

SUMMARY OF THE STATEMENT OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Proposed Amendment 5 (sexual predators)

The defenders recommend deferring action on the pattern-of-activity and incest amendments and on the increase in the base offense levels in § 2A3.2 until after hearing at which Native American tribes, organizations, and individuals can testify.

Part A – If the Commission decides to proceed without hearings, the defenders prefer option 4, adding commentary language encouraging an upward departure. The defenders, however, recommend deletion of that part of option 4 that would amend § 5D1.2 to require the maximum term of supervised release if the defendant is convicted of a sex offense. The defenders believe that this part of option 4 unnecessarily restrict judicial discretion. In any event, the defenders recommend excluding acts of incest from a definition of pattern of activity. If the Commission adopts option 1, the defenders recommend a criminal history category of not less than IV (option 1A) and recommends that proposed § 4B1.5 have the same temporal limitations under § 4A1.2(e) that apply to the career offender guideline. The defenders oppose option 2 because proposed § 4B1.6 (1) would vitiate the requirement of proof beyond a reasonable doubt; (2) would be susceptible to prosecutorial manipulation (prosecutors could obtain a greater sentence by changing one count and using other allegations to seek the enhancement under proposed § 4B1.6, rather than charging all allegations); and (3) would result in disproportionate sentences among sexual offenders.

Part B – the defenders support option 1, which would call for the grouping of counts under § 3D1.2(d), because it will encourage greater uniformity in sentencing, discourage sentence manipulation by plea agreements, and promote judicial economy.

Part C – *Base offense level.* If the Commission decides to act on the base offense level without hearings, the defenders believe that the increase in the base offense levels last cycle are generally sufficient to comply with the congressional mandate, but they would support a new base offense level of 21 that would apply to an offense under 18 U.S.C. ch. 117 that involves a sexual act. A base offense level of 18 would apply to a violation of 18 U.S.C. ch. 117 that does not involve a sexual act, and a base offense level of 15 would apply in all other cases. *Incest enhancement.* The defenders oppose an incest enhancement because of the disparate impact on defendants who are Native Americans.

Proposed Amendment 6 (stalking and domestic violence)

The defenders oppose increasing the base offense level of § 2A6.2 because a higher base offense level would fail to maintain proportionality in sentencing with the more serious offense of aggravated assault, covered by § 2A2.2. An increase to level 16 or 18 as proposed would render a higher sentence, in some instances, than that which would apply to an aggravated

assault. The defenders recommend that, in the interests of proportionality, a 4-level reduction be added to § 2A6.2 that is similar to the reduction of § 2A6.1(b)(4), to address those cases in which the offense involves a single instance evincing little or no deliberation consistent.

Proposed Amendment 7 (repromulgation of amendment 608)

The defenders favor option 3. The defenders oppose options 1 and 2 because they call for double counting. The defenders believe that option 3 appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

Proposed Amendment 8 (mandatory restitution for amphetamine and methamphetamine offenses)

The defenders do not oppose the amendment.

Proposed Amendment 9 (safety valve)

The defenders support that part proposed amendment 9 that would amend § 2D1.1(b)(6) to delete the requirement of a minimum offense level of 26. The defenders oppose that part of amendment 9 that would amend § 5C1.2 to provide that a defendant who meets the safety valve criteria cannot have an offense level from chapters 2 and 3 of the *Guidelines Manual* that is less than level 17. The Commission, when it first promulgated § 5C1.2 as an emergency amendment, recognized that in some cases a defendant who meets the safety valve criteria could have an offense level lower than 17 under chapters 2 and 3. The imposition of a floor of 17 would result in unjustifiable disparity resulting from the prosecutor's charging decision – a defendant's offense level can depend upon whether the prosecutor decides to charge a mandatory-minimum offense or a nonmandatory-minimum offense.

Proposed Amendment 10 (anhydrous ammonia)

The defenders do not oppose referring the new offense, codified at 21 U.S.C. § 864, to § 2D1.12. The amendment's proposed two-level enhancement at § 2D1.1(b)(1) – which applies if the defendant intended to manufacture methamphetamine or had reason to believe the equipment would be so used – is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The defenders oppose an enhancement of more than two levels for anhydrous ammonia. As a methamphetamine-manufacturing offense also results in a two-level enhancement under subsection (b)(2) based on a hazardous discharge into the environment, amending (b)(1) to include anhydrous ammonia doubles the enhancement already applicable for the use of anhydrous ammonia. No additional increase is necessary. The defenders oppose adding a cross-reference § 2D1.1 because there is no reliable basis for converting a given quantity of anhydrous ammonia into a quantity of methamphetamine.

Proposed Amendment 11 (GHB)

The defenders do not oppose eliminating the maximum base offense level of 20 in § 2D1.1 for Schedule I and II depressants, including GHB, in order to maintain proportionality with less serious Schedule III substances. The defenders do not oppose modification of the chemical quantity table in § 2D1.11 to include GBL, a precursor of GHB.

Proposed Amendment 12 (economic crime package)

The defenders believe that there is no justification for an across-the-board increase in offense levels for economic crimes because sentences for such crimes fall overwhelmingly at the bottom of, or below, the guideline range.

Part A – The defenders support a consolidation of the theft, property destruction, and fraud guidelines. They do not oppose the proposed resolution of the circuit conflict concerning the in-the-business enhancement but recommend that proposed application note 4 state that the enhancement does not apply if the defendant only distributed goods that the defendant had unlawfully acquired. The defenders support option 1 for proposed subsection (b)(14) (\$1 million in gross receipts from financial institution). The defenders support proposed subsection (c)(3) without the bracketed language because the determination to use a different guideline should be made without regard to the resulting offense level, as are choice-of-guideline determinations under § 1B1.2. With regard to issue for comment 1, the defenders support the Commission’s current approach of treating an inchoate offense as less serious than a completed offense. With regard to issue for comment 2, the defenders support relying on departures to deal with cases involving unique items of cultural heritage or historical or archeological significance. A fixed enhancement will be too little in some cases, too much in others, and drafting a graded enhancement would be difficult. The defenders recommend waiting to see how courts deal with such cases before attempting to draft an enhancement.

Part B – The defenders oppose rewriting the loss tables because the increased punishment that they call for is neither necessary, desirable, nor appropriate. A new loss table is not a prerequisite for consolidation of the theft, property destruction, and fraud guidelines. The defenders recommend that the consolidated guideline use the loss table in the current fraud guideline.

Part C – The defenders support a comprehensive definition of loss, and suggest adoption of such a definition even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines. *Intended loss.* The defenders oppose use of intended loss in the general rule. If the Commission decides to include intended loss, the proposed commentary on intended loss needs to be revised. The defenders oppose holding a defendant accountable for what another defendant intended. In addition, the defenders suggest modifying the commentary to state that the standard is “the pecuniary harm that

the defendant purposely intended to cause.” The defenders support excluding from intended loss a loss that was not reasonably intended to result. *Actual loss*. The defenders prefer the definition in option 1 but recommend the adoption of a remoteness limitation on the loss for which a defendant is accountable because virtually anything is reasonably foreseeable. The defenders believe that some notion of legal causation must go along with but-for causation. *Time of measurement*. The defenders do not support either option 1 (time of sentencing) or option 2 (time of detection) but recommend the adoption of time of the offense, which is when the victim’s loss occurs. *Exclusion of interest*. The defenders support option 1 because interest will only rarely make a difference in loss calculation, so to require its determination in every case not only calls for needless work but invites litigation. *Economic benefit conferred on victim*. The defenders do not object to proposed application note 2(C)(iii) and support the use of the de minimis language in the first bracket of proposed application note 2(C)(IV)(1). *Ponzi schemes*. The defenders support option 1 as the most consistent with the purpose of the Commission to have sentences ordinarily “reflect the nature and magnitude of the pecuniary harm caused.” *Evaluation of loss*. The defenders oppose the inclusion in proposed application note 2(D) of “[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence” because that language is too broad. There can be cases in which the loss will be determined solely on the basis of records that the sentencing judge’s position with regard to determining loss is not unique. The defenders recommend inserting “ordinarily” after “sentencing judge.” *Gain*. The defenders support option 4 as the most consistent with the Commission’s goal in economic-crime cases that sentences ordinarily “should reflect the nature and magnitude of the pecuniary harm caused.” Options 2, 3, and 4 would require the determination of gain in every case, unnecessary work in the view of the defenders because in the vast majority of cases loss to the victims will exceed gain to the defendant. *Downward departure*. The defenders support including proposed application note 2(G)(ii)(II) but suggest modifying it by including the bracketed language in the sentence, “The loss significantly exceeds the greater of the [defendant’s] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.” The defenders also recommend replacing “and therefore” in that sentence with “or otherwise.”

Part D – The defenders have no objection to part D.

Part E – The defenders have no objection to part E.

Part F – The defenders support part F.

Proposed Amendment 13 (aggravating and mitigating factors in fraud and theft cases)

The defenders prefer option two. The defenders object to both options insofar as they include in their calculus a factor otherwise accounted for in the guideline by another specific offense characteristic. They believe that no factor already accounted for by the guideline should

enter into a determination of whether the proposed specific offense characteristic applies.

**Proposed Amendment 14 (sentencing table amendment
and alternative to sentencing table amendment)**

The defenders support option one because it will afford sentencing judges additional discretion to fashion an appropriate sentence based on all the circumstances of the case. This option requires no additional work by the probation office and does not necessitate additional fact-finding that could become the subject of an appeal.

Proposed Amendment 15 (firearms table)

The defenders oppose both options for amending the firearms table of § 2K2.1(b)(1) to add entries for 100-199 weapons and 200 or more weapons. They believe that an increase is not warranted because nearly half of all firearms sentences were at or below the bottom of the guideline range. The defenders believe that the ATF data does not support an increase because there is no evidence that the sentences cited were inappropriately low. It is the defenders' view that federal judges would not have imposed the sentences cited if they were not warranted and appropriate.

Proposed Amendment 16 (prohibited person definition)

The defenders do not oppose the changes in the commentary defining "prohibited person" in § 2K1.3 and § 2K2.1. The defenders support that part of the amendment that would specify that a defendant's status as a prohibited person relative to the base offense level is to be determined as of the time of the commission of the instant offense. The defenders believe that the focus properly belongs on the defendant's status at the time of the commission of the offense because the reason an individual's status as a prohibited person is significant is that a gun or explosives offense committed by a prohibited person is more dangerous to public safety than an offense committed by someone who is not a prohibited person.

Proposed Amendment 17 (prior felonies)

The defenders support the amendment to §2K1.3 and § 2K2.1, which would interpret "prior felony conviction(s)" to mean the defendant had such a conviction at the time the explosives or firearms offense was committed. The defenders believe that because the reason an individual's status as a prohibited person is significant is that a gun or explosives offense committed by a prohibited person is more dangerous to public safety than an offense committed by someone who is not a prohibited person, the relevant time to consider for purposes of determining sentence is the time the gun or explosives offense was committed.

