, Part B, a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. The proposal was developed in response to concerns raised by the Departments of Justice and the Interior, among others, that the guidelines inadequately address such offenses.

Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect these intrinsic differences.

The effect of cultural heritage resource crimes transcends monetary considerations. Individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects. For much of this cultural heritage in the United States, the federal government has a perpetual duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations. The current guidelines, however, do not specifically address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Therefore, a separate guideline amendment is proposed that takes into account the transcendent and irreplaceable, *e.g.*, the non-pecuniary value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural heritage resource crimes.

First, the amendment proposes a base offense level of level 8, which is two levels higher than the base offense level for general property destruction. The higher base offense level represents the intangible and non-pecuniary harm caused by the theft of, damage to, or destruction of, essentially irreplaceable cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the loss table at § 2B1.1, that assesses the monetary value of the damage caused. Use of the standard economic crime concept of ''loss'' is not used, however, because it implies a fungible and compensatory system of value which is inappropriate for measuring the harm caused by cultural heritage resources offenses. Instead, the calculation is based on either commercial value or archaeological value, as appropriate to the particular resource, which may be

necessary to preserve or otherwise care for the resource, together with the cost of restoration and repair of the resource. These values already exist in federal law and are codified in federal regulations.

Third, the amendment proposes a two-level enhancement if the offense involved commercial advantage or private financial gain, in order to distinguish between offenders who are motivated by financial gain or commercial purposes from offenders who merely are motivated by their interest in the past and personal desire to possess cultural heritage resources, and is consistent with similar provisions elsewhere in the guidelines. See, *e.g.*, §§ 2Q2.1(b)(1) and 2B5.3(b)(3). A two-level enhancement is also proposed if the offense involved a pattern of similar violations, which is defined as ''two or more civil or administrative adjudications for misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.''

Fourth, the amendment proposes two-level enhancements that increase the offense level if the offense involves specially protected resources from specially protected places. A two-level enhancement will attach if the offense involves a resource from one of seven locations particularly designated by Congress as dedicated solely to the preservation of the resource and further education of the public. An additional two-level increase attaches to four specific types of cultural heritage resources that have merited special treatment in federal law.

Fifth, the amendment proposes a two-level enhancement and a minimum offense level of level 14 if a firearm was possessed or a dangerous weapon (including a firearm) was brandished. This enhancement reflects the harm caused by the increased danger of violence and risk to law enforcement officers and innocent passers-by in vast expanses of land, and is consistent with similar provisions elsewhere in the guidelines. See, *e.g.*, § 2B1.1(b)(11)(B).

Sixth, an upward departure provision is proposed when the offense level substantially understates the seriousness of the offense. For example, if an upward departure may be warranted in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of other items such as administrative property. In such a case, the extent of the upward departure should not exceed the number of levels from the table in § 2B1.1 corresponding to the dollar amount of the non-cultural heritage resources.

Seventh, the proposed guideline for cultural heritage resources contains three issues for comment. The first issue requests comment on the extent of the proposed enhancement in subsection (b)(4)(B) regarding ''pattern of similar violations'' and the proposed definition in Application Note 5. The second issue requests comment on proposed Application Note 7 regarding the nature of a structured upward departure for cases involving offense conduct that damages or destroys both cultural heritage resources and non-cultural heritage resources, specifically, is it appropriate to use the applicable numbers of levels from the loss table or the loss commentary in § 2B1.1 for the determination of the non-cultural heritage resource harm caused. The second issue also requests comment on whether an upward departure should be provided if the value of the cultural heritage resource, as determined under proposed subsection (b)(1) and Application Note 2, underestimates its actual value. The third issue requests comment regarding whether the proposed guideline should include an enhancement for the use of explosives.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline.

Chapter Two, Part B, Subpart 1 is amended by adding at the end the following:

''§ 2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

(a) Base Offense Level: [8]

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resources (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource from, or located, prior to the offense, on or in (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by 2 levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) designated archeological or ethnological material; or (D) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

(4) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by 2 levels.

(5) If (A) a dangerous weapon (including a firearm) was brandished; or (B) a firearm was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541–546, 641, 661, 666, 668, 1152–1153, 1163, 1170, 1361, 2314–2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes

1. Meaning of 'Cultural Heritage Resource'—For purposes of this guideline, 'cultural heritage resource' means any of the following:

(A) A historic property, as defined in 16 U.S.C. § 470w(5).

(B) A historic resource, as defined in 16 U.S.C. § 470w(5).

(C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 CFR part 7, 36 CFR part 296, 32 CFR part 299, and 18 CFR part 1312).

(D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3)(see also 43 CFR 10.2(d)).

(E) A commemorative work. 'Commemorative work' (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.

(F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a).

2. Value of the Cultural Heritage Resources.—This note applies to the determination of the value of the cultural heritage resources for purposes of subsection (b)(1).

(A) In General.—Except as provided in subdivision (B), the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair.

(B) Archaeological Resources.—The value of an archaeological resource is (i) the greater of its commercial value or its archaeological value; and (ii) the cost of restoration and repair.

(C) Definitions.—For purposes of this application note:

(i) 'Archaeological value' of an archaeological resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense,

including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports as would be necessary to realize the information potential. (See 43 CFR § 7.14(a); 36 CFR § 296.14(a); 32 CFR § 229.14(a); 18 CFR § 1312.14(a).)

(ii) 'Commercial value' of a cultural heritage resource, including an archeological resource, means the fair market value of the cultural heritage resource. In the case of a cultural heritage resource that has been damaged as a result of the offense, the fair market value shall be determined using the condition of the cultural heritage resource prior to commission of the offense, if the prior condition can be determined. (See 43 CFR § 7.14(b); 36 CFR § 296.14(b); 32 CFR § 229.14(b); 18 CFR § 1312.14(b).)

(iii) 'Cost of restoration and repair' includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 CFR § 7.14(c); 36 CFR § 296.14(c); 32 CFR § 229.14(c); 18 CFR § 1312.14(c).)

(D) Determination of Value in Cases Involving A Variety of Cultural Heritage Resources.—In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this note.

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

(A) 'Museum' has the meaning given that term in 18 U.S.C. § 668(1).

(B) ''National cemetery'' has the meaning given that term in Application Note 1 of § 2B1.1 (Theft, Property Destruction, and Fraud).

(C) 'National Historic Landmark' has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).

(D) 'National marine sanctuary' means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.

(E) 'National monument or national memorial' means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).

(F) 'National park system' has the meaning given that term in 16 U.S.C. § 1c(a).

(G) 'World Heritage List' means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):

(A) 'Designated archaeological or ethnological material' has the meaning given that term in 19 U.S.C. § 2601(7).

(B) 'Funerary object' means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

(C) 'Human remains' (A) means the physical remains of the body of a human; and (B) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(D) 'Pre-Columbian monumental or architectural sculpture or mural' has the meaning given that term in 19 U.S.C. § 2095(3).

5. Enhancements in Subsection (b)(4).—

(A) Pecuniary Gain.—For purposes of subsection (b)(4)(A), 'for pecuniary gain' means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) Pattern of Similar Violations.—For purposes of subsection (b)(4)(B), 'pattern of similar violations' means two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.

6. Dangerous Weapons Enhancement.—For purposes of subsection (b)(6), 'brandished', 'dangerous weapon', and 'firearm' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

7. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if, in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources). In such a case, the extent of the upward departure should not exceed the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the dollar amount involved in the theft of, damage to, or destruction of, the items that are not cultural heritage items.

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

''(4) If the offense involved a cultural heritage resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).''.

The Commentary to § 2B1.1 captioned 'Application Notes' is amended by redesignating Notes 12 through 15 as Notes 13 through 16; and by inserting after Note 11 the following:

''12. Cross Reference in Subsection (c)(4).—For purposes of subsection (c)(4) 'cultural heritage resource' has the meaning given that term in Application Note 1 of § 2B1.5 (Theft of, Damage to, or Destructive of, Cultural Heritage Resources).''.

Section 2Q2.1 is amended by adding after subsection (b) the following:

''(c) Cross Reference

(1) If the offense involved a cultural heritage resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).''.

The Commentary to § 2Q2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''6. For purposes of subsection (c)(1), 'cultural heritage resource' has the meaning given that term in Application Note 1 of § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).''.

Section 3D1.2 is amended in subsection (d) by inserting ''2B1.5,'' after ''2B1.4,''.

Appendix A (Statutory Index) is amended by striking the line referenced to ''16 U.S.C. § 433'' and inserting the following new line:

''16 U.S.C. § 470ee 2B1.5'';

in the line referenced to 16 U.S.C. § 668(a) by inserting ''2B1.5,'' before ''2Q2.1'';

in the line referenced to 16 U.S.C. § 707(b) by inserting ''2B1.5,'' before ''2Q2.1'';
in the line referenced to 18 U.S.C. § 541 by inserting ''2B1.5,'' before ''2T3.1'';
in the line referenced to 18 U.S.C. § 542 by inserting ''2B1.5,'' before ''2T3.1'';
in the line referenced to 18 U.S.C. § 543 by inserting ''2B1.5,'' before ''2T3.1'';
in the line referenced to 18 U.S.C. § 544 by inserting ''2B1.5,'' before ''2T3.1'';
in the line referenced to 18 U.S.C. § 545 by inserting ''2B1.5,'' before ''2Q2.1'';
by inserting after the line referenced to ''18 U.S.C. § 545'' the following new line:
''18 U.S.C. § 546 2B1.5'';
in the line referenced to 18 U.S.C. § 641 by inserting '', 2B1.5'' after ''2B1.1'';
in the line referenced to 18 U.S.C. § 661 by inserting '', 2B1.5'' after ''2B1.1'';
in the line referenced to 18 U.S.C. § 662 by inserting '', 2B1.5'' after ''2B1.1'';
in the line referenced to 18 U.S.C. § 666(a)(1)(A) by inserting '', 2B1.5'' after ''2B1.1'';
in the line referenced to 18 U.S.C. § 668 by striking ''2B1.1'' and inserting ''2B1.5'';
by inserting after the line referenced to ''18 U.S.C. § 1121'' the following new line:
''18 U.S.C. § 1152 2B1.5'';
in the line referenced to ''18 U.S.C. § 1153'' by inserting ''2B1.5,'' after ''2B1.1'';
in the line referenced to ''18 U.S.C. § 1163'' by inserting '', 2B1.5'' after ''2B1.1'';
by inserting after the line referenced to ''18 U.S.C. § 1168'' the following new line:
''18 U.S.C. § 1170 2B1.5'';
in the line referenced to ''18 U.S.C. § 1361'' by inserting '', 2B1.5'' after ''2B1.1'';
in the line referenced to 18 U.S.C. § 2232 by inserting '' 2B1.5,'' before ''2J1.2'';
in the line referenced to 18 U.S.C. § 2314 by inserting '', 2B1.5'' after ''2B1.1''; and
in the line referenced to 18 U.S.C. § 2315 by inserting '', 2B1.5'' after ''2B1.1''.