Proposed Amendment 18 (immigration)

The defenders support amendment 18 without the bracketed language because they consider that unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement applies. Not all offenses that meet the statutory definition of aggravated felony are of equal seriousness. The defenders believe that time served in prison is the best way to measure seriousness. Relying on category of offense, as is done in the bracketed language of option 1, is the least accurate measure of seriousness because such an approach incorrectly assumes that all defendants who have committed a given type of offense have engaged in equally serious conduct. A drug distribution offense may be for transporting 500 grams of cocaine powder or for being the head of an organization that distributed 250 kilograms of cocaine powder, for example. The defenders believe that time served is better than time imposed to measure seriousness because time served measures the punishment actually meted out. The defenders respond to the Justice Department's criticisms of time served by agreeing that in some situations time served can be difficult to compute, but that the problem is overstated because the time served need be computed only for one prior, not for all. Further, in the defenders view, the kind of problems that give rise to difficulty in computing time served ordinarily will not arise if the defendant is an alien because an alien convicted of a serious offense usually is deported upon release from imprisonment for that offense. In addition, the concern about shortened periods of incarceration due to prison overcrowding overstates the impact of such early release upon time served generally. The remedy of early release occurs rarely, and if it is a factor in time served for a prior aggravated felony could be the basis for a departure. In response to the Justice Department's concern that the proposed amendment does not "prevent creative bases for downward departure that have arisen, particularly in districts that do not have 'fast track' policies," the defenders point out that the need for such departures is created by the unfairness of the present 16-level enhancement. With regard to the extent of the enhancement under proposed subsection (b)(1)(A)(i), the defenders recommend level 10. The defenders oppose the proposed commentary in option 2.

Proposed Amendment 19 (nuclear, biological, and chemical weapons)

The defenders have no objection to the proposed amendment.

Proposed Amendment 21 (miscellaneous new legislation and technical amendments)

The defenders have no objection to the proposed amendment.

STATEMENT
of the
FEDERAL PUBLIC AND
COMMUNITY DEFENDERS
on

Proposed Amendments to
the Sentencing Guidelines
published on January 26, 2001

Submitted by
Jon Sands
Assistant Federal Public Defender,
District of Arizona
Chair, Sentencing Guidelines Committee of the
Federal Public and Community Defenders

March 9, 2001

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PROPOSED AMENDMENT 5

Sexual Predators

Last amendment cycle, the Commission, in response to the Protection of Children From Sexual Predators Act of 1998,¹ added enhancements to § 2A3.1 (criminal sexual abuse), § 2A3.2 (criminal sexual abuse of a minor under the age of sixteen years), § 2A3.3 (criminal sexual abuse of a ward), and § 2A3.4 (abusive sexual contact) to increase sentences in cases involving the use of computers or the knowing misrepresentation of the actual identity of the defendant, if the use of the computer or misrepresentation was done with intent to persuade, induce, entice, coerce, or facilitate the transportation of a child to engage in prohibited sexual activity. The Commission also broadened the term “distribution” in § 2G2.2 (trafficking in material involving the sexual exploitation of a minor) to include distribution for nonpecuniary gain. Moreover, the Commission amended § 2G2.2 to require increased punishment in cases involving distribution of child pornography for nonpecuniary gain, to a minor, to a minor with intent to persuade the minor to engage in prohibited sexual conduct, as well as for all distribution cases that do not otherwise receive an enhancement for distribution.

A major concern of the Protection of Children from Sexual Predators Act was a perception that sentences under § 2A3.2 both for consensual sex convictions and for convictions for offenses prosecuted under 18 U.S.C. § 2243(a) or 18 U.S.C. ch. 117 were inappropriate. When initially drafted, § 2A3.2 was designed to apply to those defendants who engage in consensual sexual acts that would be legal but for the age difference between the participants. Historically, the majority of such cases in federal court have involved Native American defendants from the reservation. However, with the advent of the internet and special federal investigation initiatives, such as “Innocent Images,” an increasing number of defendants are now being charged under 18 U.S.C. ch. 117 and sentenced under § 2A3.2. The number of Native Americans sentenced under the § 2A3.2 has remained relatively constant.²

To provide appropriate punishment for the two different types of cases now being sentenced under § 2A3.2, the Commission made several modifications to that guideline last amendment cycle. As previously noted, the Commission added an enhancement for the use of a computer or internet access device and raised the base offense level to 18 if the offense involved a violation of 18 U.S.C. ch. 117. The Commission also added an enhancement for undue influence to address those cases in which the defendant took advantage of their status as an older

¹Pub. L. No. 105-314, §§ 502-07, 112 Stat. 2974.

²See Sexual Predators Act Policy Team, U.S. Sentencing Com’n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 13, table 2 (Jan. 24, 2000). The number of Native Americans sentenced under § 2A3.2 was 32, 27 and 29 in fiscal 1998, 1997 and 1996, respectively. *Id.*

person. There is now a rebuttable presumption of undue influence if there is a ten-year age difference between the defendant and the victim.

The Commission deferred action on the directive in the Act for an enhancement if the defendant engaged in a "pattern of activity of sexual abuse of exploitation of a minor." The Commission also deferred action on the grouping of multiple counts of possession and distribution of child pornography, an issue over which there is a circuit conflict. Proposed amendment 5 is a three-part amendment that would implement two directives in the Protection of Children From Sexual Predators Act of 1998³ and call for grouping of certain child pornography counts of conviction.

At the outset, it must be stated that proposed amendment 5 would have a huge impact on Native Americans. The majority of sex offenders sentenced under §§ 2A3.1, 2A3.2 and 2A3.4 are Native Americans. In fiscal year 1999, Native Americans represented approximately 61% of sex offenders sentenced under the guidelines (165 out of 271). The numbers in fiscal 1999 are consistent with previous years.⁴ Native American groups are becoming concerned about the application of the sentencing guidelines on the individuals in their community. As noted by the South Dakota Advisory Committee to the United States Commission on Civil Rights, there is a perception of unjust treatment that is based upon the view that federal courts applying the sentencing guidelines impose harsher punishment than state courts.⁵ In New Mexico and South Dakota, offenses occurring off the reservation often have a lesser presumptive sentence than called for under the United States Sentencing Guidelines. Additionally, plea practices in federal and state court can result in unequal treatment between reservation and non-reservation cases.

It is against a background of abject poverty, unemployment, and physical isolation, all contributing to distressingly high rates of alcoholism and substance abuse, that the Commission must consider what changes to make in the guidelines. In an article relied upon by the United States Probation Office, *The American Indian Sexual Offender*, author Dewey Ertz cautions that "[t]he most important issue to keep in mind when treating the American Indian sexual offender is that the American Indian people are victims by nature of their history and life experience, and they are offenders with respect to inappropriate behavior patterns." Those behavior patterns

³See Pub. L. No. 105-314, § 505, 112 Stat. 2974. One directive concerns "pattern of activity" and the other an enhancement for transportation offenses under 18 U.S.C. ch. 117.

⁴See Sexual Predators Act Policy Team, U.S. Sentencing Com'n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 9, 13, 17, tables 1, 2, 4 (Jan. 24, 2000).

⁵See generally South Dakota Advisory Committee to the United States Commission on Civil Rights, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* (Mar. 2000).

often find their roots in substance abuse and dependency, attention deficit and impulse control disorders, and affective disorders such as depression. Mr. Ertz emphasizes that therapy addressing the roots of the behavior patterns and integrating tribal and community concepts can positively treat the offender.⁶

Physical isolation and poverty is typical on a reservation. Defendants often come from homes with no running water, electricity, or telephone. They may have to walk for miles or hitchhike for days to make court appearances. Lack of education is common, particularly among the middle-aged and elderly population, who have been the victims of "forced" boarding schools.⁷ It is not uncommon for Native American defendants, especially middle-aged and older, to have little or no English language skills. In New Mexico, there is a full-time Navajo court interpreter, and a significant minority of defendants speak little or no English.⁸

In reviewing our cases, we note that a Native American defendant was frequently a victim or witness of sex abuse as a child. It would not be surprising that a victim of sexual abuse as a child, who never had an opportunity for treatment, would become part of the cycle of abuse as an adult. The issue of incest is not so straight-forward when the adult offender was victimized as a child.

The Assistant Secretary of the Interior for Indian Affairs summed up the situation this

⁶Dewey Ertz, *The American Indian Sex Offender*, in 2 *The Sex Offender: New Insights, Treatment Innovations, and Legal Developments* (Barbara K Schwartz & Henry R. Cellini eds. 1997).

⁷Historically, a major trauma for Native Americans was the boarding school operated by the government or a religious organization. Often children were taken from their parents and taught the "values" of the dominant society. The Native American culture was prohibited in these schools, which added to the loss of social structure, community and personal identity of the Native Americans. See David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience 1875-1928* (Univ. of Kansas 1995); M. Irwin & Samuel Roll, *The Psychological Impact of Sexual Abuse of Native American Boarding School Children*, 23 J. Am. Psychoanalysis 461 (1995).

⁸A Native American defendant prosecuted in federal court suffer the additional hardship, at least in New Mexico and South Dakota, of serving the sentence outside away from the defendant's home state and family. Few reservation families have the resources to travel to another state, so a Native American inmate in federal prison suffers a greater isolation from family and culture than a Native Americans inmate of a state prison. For a Native American inmate from a small tribe or pueblo, there is a good likelihood that the inmate may be the only tribal or pueblo member in the federal institution.

way in remarks on the 175th anniversary of the establishment of the Bureau of Indian Affairs. The Assistant Secretary reviewed the history of relations between the Indian tribes and the dominant society since 1875, candidly pointing out the failures of policy that have contributed to the state of life in Indian communities today. After noting the impact of the wars with Indians, he pointed out that

it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. . . . Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian culture. After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. . . . The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another.⁹

We recommend that the Commission, before promulgating guideline amendments that will have a substantial impact on Native Americans, hear from Native Americans tribes, organizations, and individuals. The Commission should not fail to hear from the Native American community. The dynamic between Native Americans and the dominant society is complex. We suggest that the Commission hold hearings at least in South Dakota and New Mexico or Arizona before promulgating a pattern of activity and incest enhancement.

Based upon the data from fiscal 1999, approximately one in ten (17 out of 165) Native Americans defendants convicted of sex offenses could be subject to proposed § 4B1.5 (repeat and dangerous sex offender).¹⁰ Native Americans would be the majority of persons subject to the

⁹Remarks of Kevin Gover, Assistant Secretary-Indian Affairs, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000), available at www.doi.gov/bia/as-ia/175gover.htm.

¹⁰See Sexual Predators Act Policy Team, U.S. Sentencing Com'n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 3, table 1 (Jan.

proposed guideline (17 Native Americans out of a total of 32).¹¹ If the Commission were to adopt the broadest proposals for a pattern of activity enhancement, under which an offender would qualify for an enhancement if there were multiple contacts with the same victim, contacts with multiple victims, prior convictions, or prior episodes that did not result in convictions, nearly two-in-three Native American defendants (108 out of 165) would receive an enhancement.¹² Additionally, 61% of all offenders subject to the enhancement would be Native Americans (108 out of 177).¹³ The proposed pattern of activity enhancements would have a disproportional impact on Native Americans.

Similarly, the proposed special offense characteristic for incest would almost exclusively be imposed upon Native Americans. In fiscal 1999, 51 out of 60 eligible offenders (85%) would have been Native Americans.¹⁴ Moreover, nearly one-in-three (51 out of 165) of the Native American sex offenders would have been eligible for the enhancement.¹⁵

The proposed amendment increasing the base offense level of § 2A3.2 for non-18 U.S.C. ch. 117 offenses would mainly affect the Native American population. In fiscal 1999, 28 out of 36 defendants convicted of an age-differential sex offense were Native Americans.¹⁶ Cases involving Native American offenders are the most appropriate for a base offense level of 15. The Native American defendants sentenced under § 2A3.2 tend to have committed sexual acts that are truly consensual and would be legal but for the age disparity. Undue influence is rare. For such cases, a base offense level of 15 is appropriate.