Issues for Comment: (1) The proposed amendment provides an enhancement in subsection (b)(4)(B) for a ''pattern of similar violations'', which proposed Application Note 5 defines as ''two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit''. The Commission requests comment on the extent of this enhancement. For example, in addition to civil or administrative adjudications, should the enhancement cover prior convictions for similar misconduct as well? Should the enhancement cover similar misconduct for which there has not been a civil or administrative adjudicate?

(2) Proposed Application Note 7 provides, as an example of an upward departure that might be warranted, a structured upward departure for cases in which the offense also involved theft of, damage to, or destruction of, items that are not cultural heritage items. Instead of a structured upward departure, should the Commission provide an enhancement if the offense involved theft of, damage to, or destruction of, items that are not cultural heritage items? If so, should the extent of the enhancement correspond to the applicable number of levels from the loss table in § 2B1.1 (Theft, Property Destruction, and Fraud), and should the loss commentary from § 2B1.1 be used to determine the dollar amount of the theft, damage, or destruction? Generally, should proposed Application Note 7 provide an upward departure if the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, underestimates its actual value?

(3) Should the proposed amendment include an enhancement if the offense involved the use of destructive devices?

2. Synopsis of Proposed Amendment

This amendment changes the Statutory Index reference for violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1 through 78dd–3, from § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). This change is proposed because many such violations involve public corruption of foreign officials and therefore are more like public corruption cases than commercial bribery cases. In addition, such a change arguably would better implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires the United States, as a signatory, to impose comparable sentences for foreign bribery cases as for domestic bribery cases.

Although this proposal references all offenses under the Foreign Corrupt Practice Act to § 2C1.1, an issue for comment is included regarding whether some of the offenses under that Act should continue to be referenced to § 2B4.1. Although offenses under 15 U.S.C. §§ 78dd–1(a)(1), 78dd–2(a)(1), and 78dd–3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd–1(a)(2), 78dd–2(a)(2), and 78dd–3(a)(2)). Other offenses involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd–1(a)(3), 78dd–2(a)(3), and 78dd–3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates currently are referenced to § 2B4.1. Section 2B4.1 may continue to be the appropriate guideline for offenses which do not directly involve a foreign governmental official.

The Commentary to § 2B4.1 captioned ''Statutory Provisions'' is amended by striking ''15 U.S.C. §§ 78dd–1, 78dd–2;''.

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended in Note 1 by inserting '', foreign governments, or public international organizations'' after ''local government''; and by striking ''governmental'' and inserting ''any such''.

The Commentary to § 2B4.1 captioned ''Background'' is amended in the sixth paragraph by striking ''to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1 and 78dd–2, and''.

The Commentary to § 2C1.1 captioned ''Statutory Provisions'' is amended by inserting ''15 U.S.C. §§ 78dd–1, 78dd–2, 78dd–3;'' before ''18 U.S.C. §§ 201''.

Appendix A (Statutory Index) is amended in the line referenced to ''15 U.S.C. § 78dd–1'' by striking ''2B4.1'' and inserting ''2C1.1'';
in the line referenced to ''15 U.S.C. § 78dd–2'' by striking ''2B4.1'' and inserting ''2C1.1;
by inserting after the line referenced to ''15 U.S.C. § 78dd–2'' the following new line:
''15 U.S.C. § 78dd–3 2C1.1'';
and in the line referenced to ''15 U.S.C. § 78ff'' by striking ''2B4.1'' and inserting ''2C1.1''.

Issue for Comment: Although this proposed amendment references all offenses under the Foreign Corrupt Practice Act to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), the Commission requests comment regarding whether some of the offenses under that Act should continue to be referenced to § 2B4.1. Although offenses under 15 U.S.C. §§ 78dd–1(a)(1), 78dd–2(a)(1), and 78dd–3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd–1(a)(2), 78dd–2(a)(2), and 78dd–3(a)(2)). Other offenses

involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd–1(a)(3), 78dd–2(a)(3), and 78dd–3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates under 26 U.S.C. §§ 9012(e) and 9042(d) currently are referenced to § 2B4.1. Is § 2B4.1 the appropriate guideline for offenses which do not directly involve a foreign governmental official? Alternatively, should offenses under 26 U.S.C. §§ 9012(e) and 9042(d) be referenced to § 2C1.1 instead of § 2B4.1, inasmuch as those offenses are more akin to public bribery than to commercial bribery?

3. Synopsis of Proposed Amendment

This proposed amendment provides special rules in § 4B1.1 for determining and imposing a guideline sentence when the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a Career Offender under § 4B1.1 and § 4B1.2. The amendment reverses the decision made by the Commission in Amendment 600 (effective November 1, 2000), that such offenses do not qualify as a crime of violence or controlled substance offense for Career Offender purposes, except as a prior conviction. Some have expressed doubt about whether that decision complies with the statutory command in 28 U.S.C. § 994(h), as construed by the United States Supreme Court in *United States v. Labonte*, 520 U.S. 751 (1997).

Operationally, this amendment achieves the goals of (1) permitting such offenses, whether as the instant or prior offense of conviction, to qualify for Career Offender purposes, and (2) ensuring that, when such an instant offense establishes the defendant as a Career Offender, the resulting guideline sentence is determined under § 4B1.1 using a count of conviction that has a statutory maximum of life imprisonment. The resulting consecutive sentence to be imposed on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count is at least the minimum required by statute, and may be longer to the extent necessary to achieve the total Career Offender punishment. This amendment does not change the current guideline rules forbidding application of guideline weapon enhancements when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense. Furthermore, under this amendment, when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a Career Offender, the current guideline rules for sentencing on that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count continue to apply. Accordingly, under § 2K2.4, the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapters Three or Four apply to adjust the guideline sentence for that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count.

However, under this amendment, when the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count establishes the defendant as a Career Offender, which the court will determine under §§ 4B1.1 and 4B1.2, new special rules/instructions will apply. To determine the guideline sentence on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count, the court moves directly from § 2K2.4 to § 4B1.1 and applies the new Special Instruction therein, including the instructions regarding multiple counts of conviction.

Section 2K2.4 is amended by redesignating subsection (b) as subsection (d); by striking subsection (a) and inserting the following:

''(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (i) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(Career Offender), the guideline sentence shall be determined under § 4B1.1(c). Except for §§ 3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by striking the text of Note 1 and inserting the following:

''(A) Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute. Section 844(h) of title 18, United States Code, also requires a term of imprisonment imposed under that section to run consecutively to any other term of imprisonment.

(B) Application of Subsection (b).—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.,* not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under this section shall run consecutively to any other term of imprisonment.

In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a Career Offender under § 4B1.1. See Application Note 3.

(C) Application of Subsection (c).—In a case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(Career Offender), the guideline sentence shall be determined under § 4B1.1(c). The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under § 4B1.1(c).''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 2 in the first sentence of the first paragraph by inserting ''Weapon Enhancement—'' before ''If a sentence''; and by striking the third paragraph (beginning ''In a few cases,'') in its entirety.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting the following:

''Chapters Three and Four.—Except for those cases covered by subsection (c), 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 guideline sentence for each offense is determined only by the relevant statute. See §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction). For those cases covered by subsection (c), the adjustment in § 3E1.1 (Acceptance of Responsibility) may apply, as provided in § 4B1.1(c). No other adjustments in Chapter Three and no provisions of Chapter Four (Criminal History and Criminal Livelihood), other than §§ 4B1.1 and 4B1.2, shall apply in determining the guideline sentence on a conviction under 18 U.S.C. § 924(c) or § 929(a).''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 4 by inserting ''Terms of Supervised Release.—'' before ''Imposition''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 5 by inserting ''Fines.—'' before ''Subsection (b)''.

Section 4B1.1 is amended by striking ''A defendant is a career offender'' and all that follows through ''corresponding to that adjustment.'' and inserting the following:

''(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense statutory maximum	Offense level *
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant (1) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under subsection (a):

(A) The offense level shall be—

(i) in the case of a conviction only of an offense under 18 U.S.C. § 924(c) or § 929(a): level 37, decreased by the number of levels corresponding to any adjustment under § 3E1.1 (Acceptance of Responsibility) that applies; or

(ii) in the case of multiple counts of conviction: the greater of (I) the offense level applicable to the counts of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count, or (II) level 37, decreased by the number of levels corresponding to any adjustment under § 3E1.1 that applies.

(B) The criminal history category shall be Category VI.

(C) The amount of the mandatory term of imprisonment that is imposed to run consecutively shall be determined as follows:

(i) A consecutive sentence of imprisonment shall be imposed on any count of conviction under 18 U.S.C. § 924(c) or § 929(a). The length of such consecutive sentence shall be at least the minimum term required by law.

(ii) After taking into account the required statutory minimum consecutive sentence under subdivision (i), the balance of the total punishment shall be allocated and imposed, to the extent possible, on the counts of conviction, other than 18 U.S.C. §§ 924(c) and 929(a), in accordance with the rules in § 5G1.2 (Sentencing on Multiple Counts of Conviction), as applicable.