The congressional directives contained in the Protection of Children from Sexual Predators Act of 1998 were for the most part aimed at the internet sexual predator. However, these individuals who troll the internet to prey on children are a minority of the sexual offenders in the federal system. We believe that the guidelines should be written to deal with offenders who make up the majority of the sex-offense defendants in the federal court system—sadly, Native Americans. Thus, we believe that the Commission should not incapacitate Native

24, 2000).

¹¹*See id.*

¹²*See id.* at 6, table 3.

¹³*See id.*

¹⁴*See id.* at 7, table 4.

¹⁵*See id.*

¹⁶*See id.* at 9, table 5.

American sex offenders until they have had an opportunity for education and treatment. As Mr. Ertz emphasizes in his article, Native American sex offenders, unlike pedophiles, are the most amenable to treatment and have the lowest rates of recidivism. We therefore recommend that the Commission defer acting on the pattern-of-activity and incest amendments and on the increase in the base offense levels in § 2A3.2 until after the Commission has heard from Native American tribes, organizations, and individuals to determine the best approach to dealing with Native Americans who commit sex offenses.

Part A - Pattern of Activity

Part A of proposed amendment 5 seeks to implement the Congressional directive for a sentencing increase if the defendant has engaged in a “pattern of activity.”¹⁷ There are four options that could be promulgated alone or in combination to implement the directive. In addition, proposed amendment 5 would revise the guideline covering terms of supervised release, § 5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime is the maximum term authorized by statute.

The first option would establish a new chapter 4 guideline, § 4B1.5 (repeat and dangerous sex offender), that would operate in a manner similar to the career offender guideline, § 4B1.1. The second option also would establish a new chapter 4 guideline, § 4B1.6 (sexual predator), that would provide a five-level enhancement (with a floor of level of 30 or 32, to be decided) for sex-offense defendants who engage in a pattern of activity involving prohibited sexual conduct. The third option would provide a new specific offense characteristic in §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4 similar to the current pattern-of-activity adjustment of § 2G2.2(b)(4). Finally, the fourth option would add to the commentary to §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4. language encouraging an upward departure for defendants who commit repeated acts of sexual abuse of the same minor over a period of time.

As noted above, we recommend that the Commission not promulgate any of the current proposals until after holding hearings with the Native American community. However, if the Commission decides to proceed without such a hearing, we recommend promulgating the fourth option – an encouraged upward departure for a defendant who commits repeated acts of sexual abuse of minors.

The most serious repeat child abuse sex offenders currently face a mandatory life sentence, regardless of the application of the guidelines. If the defendant has a prior conviction for aggravated sexual abuse of a child or a similar state offense, 18 U.S.C. § 2241(c) provides

¹⁷Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 505, 112 Stat. 2974.

that “the defendant shall be sentenced to life in prison.” A defendant can also be subject to a mandatory life sentence for a sex conviction under the three strikes provision of 18 U.S.C. § 3559(c) if the defendant has two or more serious violent felonies or serious drug offenses, without regard to whether the prior convictions are for a sex offense. Moreover, the career offender guideline (§ 4B1.1) applies to sex offenders.

The proposed guideline for repeat and dangerous sex offenders (§ 4B1.5) is unnecessary and has the potential to impose an unwarrantedly harsh sentence. An encouraged upward departure would allow a court to incapacitate those defendants who posed a high risk of recidivism or a danger to the community who was not already subject to a mandatory life sentence or a career offender enhancement.

If the Commission adopts § 4B1.5, it should only increase a defendant’s criminal history category to not less than IV. The guidelines should distinguish between those defendants who have a criminal history category of IV or below and V and above.

Since § 4B1.5 will only apply to those defendants who are not already facing a mandatory life sentence, the Commission should adopt a departure provision that allows a court to depart when the application of the guideline significantly overstates the future risk to the community or the seriousness of the defendant’s criminal history. There may be situations, especially in cases involving statutory rape or a prior state conviction, in which a defendant might not have received appropriate education and counseling. A court should also be allowed to depart upward, if warranted, in cases involving a defendant who is clearly a pedophile and a high risk to the community.

We have grave concerns about enhancements or departures that are based on psycho-sexual evaluations. Often, psycho-sexual evaluations base a determination of the risk of recidivism upon inappropriate sentencing characteristics, such as age, education, and employment history. Moreover, there is no national uniformity concerning the availability of testing or testing protocols. Thus, generic psycho-sexual evaluations could lead to unwarranted sentencing disparities. However, an individual’s amenability to treatment in determining risk assessment for the purposes of sentencing should be considered.

It is also unclear from the proposed guideline, whether the limitation on the age of convictions under § 4A1.2(e) would apply to § 4B1.5. We recommend that § 4B1.5 have the same § 4A1.2(e) limitations as the career offender guideline (§ 4B1.1) as to the age of applicable convictions.

We also oppose the proposed sexual predator enhancement (§ 4B1.6). Section 4B1.6 would allow a five level enhancement, with a floor of level 30 or 32 (to be decided), if the court finds either that the defendant committed the crime as a part of a pattern of activity involving prohibited sexual conduct or that the defendant is a sexual predator. A sexual predator conclusion would be based upon the court’s determination, under the totality of circumstances,

that a defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. A pattern of activity is any combination of two or more prior separate instances of prohibited sexual conduct with a minor, other than the victim of the instant offense, whether or not the conduct resulted in a conviction.

The sexual predator enhancement proposed in § 4B1.6 would vitiate the requirement of proof beyond a reasonable doubt. Prosecutors could obtain a greater sentence by simply charging one count and using the other allegations to seek a sexual predator enhancement. For example, if a defendant was accused of three separate acts of sexual abuse with two victims, a prosecutor could obtain a greater sentence by simply charging one act and using the other allegations as a pattern of activity than by charging all three acts, which would only result in a three level increase under § 3D1.4. The guidelines should not remove the burden on prosecutors to prove criminal conduct beyond a reasonable doubt.

The standard for determining a sexual predator would be totally subjective and result in inconsistent application of the guidelines. What legal standard would a court use for a finding of “likely” under the totality of the circumstances? Clearly, a five level enhancement should be proved by clear and convincing evidence, not by a standard less than a preponderance of evidence. Additionally, “likely” is not defined. Does it require a 50% probability, a 10% probability, or less? In practice, the standard would shift the burden from the prosecutor to the defendant to prove that he was not a sexual predator.

If the Commission adopts § 4B1.6, § 4B1.6(b), it should require a finding that the offense was committed as part of a pattern of activity and the defendant is a sexual predator. A requirement that both be found would limit some of the concerns of the sexual predator determination. Moreover, § 4B1.6 should only be imposed on those sex offenders who have committed multiple acts of abuse with multiple victims.

Section 4B1.6 would result in disproportionate sentences among sexual offenders. For example, a five level increase in § 2A3.1 would result in a level of 32 before the addition of any other specific offense characteristics. The impact in § 2A3.1 is clearly disproportionate in comparison to its impact in other guidelines such as § 2A3.2 and § 2A3.4.

If the Commission rejects our recommendation for an encouraged upward departure and decides to impose a pattern-of-activity enhancement, we recommend option three—a chapter 2 specific offense characteristic in the sexual abuse guidelines. This would be consistent with the pattern of activity adjustment currently in § 2G2.2. Moreover, it would eliminate the need for an arbitrary floor of 30 or 32 by allowing a tailored increase in each guideline. Furthermore, an increase of two levels would bring to the guidelines the proportionality sought by Congress.

Any pattern of activity enhancement should be limited to defendants whose instant offense of conviction is a sex crime involving the sexual abuse of a child, not including trafficking or receipt of child pornography or possession of child pornography, and who have

prior convictions for the sexual abuse of a minor. If the Commission does not limit pattern of activity to prior sex abuse convictions, pattern of activity should require clear and convincing evidence of prior conduct involving the combination of two or more separate instances of prohibited conduct involving a minor different from the victim of the instant offense of conviction. The Commission should require clear and convincing evidence of the prior sexual conduct to deter prosecutors from manipulating the guidelines to circumvent the requirement of proof beyond a reasonable doubt.

Defendants are entitled to have charges against them proved before a jury and beyond a reasonable doubt. Therefore, if the Commission allows the pattern of activity to be proved by something less than conviction based on reasonable doubt, the standard of proof should be clear and convincing evidence. This would also be consistent with the case law requiring the significant sentence enhancements to be proved by greater than a preponderance of evidence.

We oppose the proposed amendment to § 5D1.2 that would require the maximum term of supervised release for sex offenses. Since Congress did not take away the court's discretion to determine the length of supervised release in sex offenses, the Commission should not. A sentencing judge can be trusted to review the facts and circumstances of the case before the court and make the appropriate determination. For example, a 19-year-old Native American who is convicted of a nonforcible sex offense involving his 14-year-old girlfriend may not need the maximum term of supervised release. There can be little fear that sentencing courts would not be inclined to impose the maximum term of supervised release in sex abuse cases, unless there was significant factors militating against it. While the Commission may encourage a maximum term of supervised release, the imposition of it should be left in the sound discretion of the sentencing court.

Part B - Grouping

Part B of the proposed amendments 5 would resolve a circuit conflict regarding who is the "victim" in a child pornography case for the purpose of grouping the multiple counts. Option one would group counts covered by § 2G2.2 (trafficking in material involving the sexual exploitation of a minor) and § 2G2.4 (possession of materials depicting a minor engaged in sexually explicit conduct) under § 3D1.2(d). Option two would add commentary to those guidelines that would expressly preclude the grouping of counts covered by those guidelines.

We recommend that the Commission adopt option one. Offenses sentenced under § 2G2.1 (manufacturing of child pornography) would still be specifically excluded from grouping under § 3D1.2.

If offenses concerning the trafficking, receipt, and possession of child pornography were grouped under § 3D1.2, the offenses would be subject to the broader relevant-conduct rules of

§ 1B1.3(a)(2). Section 1B1.3(a)(2) allows the sentencing court to consider any act the defendant committed, or any reasonably foreseeable act of another in a jointly undertaken criminal activity, that was part of the “same course of conduct or common scheme or plan as the offense of conviction” for purposes of determining the defendant’s relevant conduct for sentencing. Specifically, this would allow courts to consider images of child pornography that are outside those images listed in the count or counts of conviction. If the Commission promulgates option two, so that these offenses would not group together, additional images outside of the offenses of conviction could not be considered for guideline application purposes.

If trafficking, receipt and possession of child pornography convictions were grouped under § 3D1.2(d), the court would not be required to determine who is the victim. The determination of a victim, especially if the pictures had been computer generated or morphed, can be complex and time consuming for the court. Grouping will alleviate the need for this determination, but it will still permit the sentencing court to consider a wide range of conduct in determining the appropriate sentence.

We believe option one will encourage greater uniformity in sentencing, discourage sentencing manipulation by plea agreements, and promote judicial economy.