(iii) If the statutory minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) together with the sentence imposed on the remaining counts is less than the total punishment, then the minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) shall be increased to the extent necessary to achieve the total punishment.''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended by striking in the first paragraph of Note 1 ''For purposes of this guideline—'' and inserting ''Definitions.—For purposes of this guideline:''; and by striking ''A prior conviction for violating'' and all that follows through ''Criminal History)).'' and inserting the following:

''A violation of 18 U.S.C. § 924(c) or § 929(a) is a ''crime of violence'' or a ''controlled substance offense'' if the offense of conviction established that the underlying offense was a ''crime of violence'' or a ''controlled substance offense''. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior 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 striking the text of Note 2 in its entirety and inserting the following:

''Application of § 4B1.1(c).—

(A) In General.—Section 4B1.1(c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(a).

(B) Imposition of Consecutive Term of Imprisonment.—The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under § 4B1.1(c). The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) must, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. In the case of a career offender to whom § 4B1.1(c) applies, typically the court will determine the applicable statutory minimum sentence, subtract that minimum from the total punishment determined for all counts considered together, impose that minimum consecutive sentence on the 18 U.S.C. § 924(c) or § 929(a) count, and then impose the balance of the total punishment on the other counts in accordance with the rules provided in § 5G1.2 (Sentencing on Multiple Counts of Convictions). In some cases covered by § 4B1.1(c), a consecutive term of imprisonment longer than the minimum required by the 18 U.S.C. § 924(c) or § 929(a) statute will be necessary in order both to achieve the required total punishment determined by the court and also comply with the applicable statutory requirements. Note that a

consecutive sentence longer than the statutory minimum under 18 U.S.C. § 924(c) or § 929(a) will be necessary when the total guideline punishment determined by the court exceeds the aggregate statutory maximum term(s) of imprisonment on any counts other than 18 U.S.C. §§ 924(c) and 929(a) by more than the aggregate statutory minimum terms on the 18 U.S.C. §§ 924(c) and 929(a) counts.

(C) Examples.—The following examples illustrate the application of § 4B1.1(c) in a variety of multiple count situations in which the 18 U.S.C. § 924(c) count establishes the defendant as Career Offender:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking crime (15 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum of 20 years applies). Applying § 4B1.1(c), the court determines a combined offense level of 34 (assuming a 3-level reduction under § 3E1.1), and determines that a total punishment of 300 months is appropriate. The court then imposes a minimum sentence of 60 months, as statutorily required under 18 U.S.C. § 924(c), and also as required by 18 U.S.C. § 924(c), imposes that sentence to run consecutively to a sentence of 240 months (300 − 60 = 240) imposed on the 21 U.S.C. § 841 count. Alternatively, had the court determined that a sentence of 327 months (top of the guideline range) was appropriate, it necessarily would have increased the consecutive sentence on the 18 U.S.C. § 924(c) count to 87 months.

(ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (firearm possession in furtherance of drug trafficking), one count of drug trafficking under 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum sentence of 30 years applies), and one count of violating 21 U.S.C. § 843(b) (statutory maximum of 4 years). Applying § 4B1.1(c), the court determines a combined offense level of 36 and selects a total punishment of 324 months. Sentence is imposed as follows: (I) a minimum sentence of 60 months on the 18 U.S.C. § 924(c) count imposed to run consecutively to all other counts; (II) a sentence of 264 months on the 21 U.S.C. § 841 count (324 − 60 = 264 months balance of total punishment to be allocated and imposed on the non-924(c) counts); and (III) a sentence of 48 months on the 21 U.S.C. § 843(b) count, imposed to run concurrently with the 21 U.S.C. § 841 count. Alternatively, if the court had determined that a sentence of 405 months (top of the guideline range) was appropriate, the sentence on the 21 U.S.C. § 841 count would have been increased to 345 months (405 − 60 = 345).

(iii)The defendant is convicted of two counts of 18 U.S.C. § 924(c) (for possessing a firearm in two separate drug trafficking offenses), and one count of conspiracy under 21 U.S.C. § 846 (assume a statutory maximum of life and minimum of ten years is applied). The court determines, under § 4B1.1(c), that the combined offense level is 42 and that a total punishment of 480 months is appropriate. As required by statute, a minimum consecutive sentence of 60 months is imposed on the first 18 U.S.C. § 924(c) count, and a minimum consecutive sentence of 300 months is imposed on the second 18 U.S.C. § 924(c) count. The balance of the total punishment, 120 months (480 − (60 + 300) = 120), is imposed on the 21 U.S.C. § 846 count.''.

Section 5G1.2(a) is amended by inserting a comma after ''other term of imprisonment''; and by inserting '', except as provided in § 4B1.1 (Career Offender)'' after ''independently''.