Part C - Enhancement for Transportation Offenses and Other Amendments

Part C responds to a directive in the Protection of Children from Sexual Predators Act of 1998 dealing with offenses under 18 U.S.C. ch. 117 (transportation for illegal sexual activity and related crimes) that involve transporting minors for prostitution or prohibited sexual conduct.¹⁸ Relying on that directive and the Commission’s general authority in 28 U.S.C. § 994, part C would make a number of changes in § 2A3.2 (criminal sexual abuse of a minor under the age of sixteen years) and § 2A3.4 (abusive sexual contact). Part C would amend § 2A3.2 to (1) add a new base level of 24 for violations of 18 U.S.C. ch. 117 that involve the commission or attempted commission of a sexual act and increase the existing base offense levels by three levels; and (2) add a two-level enhancement if the offense involved incest (which would apply in addition to the care, custody, or control enhancement). Part C would amend § 2A3.4 by adding a two-level enhancement if the offense involved incest and a three-level enhancement if the offense involved a violation of 18 U.S.C. ch. 117. Part C would also add the two-level incest enhancement to § 2A3.1 (criminal sexual abuse). Finally, part C would amend the statutory index of Appendix A to refer violations of 18 U.S.C. ch. 117 to § 2A3.2.

Base-offense level increase. As noted above, the Commission last year promulgated major changes to § 2A3.2, resulting in significant increases for most offenders. The Commission

¹⁸*Id.*

raised the base offense level for violations of 18 U.S.C. ch. 117 to level 18 and added a two-level enhancement for the use of computer or other internet access device. Moreover, to enhance the sentences for the more culpable and manipulative defendants, the Commission added a two-level enhancement for using undue influence or knowingly misrepresenting identity. There is a rebuttable presumption of undue influence if there is more than 10 years difference between the defendant and the victim.

These increases last cycle, together with the proposed increases for pattern of activity, are sufficient to comply with Congressional directives in the Protection of Children from Sexual Predators Act of 1998. Before adding a pattern-of-activity enhancement, the Commission's previous amendment of § 2A3.2 raised the offense level from 15 to 22 for most 18 U.S.C. ch. 117 violations. This, in effect, doubled the sentence for most of those cases.

An increase in the base offense level for non-18 U.S.C. ch. 117 violations is unwarranted. In fiscal year 1999, approximately 78% of the non-18 U.S.C. ch. 117 defendants (28 out of 36 defendants) were Native Americans. These are individuals who have been convicted of a nonforcible offense made criminal under 18 U.S.C. § 2243 because of difference in ages. If there has been no undue influence, an offense level 15, or 13 with acceptance of responsibility, is an appropriate sentence, especially given the dynamics of reservation life. Unlike individuals who troll the internet looking for victims, a defendant living in the isolation of the reservation is often limited in choice of partner. Moreover, on those pockets on the reservation where there is a cluster of housing, the individuals interact often and get to know each other well. Thus, the harm to society is less in a typical reservation statutory rape case than in a case involving an individual who trafficks in child pornography.

If the Commission concludes that there must be an increase for those individuals who commit an offense under 18 U.S.C. ch. 117 involving a sexual act, we would propose the following: A base offense level of 21 for an offense under 18 U.S.C. ch. 117 involving a sexual act; a base offense level of 18 if the violation of 18 U.S.C. ch. 117 did not involve the commission of a sexual act; and a base offense level of 15 in all other cases. The majority of offenders under 18 U.S.C. ch. 117 would be subject to other enhancements in § 2A3.2. Thus, a three level across-the-board increase is neither necessary to comply with the directives of the protection of Children from Sexual Predators Act of 1998 nor warranted in terms of proportionality. Additionally, if the Commission promulgates a pattern-of-activity enhancement or encouraged-departure commentary, the most dangerous offenders would be subject to that provision.

Incest enhancement. We oppose an incest enhancement in §§ 2A3.1, 2A3.2 and 2A3.4, because it would be the equivalent of an enhancement for being a Native American. In 1999, it appears that 85% (51 out of 60) defendants convicted of sex offenses involving incest were

Native American.¹⁹ The proposed amendment would affect overwhelmingly Native American defendants in contrast to any other group.

Reservation incest cases are often some of the most complex in the federal system. In addition to the problems of poverty, isolation, and substance abuse on the reservation, there exists the problem of incest as learned behavior. In many cases, today's defendant was yesterday's victim. Incest cases also involve defendants with the greatest amenability to treatment and the lowest chance for recidivism if afforded a competent treatment regime. We oppose any enhancement that would have such a disparate impact upon the Native American community.

We believe the current proposals are too compartmentalized and are fundamentally flawed. Congress's major concern was to incapacitate pedophiles who seek out and prey on children. True pedophiles, individuals who prefer children as sexual partners, have a high risk of recidivism and need the greatest amount of treatment. However, not all individuals, even those who, unfortunately, abuse multiple children, are pedophiles or unamenable to treatment.

The Commission's proposed amendments might allow Native American incest cases to be doubly enhanced (for pattern of activity and incest) based upon the same facts. If so, pedophiles who rarely prey on their own family would receive a lesser sentence, despite their greater risk to society, than Native Americans, who are the most amenable to treatment.²⁰

The Commission should hold hearings with the Native American community before resolving these complex issues. However, if the Commission is committed to promulgating a pattern-of-activity enhancement and an incest enhancement, we strongly urge that acts of incest be prohibited from being used to impose a pattern-of-activity enhancement.

Both pattern of activity and incest are used to enhance the sentence of individuals who engage in more than a one-time act of abuse. However, the dynamics of incest verses pedophilia are different. The guidelines should set up a tiered approach recognizing each individual harm, and sentencing each appropriately.

The greatest danger to the community are those individuals who engage in a non-incestual pattern of activity of abuse. Pedophiles are the individuals who would be most appropriately punished by the proposed § 4B1.5 and § 4B1.6. Individuals who commit repeated

¹⁹See Sexual Predators Act Policy Team, U.S. Sentencing Com'n, *Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998*, at 7, table 4 (Jan. 24, 2000).

²⁰Dewey Ertz, *The American Indian Sex Offender*, in 2 *The Sex Offender: New Insights, Treatment Innovations, and Legal Developments* (Barbara K Schwartz & Henry R. Cellini eds. 1997).

acts of incest with multiple family members should receive a greater sentence than an individual who only abuses one family member. However, since in the federal system the incest enhancement will be almost exclusively used on Native Americans, the Commission should keep in mind the particular needs and realities of the Indian Reservation. While Native Americans convicted of sexual acts involving incest may deserve a sentencing increase, they should not be on a higher, or even the same, tier as the predatory pedophile.

By removing acts of incest from being used to impose § 4B1.5 and § 4B1.6, the Commission could avoid the appearance of racism and discrimination against the Native American community. Some Native American defendants might be subject to those enhancements, but only when their actions were similar to the non-Native American defendants who were subject to those enhancements. For example, those Native American defendants who traveled outside of their family compounds on the reservation to abuse children in the general community would be subject to the same enhancements as those non-Native American defendants who travel across Interstate lines to abuse children. Those Native Americans who are isolated on the reservation and act inappropriately toward family members, often while intoxicated, should not and would not be subject to the same enhancements.

Conclusion

We recommend that the Commission hold hearings at which Native American tribes, organizations, and individuals can testify, before promulgating enhancements concerning pattern of activity, incest and statutory rape, § 2A3.2. The problems on the Indian Reservations are unique and complex compared to other types of federal crime.

If the Commission proceeds with promulgating a pattern-of-activity enhancement, we recommend that the Commission adopt Option 4, an encouraged upward departure. The judges in South Dakota, New Mexico and Arizona, and other areas with a significant Native American population, have experience and expertise concerning those individuals who need to be incapacitated to protect society and those individuals who do not. The Commission should not discount the experiences of those jurisdictions who handled the majority of federal sex crimes. Likewise, we oppose the proposed enhancement for incest.

Finally, if the Commission is committed to promulgating an enhancement for pattern of activity and incest, we strongly urge that acts of incest be excluded from the definition of the acts necessary for a pattern of activity. This would reduce the possibility that Native Americans, who do not need to be incapacitated to protect the community, would receive an unwarrantedly long sentence. Moreover, it would tier sex offenders in a more appropriate manner, giving the greater sentences to those individuals who have the highest risk of recidivism.

PROPOSED AMENDMENT 6

Stalking and Domestic Violence

Proposed amendment 6 would amend § 2A6.2 (stalking or domestic violence) in response to the Victims of Trafficking and Violence Protection Act of 2000.²¹ The Act amended 18 U.S.C. §§ 2261, 2261A, and 2262 by expanding their reach to include international travel to commit stalking and domestic violence or to violate a protective order. Section 2261A was also amended to include intimate partners within the category of protected persons and to provide a new offense at § 2262A(2) prohibiting use of the mail or any facility of interstate or foreign commerce to commit stalking. Congress directed the Commission to amend the guidelines to reflect these statutory changes and specifically to consider (1) whether the guidelines relating to stalking offenses should be modified in light of this amendment, and (2) whether any changes made by this amendment should also be made with respect to offenses under 18 U.S.C. ch. 110A (domestic violence and stalking).

The amendment would increase the base offense level in § 2A6.2 from level 14 to level 16 or 18 (to be decided). The amendment would treat stalking-by-mail under § 2A6.2, the same as other stalking offenses. It would also add a cross reference to § 1B1.5 (interpretation of references to other offense guidelines) and amend note 3 to § 1B1.5 to clarify that the cross reference is to be determined consistent with § 1B1.3's relevant conduct provision. The purpose is to ensure that a guideline's reference to use another guideline includes conduct that is a state or local offense but that would be a federal offense had the conduct occurred within the special territorial and maritime jurisdiction of the United States.

We oppose any increase in the base offense level of § 2A6.2. The apparent basis for the increase is that a stalking offense involving violation of a protective order and bodily injury should receive punishment equal to or greater than an offense covered by § 2A6.1 (threatening or harassing communications) that involves violation of a protective order and conduct evincing an intention to carry out the threat. The latter offense presently receives an offense level of 20 under § 2A6.1. The synopsis of proposed amendment indicates that the increase is motivated by a concern for proportionality. "Setting the base offense level at [16] or [18] for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications [covered by §2A6.1]." An increase to either level 16 or 18, however, would fail to maintain the necessary proportionality with the more serious, violent offense of aggravated assault, covered by § 2A2.2. That guideline carries a base offense level of 15. Thus, a defendant who commits an aggravated assault that results in bodily injury, in violation of a protective order, receives an offense level of 19 (15 + 2 + 2) under § 2A2.2, whereas a defendant who commits a stalking offense resulting in bodily injury in violation of a protective order would be subject to an offense level under § 2A6.2 of

²¹Pub. L. No. 106-386, § 1107, 114 Stat. 1464.

either 20, if a base offense level of 16 is set ($16 + 2 + 2$). We do not believe that there is a sound reason for an offense level for a stalking offense that is higher than the offense level for a more serious aggravated assault offense.²² Moreover, if a base offense level of 18 is set, a stalking offense involving violation of a protective order that *does not* resulting in bodily injury would be subject to a greater punishment ($18 + 2 = 20$) than an aggravated assault involving violation of a protective order that *does* result in bodily injury ($15 + 2 + 2 = 19$).

Finally, in the interest of proportionality, § 2A6.2 ought to include the same four-level reduction provided by § 2A6.1(b)(4) to address those cases in which the offense involves a single instance evincing little or no deliberation.

PROPOSED AMENDMENT 7 Repromulgation of Amendment 608

Proposed amendment 7 would repromulgate amendment 608 that implemented the “substantial risk” directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000.²³ Amendment 608 that took effect December 16, 2000.²⁴

The Act requires the Commission to increase penalties for the manufacture of amphetamine or methamphetamine (and attempts or conspiracies to manufacture) “(A) if the offense created a substantial risk of harm to human life or the environment” or “(B) if the offense created a substantial risk of harm to the life of a minor or incompetent.” Congress directed that the offense level for offenses described by (A) be increased by not less than three levels (with a floor of level 27) and that the offense level for offenses described by (B) be increased by not less than six levels (with a floor of level 30). Amendment 608 added enhancements to § 2D1.1 and § 2D1.10 to carry out this directive.²⁵

²²Application note 2 to § 2A6.2 reflects that the cross reference of subsection (c)(1) should apply if the resulting offense level is greater in a case involving more serious conduct. “For example, § 2A2.2 (Aggravated Assault) most likely will apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.” However, § 2A2.2 includes the same two-level increase for “bodily injury” set forth in § 2A6.2(b)(1).

²³Pub. L. No. 106-310, Section 201.

²⁴See U.S.S.G. App. C, amend. 608.

²⁵Amendment 608 added subsection (b)(6) to § 2D1.1. Subsection (b)(6) calls for a 3-level enhancement (with a floor of level 27) if the offense (A) involved the manufacture of amphetamine or methamphetamine and (B) created a substantial risk of either harm to human life

Neither the directive nor any other provision of the Act defines “substantial risk of harm.” Amendment 608 added commentary to §§ 2D1.1 and 2D1.10 a sentencing court can consider in determining if the offense involved a substantial risk of harm. These factors include the quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored; the manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances; the duration of the offense, or the extent of the manufacturing operation, and the location of the illicit laboratory (e.g., residential or remote area) and the number of human lives placed at substantial risk of harm.

Amendment 7 sets forth three options for promulgating a regular amendment to implement the directive. Option one would repromulgate the emergency amendment without change.

Option two would expand the amendment to apply to the manufacture of any controlled substance, rather than just amphetamine or methamphetamine. Option two would increase the alternative offense levels in subsection § 2D1.1(a)(1) from “3 plus the offense level from the Drug Quantity Table in § 2D1.1” to “6 plus the offense level from the Drug Quantity Table in § 2D1.1.” Option two sets forth two alternatives for amending § 2D1.10 to address the requirement of a minimum offense level of 27. Option 2(a) would increase the base offense level § 2D1.10(a)(2) from level 20 to level 27. Option 2(b) would add an additional alternative base offense level of 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintain alternative offense levels of 6 plus the offense level from the drug quantity table of § 2D1.1 and 20. The synopsis of proposed amendment indicates that although this option has less of an impact on lower level drug offenders than option 2(a), “it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances.” Finally, option two would apply to all controlled substance offenses the enhancement for creating a substantial risk of harm to the life of a minor or an incompetent.

Option three assumes that the manufacturing process for amphetamine or methamphetamine necessarily creates a substantial risk of harm. Option three, therefore, would amend §§ 2D1.1 and 2D1.10 to call for the three- and six-level enhancements and the floors

or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, subsection (b)(6) calls for a 6-level increase (with a floor of level of 30). Subsection (b)(1) that amendment 608 added to § 2D1.10 is slightly different. Subsection (b)(1) provides a 3-level increase (with a floor of level 27) if the offense involved the manufacture of amphetamine or methamphetamine. There is no requirement that the court find a substantial risk of harm to human life or the environment. Such a finding is unnecessary because § 2D1.10 applies only to convictions under 21 U.S.C. § 858, for which a substantial risk of harm to human life is an element of the offense.

required by Congress if the offense involved manufacture of amphetamine or methamphetamine. The enhancements and floors would apply to manufacture of other controlled substances if the sentencing court finds a substantial risk of harm. Option three puts the substantial-risk enhancement in § 2D1.1(b)(5) and makes it an alternative to the environmental-harm enhancement.

We support option three. We oppose both options one and two because they call for double counting. Congress determined that a substantial risk of harm to human life required at least a three-level enhancement. Under options one and two, the enhancement under § 2D1.1 is going to be five levels in virtually every instance – two levels under subsection (b)(5) for discharge or handling of a hazardous or toxic substance and three levels under subsection (b)(6) for a substantial risk to human life. Option three appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

PROPOSED AMENDMENT 8

Mandatory Restitution for Amphetamine and Methamphetamine Offenses

The amendment responds to an amendment to 21 U.S.C. § 853(q) that provides for mandatory restitution for offenses involving manufacture of methamphetamine.²⁶ Proposed amendment 8 would amend § 5E1.1(a)(1) to include a reference to 21 U.S.C. § 853(q). We do not oppose the amendment.

PROPOSED AMENDMENT 9

Safety Valve

Proposed amendment 9 would amend the safety-valve provisions of § 5C1.2 and § 2D1.1(b)(6). The Violent Crime Control and Law Enforcement Act of 1994 authorized the Commission to amend the guidelines to permit judges to impose sentence without regard to a mandatory-minimum term of imprisonment if the defendant met five specified criteria.²⁷ The Commission's initial response to that authorization was amendment 509, which promulgated § 5C1.2 as a temporary, emergency guideline effective September 23, 1994. The Commission

²⁶Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106–310, § 3613, 114 Stat. 1229.

²⁷Pub. L. No. 103-322, § 80001, 108 Stat. 1985.

repromulgated § 5C1.2 as a regular amendment in amendment 515, effective November 1, 1995. Amendment 515 also added what is now designated subsection (b)(6) of § 2D1.1.²⁸

Section 5C1.2 provides, in language taken from statute, that “the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence” if the defendant meets five criteria. The five criteria are taken from the legislation almost verbatim. As a result of amendment 509, a defendant subject to a five-year mandatory minimum who met the criteria of § 5C1.2 could have received a sentence of 30 months.²⁹ The legislation, however, stated that “[i]n the case of a defendant for whom that statutorily-required minimum sentence is 5 years,” the guidelines “shall call for a guideline range in which the lowest term of imprisonment is at least 24 months.”³⁰ Amendment 515 added § 2D1.1(b)(6) to authorize a two-level reduction for a defendant who met the five criteria of § 5C1.2.³¹ As a consequence, a defendant subject to a five-year mandatory minimum who meets the criteria of § 5C1.2 can receive a sentence of 24 months.³²

²⁸Amendment 515 designated the provision as subsection (b)(4). Amendment 555 redesignated it subsection (b)(6), effective November 1, 1997.

²⁹Offense level of 26 for quantity, less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of 19. The applicable range for offense level 19, criminal history category I is 30-37 months.

³⁰Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(b)(1)(B), 108 Stat. 1986.

³¹The reduction under § 2D1.1(b)(6) is available to any defendant who meets the five criteria of § 5C1.2, even if that defendant is not subject to a mandatory minimum. The Commission has not set forth the rationale, but the rationale would seem to be to avoid unfair disparity. As the Second Circuit pointed out in a case involving a plea agreement,

[h]ad Osei failed to obtain a plea bargain promise from the government that he would not be subject to a mandatory minimum sentence, he would have received a two-level reduction under § 2D1.1(b)[(6)]. To subject Osei to a longer sentence as a result of his attorney’s ability to secure such a promise in the plea agreement makes little sense, and does not comport with the fundamental principle underlying the Guidelines that like cases be treated alike.

United States v. Osei, 107 F.3d 101, 104 (2d Cir. 1997) (rejecting argument that subsection (b)(6) applies only to a defendant subject to a mandatory minimum).

³²Offense level of 26 for quantity, less 2 levels under subsection (b)(6), less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of

There are, however, some cases in which the guideline sentence may be lower than 24 months. This can occur if the case involves a drug for which the guideline formula for determining quantity differs from the statutory formula for determining quantity. The Commission pointed this out when it first promulgated § 5C1.2 as a temporary, emergency guideline, and stated that

[t]he Commission believes that it has the authority to authorize such minor variations from the literal language of the Congressional instruction to ensure consistency with the guidelines as a whole. In the Conference Report accompanying this legislation, the Congress expressly noted that the Commission should interpret Congressional instructions to the Commission in a manner that “shall assure reasonable consistency with other guidelines” and “take into account any mitigating circumstances which might justify exceptions.” H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess 388 (title X) (1994); see also *id.*, sec. 28003 at 312 (directing Commission to carry out a specific instruction regarding sentencing enhancements for hate crimes in a manner to ensure reasonable consistency with other guidelines). The Commission similarly believes its interpretation of section 80001(b)(1)(B), within the overall context of a clearly ameliorative sentencing provision for qualified defendants is consistent with past Congressional directives to the Commission and Congress’s rationale for employing such directives as a more flexible means of effecting sentencing policy in particular situations.³³

Proposed amendment 9 would amend both § 5C1.2 and § 2D1.1(b)(6). First, the amendment would add a new subsection to § 5C1.2, stating that a defendant who meets the five criteria and who is subject to a mandatory minimum of at least five years, cannot have an offense level from chapters two and three of the *Guidelines Manual* that is less than level 17. Next, the amendment would amend § 2D1.1(b)(6) to eliminate the requirement that the offense level be at least level 26, thus making the two-level reduction available to any defendant who meets the five criteria of § 5C1.2.

We support the second part of the amendment, which will help ameliorate the harshness of the drug penalties for defendants whom Congress has identified at the least culpable (those who meet the five criteria in § 5C1.2). We oppose part one of the amendment as unnecessary and unsupported by logic or policy. Indeed, part one will result in unjustifiable disparity of treatment.

There can be no question about the Commission’s authority to have in place a safety-valve provision that can result in a guideline range with a bottom of less than 24 months. The Commission’s rationale quoted above, in our judgment, is correct. More importantly, if Congress thought that the Commission had not complied with the legislation, Congress would

17. The applicable range for offense level 17, criminal history category I is 24-30 months.

³³59 Fed. Reg. 52,210, 52,211-12 (1994).

have rejected what the Commission had promulgated. If part one is adopted, the Commission will be treating defendants differently solely on the basis of whether the defendant is subject to a mandatory minimum. Assume, for example, that a level-24 LSD defendant meets the five criteria of § 5C1.2 and is entitled to reductions for minimal role and acceptance of responsibility. If that defendant is not subject to a mandatory minimum (because, for example, the government chooses to charge an offense under 21 U.S.C. § 841(a)(1) and (b)(1)(C)), the defendant's final offense level will be 15. If that defendant is subject to a five-year mandatory minimum (because the government chooses to charge under 21 U.S.C. § 841(a)(1) and (b)(1)(B)), the defendant's final offense level will be 17. In effect, then, the second defendant is being penalized more severely because of the prosecutor's charging decision.

PROPOSED AMENDMENT 10

Anhydrous Ammonia

Proposed Amendment 10 addresses a new offense, stealing anhydrous ammonia or transporting it across a state line, knowing, intending, or having reasonable cause to believe that it will be used to manufacture a controlled substance (codified at 21 U.S.C. § 864), that was established by the Methamphetamine Anti-Proliferation Act of 2000.³⁴ The maximum prison term for the offense is 4 years (8 years if the defendant has a prior conviction for certain offenses), or 10 years (20 years if the defendant has a prior conviction for certain offenses) if the offense involved the manufacture of methamphetamine.

Proposed amendment 10 would assign § 2D1.12 (unlawful possession, manufacture, distribution, or importation of prohibited flask or equipment; attempt or conspiracy) on the basis that the new crime is similar to other offenses referenced to § 2D1.12. We do not oppose referring the new offense to § 2D1.12.