The Commentary to § 5G1.2 is amended by striking the first paragraph and inserting the following:

''Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences (''total punishment'') is determined by the court after determining the adjusted combined offense level and the Criminal History Category. Except as otherwise required by law or by § 4B1.1(c), the total punishment is to be imposed on each count, and the sentences on all counts are imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.''; and by striking the last paragraph and inserting the following:

''2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Special Instruction).—Subsection (a) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, *e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment). Except for certain Career Offender situations in which subsection (c) of § 4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction, and is independent of the guideline sentence on any other count. See, *e.g.,* Commentary to §§ 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, *e.g.,* Application Note 3 of the Commentary to § 2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.''.

4. Synopsis of Proposed Amendment

This amendment proposes to expand the persons who may qualify as an official victim for purposes of the enhancement in § 3A1.2 (Official Victim). Specifically, this proposed amendment responds to *United States* v. *Walker,* 202 F.3d 181 (3d Cir. 1999), which held that the enhancement under § 3A1.2(b) was not applicable in the case of a defendant prison inmate who attacked his supervisor, a food service department employee at the prison. *Walker* held that the work supervisor was not a corrections officer within the meaning of § 3A1.2. The proposed amendment amends § 3A1.2(b) to apply to assaults of any prison employee or other person retained or designated by the prison to perform duties within the prison. The amendment also limits application of the enhancement, in the case of assaults on corrections officers and prison employees, to offenses that occurred while the defendant was in the custody or control of the correctional facility or prison.

A general request for comment follows regarding the appropriate scope of coverage under the enhancement (*i.e.,* who should be considered an official victim for purposes of proposed subsection (b)(2)).

Section 3A1.2 is amended by striking the text of subsection (b) and inserting the following:

''during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise

accountable, knowing or having reasonable cause to believe that a person was—

(1) a law enforcement officer, or

(2) a corrections officer or prison employee, in the case of an offense that occurred while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

assaulted such officer or employee in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels.''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended by striking the text of Note 5 and inserting the following:

''Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement officer, corrections officer, or prison employee, committed in the course of, or in immediate flight following, another offense. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims (such as a bank robbery), its applicability is limited to assaultive conduct against law enforcement officers, corrections officers, or prison employees that is sufficiently serious to create at least a ''substantial risk of serious bodily injury'' and that is proximate in time to the commission of the offense.

''Prison employee'', for purposes of subsection (b)(2), includes any individual retained or designated by a prison or other correctional facility to perform any duty or function within the prison or other correctional facility, regardless of whether the individual is compensated for the performance of the duty or function and whether the individual technically is an employee of the prison or other correctional facility. For example, the term ''prison employee'' includes an individual employed by the prison as a kitchen supervisor, as well as a nurse who, under contract, provides medical services to prisoners in the prison health facility.''.

Issue for Comment: The Commission requests comment on the appropriate scope of the enhancement provided in § 3A1.2(b)(2). Are there particular individuals or groups of individuals against whom assaults by the defendant in a correctional or prison setting should subject the defendant to enhanced punishment? For example, should the enhancement be expanded, further than that proposed in the amendment, to include individuals who assist law enforcement officers in the performance of official duties? Should the enhancement cover individuals who perform functions within a prison (as an employee, under contract, or otherwise) but who do not have regular contact with, or exercise any supervision of, prisoners (*e.g.,* an electrician under contract who repairs wiring in a building typically off-limits to prisoners)? Should the enhancement cover, for example, a minister or attorney who is assaulted while providing volunteer services to inmates?

5. Synopsis of Amendment

This proposal amends § 3E1.1 (Acceptance of Responsibility) by (1) deleting subsection (b)(1) which provides an additional one-level reduction if the defendant timely provides complete information to the government concerning his own involvement in the offense; and (2) resolving a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction.

Section 3E1.1(b) provides alternative reductions for either (1) timely providing complete information to the government concerning the defendant's own involvement in the offense; or (2) timely notifying authorities of the defendant's intention to enter a plea of guilty. Subsection (b)(2) specifically addresses the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. However, it has been argued that subsection (b)(1) undermines the incentive to plead guilty in subsection (b)(2), because the defendant can receive the reduction even if the defendant has caused the government and the court to devote substantial resources to preparing the case for trial. Under this proposal, a defendant who accepts responsibility for the offense would receive a two-level reduction under subsection (a), and an additional one-level reduction only if the defendant timely notifies authorities of his intent to plead guilty. This proposal is intended to save both judicial and governmental resources by providing defendants a stronger incentive to timely plead guilty.

This amendment also resolves a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. The majority of circuits have held that the sentencing court may consider new criminal conduct (*i.e.,* conduct occurring after the defendant has been charged for the instant offense), such as subsequent drug use or the commission of the new offense, when determining whether an adjustment for acceptance of responsibility is warranted. The Sixth Circuit, the sole minority circuit, has held that the court may not look at post-indictment conduct unrelated to the offense of conviction when assessing the defendant's acceptance of responsibility for the underlying offense (see United States v. Morrison, 983 F.2d 730 (6th Cir. 1993)). This amendment adopts the majority view by making clear that a defendant who commits another offense while pending trial or sentencing on the instant offense ordinarily is not entitled to a reduction under this guideline.

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

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

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

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

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

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

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

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended by striking the first sentence of Note 6 and inserting ''Application of Subsection (b).—''; and by striking ''has assisted authorities in the investigation or prosecution of his own misconduct by

taking one or both of the steps set forth in subsection (b)'' and inserting ''timely notified authorities of the defendant's intention to enter a guilty plea''.

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

6. Synopsis of Proposed Amendment

This proposed amendment makes technical and conforming changes to various guideline provisions. The proposed amendment accomplishes the following:

(1) Clarifies that language in § 5D1.2(c) (recommending the maximum term of supervised release for sex offenders) is a policy statement;

(2) Conforms the language in § 2B4.1(b)(2) concerning offenses that ''affect a financial institution'' with subsection (b)(12) of § 2B1.1 (Larceny, Embezzlement, and other forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit).

(3) Inserts a missing ''or'' in §§ 2C1.7(b)(1)(A) and 2Q1.6(a)(3).

(4) (A) Updates statutory references in §§ 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillory J. Farias and Samantha Reid Date Rape Prevention Act; and (B) corrects references to the new chemical quantity tables in § 2D1.11.

(5) Corrects a change to the commentary of § 2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package.

(6) Corrects a grammatical error in Note (D) of § 2T1.1(c)(1) by replacing ''subdivisions (A), (B), or (C)'' with ''subdivision (A), (B), or (C)''.

(7) Adds a mandatory condition to §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide DNA if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000. Pursuant to section 3 of this Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (*e.g.,* murder, kidnapping).

(8) Deletes from Application Note 5 of § 5E1.1 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.

(9) Inserts a missing ''Background'' title in § 5F1.7 (Shock Incarceration).

(10) Conforms Part A of Chapter Seven and § 7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the condition of intermittent confinement as a condition of supervised release.

(11) Updates statutory references in § 5F1.5 (Occupational Restrictions).

(12) Refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to § 2A1.1 (First Degree Murder) in Appendix A (Statutory Index).

(13) Repromulgates amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to § 4B1.4 (Armed Career Criminal) from amendment 568.

(14) Responds to new legislation as follows:

(A) Updates, in § 2B1.1, a statutory reference in the definition of ''means of identification'' to correspond to a redesignation made by the Internet False Identification Prevention Act of 2000, Pub. L. 106–578, Dec. 28, 2000, 114 Stat. 305.

(B) References in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106–569, Dec. 27, 2000, _ Stat. _. Section 5410(b) of title 42, which provides that knowing and willful violations of a state's installation program standards shall be punishable as a Class A misdemeanor, is referenced to § 2N2.1. Section 14905 of title 42, which provides a criminal penalty of a $250,000 fine and five years' imprisonment for equity skimming, is referenced to § 2B1.1.

(C) References 16 U.S.C. § 1437(c) to § 2A2.4 (Obstructing or Impeding Officers). Section 1437, as amended by the National Marine Sanctuaries Act of 2000, Pub. L. 106–513, Nov. 13, 2000, 114 Stat. 2387, prohibits the interference with the enforcement of conservation activities authorized in title 16, United States Code, including refusing to permit any officer authorized to enforce such title to board a vessel for purposes of conducting a search or inspection in connection with the enforcement of title 16. The Act provides a statutory maximum of six months, or if the offense involved the use of a dangerous weapon or resulted in bodily injury, a statutory maximum of 10 years. Section 1437(c) seems sufficiently similar to other offenses referenced to § 2A2.4 to warrant reference to this guideline.

(15) Proposes several changes to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the ''Act''), Pub. L. 106–386, pertaining to the new offense at 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion). Section 1591 prohibits knowingly transporting or harboring any person, or benefitting from such transporting or harboring, knowing either that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act, or that the person is not 18 years old and will be forced to engage in a commercial sex act.

In response to the Act, the Commission, in March 2001, passed an amendment that (A) referenced 18 U.S.C. § 1591 to §§ 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (B) provided an encouraged upward departure in § 2G1.1 to address cases in which (i) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (ii) the offense involved more than 10 victims. Staff had recommended additional changes to § 2G1.1 at that time but because adequate public notice regarding those changes had not been provided, staff recommended that the changes be made during this amendment cycle.

This amendment proposes three substantive changes to § 2G1.1. First, this amendment broadens the conduct covered by the guideline to all commercial sex acts. Currently, the conduct covered by the guideline is limited to prostitution. Second, this amendment expands the ''force or coercion'' prong of § 2G1.1(b)(1) to also cover offenses involving fraud. This change addresses the increased punishment provided by section 1591 for offenses effected by ''force, fraud, or coercion''. Third, after reviewing again the statute and the encouraged upward departure note that the Commission passed in March, staff recommends deleting the portion of the note

pertaining to the age of the victim because it encourages a departure for conduct arguably covered by the guideline in subsection (b)(2).

Section 5D1.2 is amended in subsection (c) by inserting ''(Policy Statement)'' before ''If the instant''.

Section 2B4.1 is amended by striking subsection (b)(2) in its entirety and inserting the following:

''(2) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.''