Proposed amendment 10 seeks comment about whether the two-level enhancement of § 2D1.12(b)(1) – which applies if the defendant intended to manufacture methamphetamine or had reason to believe that the equipment would be so used – is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The issue for comment also asks whether the seriousness of using anhydrous ammonia should be accounted for by an enhancement in §2D1.12(b)(1) of up to 10 levels or by an alternative method, such as a cross reference to § 2D1.11 using a conversion to methamphetamine.

We believe that the amendment as proposed, which will result in a two-level enhancement under § 2D1.12(b)(1), is appropriate. Under the present guideline, an offense involving an attempt to manufacture methamphetamine using anhydrous ammonia results in a 2-level enhancement under subsection (b)(2) because of a release into the environment of a

³⁴Pub. L. No. 106-310, § 3653, 114 Stat. 1101. Anhydrous ammonia is used in one method of methamphetamine production. It is typically stored as a liquid under pressure but becomes a toxic gas when released to the environment. Anhydrous ammonia can be harmful to individuals who come into contact with it or inhale the gas at high concentrations. The gas can, of course, be released unintentionally. The risk from release of anhydrous ammonia into the air can be mitigated by other factors, such as a rain which knocks down the vapor, preventing it from rising into the air and dispersing. The EPA, as required by the Risk Management Program under the Clean Air Act, has determined that the concentration below which it is believed nearly all individuals could be exposed for up to one hour without irreversible or serious health effects is 200 parts per million (ppm). The National Institute of Occupational Safety and Health has established 300 ppm as the Immediately Dangerous to Life and Health Level.

hazardous or toxic substance. The Commission has thus determined that the hazardous or toxic nature of a substance calls for a two-level increase. The effect of amending subsection (b)(1) to cover anhydrous ammonia is to double the enhancement already applicable to an offense involving anhydrous ammonia, and that there is not need for increasing the enhancement if anhydrous ammonia is involved. We oppose cross-referencing from § 2D1.12 to § 2D1.1 using a conversion to methamphetamine from anhydrous ammonia. We do not believe that there is an established conversion ratio based on any scientific or other reliable data that will specify the quantity of methamphetamine that could reasonably be expected to have been made from a given quantity of anhydrous ammonia. Absent such data, expected yield would have to be litigated case-by-case, which undoubtedly would protract sentencing proceedings, if for no other reason than the necessity to present expert testimony.

PROPOSED AMENDMENT 11

GHB

Proposed amendment 11 responds to the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000.³⁵ That Act provides emergency scheduling of GHB as a Schedule I controlled substance under the Controlled Substances Act when used illicitly.³⁶ The Act also (1) amended 21 U.S.C. § 841(b)(1)(C) and 21 U.S.C. § 960(b)(3) to provide a maximum prison term of 20 years for an offense that involves GHB and (2) added GBL as a List I chemical in section 401(b)(1)(C) of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C).³⁷

The guidelines currently treat GHB and other Schedule I and II depressants with a statutory maximum prison term of 20 years identically to Schedule III substances that have a five-year statutory maximum. Section 2D1.1 provides a maximum offense level 20 for these substances, resulting in a guideline range of 33 to 44 months for defendants in criminal history category I. The proposed amendment eliminates the maximum base offense level of 20 in § 2D1.1 for Schedule I and II depressants, including GHB, because “the lack of penalty distinctions between offenses with such divergent statutory maximum raises proportionality concerns.” The same change is proposed for flunitrazepam, which is tied to Schedule I and II depressants for sentencing. We recognize there is no basis for treating GHB any differently in § 2D1.1 from other Schedule I and II depressants. We agree with the Commission that, given the statutory maximums, proportionality concerns dictate that the less serious Schedule III

³⁵Pub. L. No. 106–172, 114 Stat.7.

³⁶GHB is gamma hydroxybutyric acid.

³⁷GBL is gamma butyrolactone.

substances should not be sentenced comparably to those in Schedules I and II.

Amendment 11 also would modify the chemical quantity table of § 2D1.11 to include as a list I chemical the substance GBL, which is a precursor in the production of GHB. Offense levels for GBL were established in the same fashion as other list I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the drug quantity table of § 2D1.1. From this offense level, six levels were subtracted and the result identifies the corresponding offense level in the chemical quantity table of § 2D1.11. We do not oppose this part of the amendment.

PROPOSED AMENDMENT 12

Economic Crime Package

Proposed amendment 12 makes extensive changes to a number of guidelines. There are six parts to the amendment. Part A of proposed amendment 12 would consolidate § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property), § 2B1.3 (property damage or destruction), and § 2F1.1 (fraud and deceit; forgery; offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States). Part B would add a loss table to the consolidated guideline. Part C would add to the consolidated guideline commentary defining the term “loss.” Part D would amend guideline provisions that utilize the loss table of § 2B1.1 or § 2F1.1. Part E would make technical and conforming changes necessitated by the other parts of the amendment. Part F would address a circuit split about how tax loss is to be calculated in a case in which a defendant underreports on individual and corporate tax returns.

We are concerned that the economic crime package not be used as a vehicle for an across-the-board increase in punishment for the offenses covered by those three guidelines. The sentences for those offenses fall overwhelmingly below or at the bottom of the applicable guideline range. Commission data for fiscal year 1999 indicates that 9.7% of fraud defendants received a downward departure for other than substantial assistance.³⁸ Of those fraud defendants who did not receive a departure, 61.9% of them received a sentence at the bottom of the guideline range.³⁹ The data is similar for larceny in fiscal year 1999 – 7.0% of the defendants received a downward departure for other than substantial assistance, and 68.8% of the defendants

³⁸U.S. Sentencing Com’n, 1999 Sourcebook of Federal Sentencing Statistics table 27.

³⁹*Id.* at table 29. An additional 10.8% received a sentence below the midpoint of the applicable guideline range. *Id.*

who did not receive a departure were sentenced at the bottom of the guideline range.⁴⁰ This pattern has held true over the years.⁴¹ There is, in short, no need – or justification – for an increase in penalties for the offenses covered by §§ 2B1.1, 2B1.3, and 2F1.1.

Part A

We support the consolidation of §§ 2B1.1, 2B1.3, and 2F1.1. The Commission considers that the severity of the property offenses covered by those guidelines is related principally to the economic harm caused. It makes sense, therefore, that a single guideline be used to determine offense level.

The base offense level of six for the consolidated guideline seems appropriate if proposed specific offense characteristic (b)(7) is adopted. At very low loss amounts, the current theft and fraud guidelines produce different offense levels. A theft involving \$150 in loss produces an offense level of five; a fraud involving the same amount produces an offense level of six. To treat theft and fraud the same, the Commission must choose between higher offense levels for small-loss thefts and lower offense levels for small-loss frauds. Given the sentencing patterns noted above for offenses covered by the theft and fraud guidelines, we believe that the lower offense levels produced by the theft guideline should be used. At the low end of the offense severity scale, one level can be the difference between Zone A and Zone B, Zone B and Zone C, or Zone C and Zone D.

We support the elimination of the more-than-minimal planning enhancement. The expansive definition assured application of the enhancement in the vast majority of cases.⁴² We

⁴⁰*Id.* at table 27, 29.

⁴¹Indeed, the trend seems to be for sentences to fall below or at the bottom of the guideline range more frequently. Thus, Commission data for fiscal year 1995 indicates that 7.6% of fraud defendants received a downward departure other than for substantial assistance, and that 47.2% of the fraud defendants who did not receive a departure received a sentence within the first quarter of the guideline range. U.S. Sentencing Com'n, Annual Report 1995, at table 32. Similarly, the fiscal year 1995 data indicates that 4.4% of larceny defendants received a downward departure, and that 64.4% of the larceny defendants who did not receive a departure received a sentence in the first quarter of the guideline range. *Id.*

⁴²The basic definition is straight-forward – “more planning than is typical for commission of the offense in a simple form.” U.S.S.G. § 1B1.1, comment. (n.1(f)). The definition goes on, however, to state that “‘more than minimal planning’ is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.”

also support the proposed amendment's treatment of offenses involving several victims. The fraud guideline, as an alternative to more-than-minimal planning, currently calls for a two-level enhancement if the offense involved more than one victim. The fraud guideline also has a two-level enhancement if the offense was committed through mass marketing. The theft guideline has provision similar to either. The proposed amendment would replace both of those provisions in the current fraud guideline with an enhancement based upon the number of victims. There would be a two-level enhancement if there were more than 4 but fewer than 50 victims or if the offense was committed through mass marketing. There would be a four-level increase if the offense involved 50 or more victims.

The current theft guideline has a two-level enhancement if the offense was receiving stolen property and the defendant was "in the business of receiving and selling stolen property." That enhancement derives from a provision in guideline that was merged with § 2B1.1.⁴³ The Commission set forth the rationale for the enhancement in commentary to the superceded provision. "Persons who receive stolen property for resale receive a sentence enhancement because the amount of property is likely to underrepresent the scope of their criminality and the extent to which they encourage or facilitate other crimes."⁴⁴ This explanation was not carried forward, however. Although the amendment merging the guidelines does not indicate why the explanation was not added to § 2B1.1, it seems unlikely that the Commission was repudiating that purpose.

The circuits developed two approaches to the in-the-business enhancement. One approach (the "fence test") requires that the government prove that the defendant buys and sells stolen property, thereby encouraging others to commit property crimes. The other approach calls upon the sentencing court to "weigh[] the totality of the circumstances, with particular emphasis on the regularity and sophistication of a defendant's operation, in order to determine whether a defendant is 'in the business' of receiving and selling stolen property."⁴⁵ The Commission has opted for the totality approach, which is consistent with the originally-described purpose of the enhancement. We do not oppose doing that, but we believe that proposed application note 4 should be modified to give a better indication of the activity that the enhancement is aimed at.

The enhancement, in our judgment, should not apply merely because the defendant sold what he or she stole. As the Seventh Circuit (a fence test circuit) has pointed out, "[o]ther than

⁴³See U.S.S.G. § 2B1.2(b)(2)(A). The Commission merged § 2B1.2 into § 2B1.1, effective November 1, 1993. U.S.S.G. App. C, amend. 481.

⁴⁴U.S.S.G § 2B1.2, comment. (backg'd).

⁴⁵United States v. St.Cyr, 977 F.2d 698, 703 (1st Cir. 1992).

using them himself, about the only thing a thief can do with his stolen goods is to sell them.”⁴⁶ If selling what has been stolen is sufficient, then the enhancement will be applied in virtually every case. The First Circuit (a totality-of-circumstances circuit) has also recognized this problem and has held that “a thief would not qualify for the ITB [in-the-business] enhancement if the only goods he distributed were those which he had stolen.”⁴⁷ We suggest that proposed application note 4 state that the enhancement does not apply if the defendant only distributed goods that the defendant had unlawfully acquired.

We support option one for proposed subsection (b)(14), which would apply if, as a result of the offense, the defendant derived more than \$1,000,000 in gross receipts from one or more financial institution. This enhancement derives from a directive in the Crime Control Act of 1990.⁴⁸ The directive required that defendants convicted of specified offenses involving a financial institution “be assigned not less than offense level 24 . . . if the defendant derives more than \$1,000,000 in gross receipts from the offense.”⁴⁹ The current enhancement not only double counts the amount of loss, but also exceeds what Congress required.

The Commission has recognized that the fraudulent-statement offense of 18 U.S.C. § 1001, or a similar general offense, can be used to prosecute conduct that another, more specific offense covers. Current application note 14, in such a circumstance, calls for the use of the offense guideline applicable to the more specific offense, rather than § 2F1.1. The cross reference in proposed subsection (c)(3) would replace current application note 14. We support proposed subsection (c)(3) without the bracketed language. The issue involved is really determining the applicable offense guideline. Under § 1B1.2, that determination is made without reference to the offense level produced by the guideline. We therefore believe that the determination under proposed subsection (c)(3) should be made without reference to the offense level produced by the guideline.

⁴⁶United States v. Braslawsky, 913 F.2d 466, 468 (7th Cir. 1990) (interpreting in-the-business enhancement of § 3B1.2(b)(3)(A)).

⁴⁷United States v. McMinn, 103 F.3d 216, 222 (1st Cir. 1997). The First Circuit adopted the totality test in United States v. St.Cyr, 977 F.2d 698. The *McMinn* court distinguished *St. Cyr* on the ground that although *St. Cyr* “did define the term ‘in the business,’ the court never reached the question squarely presented here; viz., whether a defendant need have been in the business of ‘receiving and selling’ stolen property (*i.e.* acting as a fence) in order for the ITB enhancement to apply.” *McMinn*, 103 F.3d at 222.

⁴⁸Pub. L No. 101-647, § 2507, 104 Stat. 4862.

⁴⁹*Id.*

Issue for comment one. We support the current approach of the Commission, which is to treat an inchoate offense as less serious than a completed one. The Commission's language in the last paragraph of current application note 2 to § 2B1.1 is virtually identical to the language in current application note 10 to § 2F1.1. We recommend that the Commission carry forward this language. We understand the concern that the method for determining the offense level in an inchoate offense be clear and relatively easy to apply. The current method requires several steps but is not unclear.⁵⁰

Assume, for example, an uncompleted fraud offense for which the only enhancements will be for more-than-minimal planning and an enhancement for loss. Assume further that the loss from the completed portion of the offense is \$30,000 and the intended loss from the uncompleted portion was an additional \$400,000.

Step one – go to § 2X1.1. Because the fraud offense was uncompleted, current application note 10 to § 2F1.1 directs the court to determine the offense level by applying § 2X1.1 (attempt, solicitation, or conspiracy (not covered by a specific offense guideline)).⁵¹

Step two – apply § 2X1.1(a). Under § 2X1.1(a), the court uses the base offense level applicable to the offense that was the object of the inchoate offense. The base offense level for a fraud offense under § 2F1.1 is six.

Step three – apply § 2X1.1(b). Under § 2X1.1(b), the court must apply the enhancements from § 2F1.1. based upon “any intended offense conduct that can be established with reasonable certainty.” That calculation adds 10 levels to the base offense level (2 levels for more-than-minimal planning plus 4 levels for a \$400,000 loss), yielding a total offense level of 16. Under § 2X1.1(b), the offense level of 16 will be reduced by 3 levels unless the court determines that the defendant had completed all of the acts that the defendant believed necessary to complete the offense successfully (or

⁵⁰The Seventh Circuit has stated about § 2X1.1(b)(1) that “the application of this guideline is straight-forward . . .” *United States v. Lamb*, 207 F.3d 1006, 1009 (7th Cir. 2000) (finding plain error and remanding for resentencing).. *Lamb* involved a burglary, but the commentary to the burglary guideline contains a cross reference to the discussion of loss in the commentary to § 2B1.1. See § 2B2.1, comment. (n.2).

⁵¹The initial determination probably should be whether the offense guideline applicable to the offense that is the objective of the inchoate offense (the “substantive offense”) covers inchoate offenses. If that offense guideline does cover inchoate offenses, there is no need, and it would be an error, to go to § 2X1.1. This determination is handled in § 2X1.1 by means of a cross reference in subsection (c).

would have done so but for apprehension or a similar act beyond the defendant's control).

Step four – determine the offense level applicable to the completed portion of the offense.

The court does not necessarily use the reduced offense level (13 in this example).

Application note 4 to § 2X1.1 directs the court to use the greater of (1) the reduced offense level (13) and (2) the offense level for that part of the offense that was completed (or would have been completed but for apprehension or a similar act beyond the defendant's control). In this example the offense level for that part of the offense that was completed is 12 (base offense level of 6, plus 2 for more-than-minimal planning, plus 4 for a \$30,000 loss).

Step five – use the greater of the offense level for the inchoate offense and the offense level for the completed portion of the offense. In this example, the offense level would be 13, the offense level for the inchoate offense.

Issue for comment two. The Commission seeks comment upon how to deal with “the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archeological, or historical significance.” We favor reliance upon departures. Cases involving such conduct are relatively infrequent. A fixed enhancement inevitably will be too little in some instances and too much in others. Drafting a scaled enhancement would be difficult. We believe it best to see how sentencing courts deals with such cases before attempting to draft a specific offense characteristic.

Part B

We do not believe that the Commission should revise the loss table. The increased punishment called for by the three published options is neither necessary, desirable, nor appropriate. The actual sentencing practices of federal judges demonstrate that the current level of punishment is more than adequate for economic crimes. Increasing the level of punishment simply means that federal judges will be departing downward from, or sentencing at the bottom of, higher guideline ranges. The likelihood is for an increase in the number of downward departures (for other than substantial assistance) and sentences at the bottom of the guideline range. None of the published options, in our opinion, should be adopted. The table proposed by the Practitioners Advisory Group also would increase punishment levels, but the increases begin at higher loss amounts and are more modest than the increases in the published options.

Adoption of a new loss table is not a prerequisite to consolidating the theft, property destruction, and fraud guidelines. The current theft or fraud table will mesh with the proposed consolidated guideline as well as any of the options. The current theft table was constructed to work with a base offense level of four, and the current fraud table with a base offense level of six. Because the proposed consolidated guideline has a base offense level of six, we suggest

using the loss table in the current fraud guideline.

Part C

We support a comprehensive definition of loss. Even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines, there should be a single, comprehensive definition of loss applicable to those guidelines.

General rule. Proposed application note 2(A) states that “loss is the greater of actual loss or intended loss.” Proposed application note 2(A) also provides that “‘intended loss’ means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3.” We do not support the inclusion of intended loss, but if the Commission does decide to include it, there needs to be some modification of proposed application note 2(A).

The definition of “intended loss” needs clarification. The present commentary refers to “an intended loss that the defendant was attempting to inflict,” making clear that the defendant’s subjective intention is what the court should look to.⁵² The use of the passive voice in proposed application note 2(A) – “the pecuniary harm that was intended to result” – masks whether the test remains the defendant’s subjective intention (“was intended” by whom?). The proposed commentary appears to be trying to hold a defendant accountable for the defendant’s own intention and for the intention of others for whose *conduct* the defendant is accountable under the relevant conduct rules of § 1B1.3. We believe it to be inappropriate to attribute to the defendant the loss that another participant in the offense intended to inflict. A defendant should be held accountable only for the defendant’s intention.

We also believe it would be good for the proposed commentary to note that “intended” means more than merely knowing something would result. As then-Justice Rehnquist has written, “a person who causes a particular result is said to act purposefully (intentionally) ‘when he consciously desires that result, whatever the likelihood of that result happening from his conduct’; while he is said to act knowingly if he is aware ‘that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.’”⁵³ There also is a

⁵²See *United States v. Haggert*, 980 F.2d 8, 12-13 (1st Cir. 1991); *United States v. Yeaman*, 194 F.3d 442, 460 (3d Cir. 1999); *United States v. Henderson*, 19 F.3d 917, 928 (5th Cir.), *cert. denied*, 513 U.S. 877, 115 S.Ct. 207 (1994); *United States v. Moored*, 38 F.3d 1419, 1423-27 (6th Cir. 1994); *United States v. Wells*, 127 F.3d 739, 745-47 (8th Cir. 1997); *United States v. Lorenzo*, 995 F.2d 1448, 1460 (9th Cir.), *cert. denied*, 510 U.S. 882, 114 S.Ct. 227 (1993).

⁵³*United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 631-32 (1980).

difference between something that is intended and something that is reasonably foreseeable. We support the suggestion of the Practitioners Advisory Group that, if intended loss is to be considered, the standard be “the pecuniary harm that the defendant purposely intended to cause.”

We believe that, if intended loss is to be considered, the proposed commentary should address intended losses that cannot occur – the filing of an insurance claim for \$10,000 for a stolen car whose blue book value is \$5,000. The proposed commentary addresses the matter in bracketed language. While the bracketed language would work, we think it would be better if the proposed commentary also defined intended loss to be “the pecuniary harm that *reasonably* was intended to result”

At bottom, however, we do not support the inclusion of intended loss. Except in unusual circumstance, a thief does not have a fixed amount in mind. The thief’s goal is to get as much as possible. Since a thief also does not intend (or expect) to get caught, the intended loss is virtually limitless. Applied rigorously, a requirement of including intended loss would put most loss amounts at or near the top of the loss table. We believe that intended loss can apply to inchoate offenses, but § 2X1.1 already deals with those. If the Commission decides to have an intended-loss rule for the consolidated guideline, we recommend that the Commission, rather than adopting proposed application note 2(A), adopt the proposal made by the Practitioners Advisory Group. That proposal is: “For all offense except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. ‘Inchoate offenses’ are those offenses in which the defendant is apprehended before the offense has been completed.”

Definition of “actual loss.” There are two options associated with the general rule. Option one would define “actual loss” to mean “reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable” under the relevant conduct rules. Option two has a similar definition but, significantly, no reasonable foreseeability limitation, making option two, in effect, a strict liability provision. We prefer option one, but believe that there needs to be some sort of remoteness limitation on the loss for which a defendant is accountable. Virtually anything is reasonably foreseeable, so a reasonable foreseeability test does not really place a boundary on loss. Some notion of legal causation must go along with but-for causation.

A Seventh Circuit case discusses the relationship between but-for causation and legal causation. The defendant owned a title company that issued title insurance through Ticor Title Insurance Company. The defendant bought a resort hotel and sold time-share condominium units in it, representing that the titles were clear. His title company issued the purchasers title insurance through Ticor. In reality, as defendant knew, the titles were not clear, but were encumbered. Ticor discovered this and spent some \$476,000 to clear the titles. In addition, however, the value of the condominium units declined greatly, and the condominium-unit owners were unhappy and threatening to sue Ticor. Ticor eventually bought the condominium units from the purchasers for about \$565,000. The defendant was convicted of mail fraud, and

the district court concluded that the loss was \$1,041,000 (the money spent to clear title and to purchase the condominium units). The Seventh Circuit reversed.⁵⁴ The court distinguished between “but for” causation and causation “in the legal sense.”

The loss [incurred by Ticor in purchasing the condominium units] was not a consequence of the fraud, however, other than in the sense, irrelevant here as we shall explain, of “but for” causality. Ticor had made good the only loss caused in a legal sense by the defendant’s fraudulent concealment of the defects in the titles it had insured. We do not know the cause of the loss of which the purchasers complained. . . . All we know for sure is that the loss in value was not caused by the defective titles. . . . The fact that the purchasers would not have purchased the time shares had it not been for the title insurance policies issued by Ticor would not make Ticor an insurer against a drop in the real estate market. . . . That is the difference between “but for” causation and the causation – for which the presence of but-for causation is ordinarily a necessary condition but rarely a sufficient one – that imposes legal liability. The distinction runs throughout the law. Criminal law is no exception. A man rapes a woman and she is hospitalized. Her injuries are not serious but the hospital burns down and she dies. The rapist would not be responsible for the death, because the rape did not make it more likely that the victim would die as a result of a fire. The rape therefore did not, in either a legal or an ordinary-language sense, “cause” her death, though she would not have died in the hospital fire but for the rape.⁵⁵

Under either option one or option two, Ticor’s cost of purchasing the condominium units would be a part of loss, for as the Seventh Circuit notes, there is but-for causation. But-for causation is all that is required by option two. Option one requires reasonable foreseeability, but is it not reasonable to expect that purchasers, upon finding that they have bought property with encumbered title, would want a refund and that Ticor, whose agent sold them the property, would refund the purchase price to avoid litigation or as a matter of business goodwill?