The Commentary to § 2B4.1 captioned ''Application Notes'' is amended by striking Notes 4 and 5 and inserting the following:

''4. Gross Receipts Enhancement under Subsection (b)(2)(A).—

(A) In General.—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

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

5. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.''.

Section 2C1.7 is amended in subsection (b)(1)(A) by striking the period at the end and inserting ''; or''.

Section 2Q1.6 is amended in subsection (a)(3) by inserting at the end ''or''.

The Commentary to § 2D1.9 captioned ''Statutory Provisions'' is amended by striking ''(e)'' after ''841'' and inserting ''(d)''.

Section 2D1.11(a) is amended by striking ''below'' and inserting ''or (e), as appropriate''.

Section 2D1.11 is amended in the Notes before the Commentary in Note (A) by striking ''of this guideline'' and inserting ''or (e) of this guideline, as appropriate''.

The Commentary to § 2D1.11 captioned ''Statutory Provisions'' is amended by striking ''(d)'' after ''841'' and inserting ''(c)''; and by striking ''(g)'' and inserting ''(f)''.

The Commentary to § 2D1.13 captioned ''Statutory Provisions'' is amended by striking ''(d)'' and inserting ''(c)''; and by striking ''(g)'' and inserting ''(f)''.

Appendix A (Statutory Index) is amended in the line referenced to ''21 U.S.C. § 841(d)(1),(2)'' by striking ''(d)'' and inserting ''(c)'';

In the line referenced to ''21 U.S.C. § 841(d)(3)'' by striking ''(d)'' and inserting ''(c)'';

In the line referenced to ''21 U.S.C. § 841(e)'' by striking ''(e)'' and inserting ''(d)''; and

In the line referenced to ''21 U.S.C. § 841(g)'' by striking ''(g)'' and inserting ''(f)''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''theft, property destruction, or''.

Section 2T1.1 is amended in the Notes following subsection (c)(1) in Note D by striking ''subdivisions'' and inserting ''subdivision''.

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

''(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).''.

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

''(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).''.

The Commentary to § 5E1.2 captioned ''Application Notes'' is amended in Note 5 by striking ''; and 42 U.S.C. § 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act''.

The Commentary to § 5F1.7 is amended by inserting before the first paragraph ''Background''.

Chapter Seven, Part A, is amended in the second paragraph of 2(b) captioned ''Supervised Release'' by striking ''intermittent confinement'' and inserting ''residency in, or participation in the program of, a community corrections facility*''; and by adding at the end the following:

''*Note: Section 3583(d) of title 18, United States Code, provides that '[t]he court may order, as a further condition of supervised release* * *any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.' Subsection (b)(11) of section 3563 is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at subsection (b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and re-designated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended in Note 5 by striking ''18 U.S.C. § 3563(b)(11). Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d).'' and inserting ''18 U.S.C. § 3563(b)(10)''.

***Note:** Section 3583(d) of title 18, United States Code, provides that'[t]he court may order, as a further condition of supervised release* * *any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.' Subsection (b)(11) of section 3563 is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at subsection (b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and re-

designated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.''.

The Commentary to § 5F1.5 captioned ''Background'' is amended in the first paragraph by striking ''(b)(6)'' and inserting ''(b)(5)'' each place it appears.

The Commentary to § 5F1.5 captioned ''Background'' is amended by striking the last paragraph in its entirety and inserting the following:

''The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. See 18 U.S.C. § 3742(a)(3). The government may appeal if the sentence includes a less limiting condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. § 2244'' the following:

''18 U.S.C. § 2245 2A1.1''.

Section 4B1.4(b)(3)(A) is amended to read as follows:

''(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(a) and (b), respectively, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or''.

Section 2B1.1 captioned ''Application Notes'' is amended in Note 7 by striking ''(d)(3)'' and inserting ''(d)(4)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''16 U.S.C. § 1417(a)(5),(6), (b)(2)'' the following:

''16 U.S.C. § 1437(c) 2A2.4'';

by inserting after the line referenced to ''42 U.S.C. § 5157(a)'' the following:

''42 U.S.C. § 5410(b) 2N2.1'';

and by inserting after the line referenced to ''42 U.S.C. § 9603(d)'' the following:

''42 U.S.C. § 149052 B1.1''.

Chapter Two, Part G, Subpart 1 is amended in the title by striking ''Prostitution'' and inserting ''A Commercial Sex Act''.

Section 2G1.1 is amended in the title by striking ''Prostitution'' and inserting ''A Commercial Sex Act''.

Section 2G1.1 is amended in the guideline, the Commentary captioned ''Application Notes'', and the Commentary captioned ''Background'' by striking ''prostitution'' each place it appears and inserting ''a commercial sex act''.

—Section 2G1.1(b)(1) is amended by striking ''by threats or drugs or in any manner''.

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

''Commercial sex act'' has the meaning given that term in 18 U.S.C. § 1591(c)(2).''

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in the first sentence of Note 2 by inserting ''fraud,'' after ''force,''; and by striking the comma after ''coercion''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 12 by striking ''in either of the following circumstances:'' and all that follows through ''more than 10 victims'' and inserting ''if the offense involved more than 10 victims''.

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