Time of measurement. Proposed application note 2(B) has two options for when to measure loss. Option one would measure the loss as of the time of sentencing, and option two would measure loss at the time the offense is detected. We do not support either option. In our judgment, the time to measure loss is when the offense is committed. Suppose, for example, that a defendant steals a new car worth \$50,000 from a dealer. The loss is discovered a month later, and the defendant is convicted and sentenced two years after the theft. The value of the car at the

⁵⁴United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994).

⁵⁵*Id.* at 1007. The court of appeals did not hold that Ticor was wrong to buy the condominium units. “We have no reason to doubt the prudence of Ticor’s expenditure. But that expenditure was not a loss caused by the defendant in the legal sense.” *Id.* The court also indicated that, even if the \$565,000 were part of loss, it was a consequential damage excluded from loss. *Id.* at 1007-08.

time of the theft was \$50,000. The value a month later, when the car no longer is new, is less than that, probably by one-third (the usual depreciation in value once a new car leaves the dealer's lot). The value two years later may be less than half the \$50,000 that the car was worth on the dealer's lot.

The amount of loss should be determined as of the time when the loss occurs. Use of any other time is artificial and should be supported by a strong rationale. A time-of-detection rule has no apparent rationale and, in any event, is too subjective and invites litigation. Time of sentencing lacks a rationale other than ease of application. Time of sentencing, however, is preferable to time of detection because it is not subjective and therefore does not invite litigation. We believe that time of offense will usually be as easy to apply as time of sentencing.

Exclusion of interest. Proposed application note 2(C)(i) contains two options for excluding interest. Option one would exclude "interest of any kind, finance charges, late fees, penalties, amounts based upon an agreed-upon return or rate of return, or other opportunity costs." Option two would exclude interest other than bargained-for interest. We support option one. Inclusion of bargained-for interest would invite litigation. Because including interest rarely is likely to make a difference in punishment, and because loss-determination for guideline purposes is not intended to be a precise accounting of the fiscal impact of the offense, there is little reason to require the additional work necessary to gather information about bargained-for interest.

Economic benefit conferred on victim. Proposed application note 2(C)(iii) would exclude from loss "the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected." We support this provision. The proposed application note contains bracketed language that would not count the value of two kinds of benefit – (1) benefit of slight value, and (2) services rendered by a person falsely posing as a licensed professional, goods falsely represented as approved by a governmental regulatory agency, or goods for which governmental regulatory approval was fraudulently obtained. We do not object to these exclusions. With respect to proposed application note 2(C)(iii)(IV)(1), we believe that the de minimis language in the first brackets is better than the substantially different language in the second brackets.

Ponzi schemes. Proposed application note 2(C)(iii)(V) contains two proposals for dealing with Ponzi schemes. Option one would preclude reducing loss "by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor's principal investment." Option two would preclude reducing loss "by the benefit transferred to victims designed to lure additional 'investments' in the scheme." We support option one as most consistent with the approach of the consolidated guideline, which as stated in the proposed background commentary is that sentences ordinarily "should reflect the nature and magnitude of the pecuniary harm caused" Ponzi-scheme victims who have had their principal returned have not been harmed pecuniarily. Option one, by not allowing a reduction in excess of the victim's principal, ensures that one victim's "profit" will not be used to reduce another victim's

loss.

Estimation of loss. Proposed application note 2(D) would state that the sentencing court “need only make a reasonable estimate of the loss.” We do not object to that part of the proposed commentary. But proposed application note 2(D) then goes on to state that “[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence.” We believe that this overstates the situation. There can be cases in which the loss will be determined principally from documents. With regard to reading and interpreting those documents, the sentencing court may not be in a better position than an appellate court. We suggest that this sentence, and the next two, be deleted as unnecessary. An appellate court is required by 18 U.S.C. § 3742 to give due deference to the trial court’s application of the guidelines to the facts. If they are to be retained, we recommend that “ordinarily” be inserted after “sentencing judge” in the second sentence of the first paragraph of proposed application note 2(d), quoted above.

Gain. The proposed commentary contains four options for dealing with gain. Option one would permit the court to consider the gain from the offense in estimating the loss. Option two would require the court to use the gain if the gain is greater than loss. Option three would require the court to use the gain if loss cannot reasonably be determined or gain is greater than loss. Option four would require the use of gain if loss cannot reasonably be determined.

As noted above, the Commission’s view, set forth in the proposed background commentary, is that sentences under the consolidated guideline “should reflect the nature and magnitude of the pecuniary harm caused” by the crime. We support option four. The Commission’s focus is on harm to the victim. Only if that harm cannot reasonably be determined should the court look to gain. Options one, two, and three would require a determination of gain in every case sentenced under the consolidated guideline – unnecessary work, in our judgment, because in the vast majority of cases the loss to victims will exceed a defendant’s gain.

Downward departure. We support the inclusion of proposed application note 2(G)(ii)(II), but suggest some modification of it. The proposed commentary would indicate that a court, in determining whether to depart downward, can consider that, “The loss significantly exceeds the greater of the [defendant’s] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.” We support inclusion of the bracketed words, but we believe that the sentence should be modified by deleting “and therefore” and inserting “or otherwise.”

Part D

We have no objection to this part of the proposed amendment if the Commission decides to adopt a new loss table.

Part E

We have no objection to this part of the proposed amendment.

Part F

Part F of proposed amendment 12 addresses a circuit split involving the computation of tax loss when a case involves underreporting of both business and personal tax. For example, a defendant, an officer and main stockholder in a corporation, diverts for personal use \$100,000 of corporate funds. The Sixth Circuit applies both the individual rate and the corporate rate to the amount diverted.⁵⁶ With an individual rate of 28% and a corporate rate of 34 %, the tax loss in the example would be \$62,000. The Second and Seventh Circuits applies the corporate rate to the amount diverted from the corporation and the personal rate to the amount diverted from the corporation less the corporate-rate tax.⁵⁷ In the example, the tax loss would be \$52,480 (34% of \$100,000, or \$34,000; plus 28% of \$66,000, or \$18,480).

Part F adopts the approach of the Second and Seventh Circuits. We support part F.

PROPOSED AMENDMENT 13 **Aggravating and Mitigating Factors in Fraud and Theft Cases**

Proposed amendment 13 contains two options “to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases.” The options are drafted to fit into the consolidated guideline set forth in proposed amendment 12. Option one would add a specific offense characteristic calling for a range of adjustments, from a four-level enhancement to a four-level reduction, dependent upon the presence of aggravating and mitigating circumstances. New commentary would set forth factors to consider in determining if aggravating, or significantly aggravating, circumstances are present and if mitigating, or significantly mitigating, circumstances are present. Option two would add a specific offense characteristic calling for a two-level enhancement or a two-level reduction. The two-level enhancement would apply if there was a qualifying aggravating factor and no qualifying mitigating factor or if the seriousness of the qualifying aggravating factors outweigh

⁵⁶United States v. Cseplo, 42 F.3d 360, 364-65 (6th Cir. 1994).

⁵⁷United States v. Martinez-Rios, 143 F.3d 662, 672 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919, 920-21 (7th Cir. 1993).

the seriousness of the qualifying mitigating factors. The same balancing approach would be used to determine whether to apply the two-level reduction.

We applaud the Commission's effort to find other factors that should affect the sentencing of economic crimes. We prefer option two.

Both options, however, present a problem to the extent that they rely on factors already accounted for in calculating the offense level. In determining if there is an "aggravating" or "significantly aggravating" circumstances (option one) or a "qualifying aggravating factor," both options, for example, call for consideration of the number of victims – a factor already accounted for in proposed § 2B1.1(b)(2). Further, under each option the presence of that factor is not controlling. The court must consider the "intensity" of that factor (option one) or determine that the seriousness of the aggravating factors outweigh the mitigating effects of the mitigating factors. However, by determining that there will always be an enhancement if there are more than a specified number of victims (four in proposed § 2B1.1), the Commission has determined for all cases that the factor is controlling. The result is that if an offense involves 50 victims, defendant A could receive only the four-level enhancement of proposed § 2B1.1(b)(2), while defendant B – in an otherwise identical case involving 30 victims – could receive the four-level enhancement of proposed § 2B1.1(b)(2) plus another two-levels for an aggravating factor (or four levels under option one for a significantly aggravating factor). No factor already accounted for by a specific offense characteristic should enter into the determination of whether there are "aggravating" or "significantly aggravating" circumstances (option one) or whether the qualifying aggravating factors outweigh the qualifying mitigating factors (option two).

PROPOSED AMENDMENT 14

Sentencing Table Amendment and Alternative to Sentencing Table Amendment

Proposed amendment 14 sets forth two alternatives. Option one would expand Zones B and C of the sentencing table for criminal history categories I and II. Option two would add a new guideline to chapter five of the *Guidelines Manual* that would authorize a two level reduction for defendants convicted of certain economic crimes who meet specified criteria. The criteria are (1) the defendant has no criminal history points, (2) the defendant did not use violence or threats of violence and did not possess or use a gun or other dangerous weapon, (3) the offense did not involve bodily injury or a conscious or reckless risk of serious bodily injury, (4) the defendant did not receive an enhancement under any of several specified provisions, and (5) before sentencing, the defendant voluntarily makes full restitution or notifies the government and the court that the defendant agrees to make full restitution as determined by the court, fully cooperates in determining the amount of full restitution, and makes partial restitution to the extent able to do so.

We support option one, which will give federal judges additional discretion to fashion a

sentence that is most appropriate under all of the circumstances of the case. Option one, unlike option two, requires no additional work by the probation officer conducting the presentence investigation and does not involve additional fact-finding that could become the subject of an appeal. We believe that federal judges will not abuse the additional discretion afforded by option one but will exercise that discretion in a responsible manner.

PROPOSED AMENDMENT 15

Firearms Table

Proposed amendment 15 would amend the firearms table of § 2K2.1(b)(1) to add entries for 100-199 weapons and 200 or more weapons. Two options are presented. Option 1 would continue to use the one-level increments of the current table. Option 2 would convert the entire table to two-level increments. We oppose the amendment.

The synopsis of proposed amendment states that the amendment responds to a recommendation of the Bureau of Alcohol, Tobacco, and Firearms to increase the penalties under § 2K2.1 for offenses involving more than 100 guns. There is nothing to suggest that an increase is warranted. Indeed, the Commission data indicates that the present offense levels are, if anything, too high. In fiscal year 1999, more than three-quarters (76.3%) of the firearms cases were sentenced within the guideline range.⁵⁸ Of those sentences, slightly more than half (51.3%) were at the bottom of the guideline range and another 10.1% were in the lower half of the guideline range.⁵⁹ Downward departures occurred in 11% of the sentences, and upward departures in 1.2%.⁶⁰ In other words, nearly half of all firearms sentences were at or below the bottom of the guideline range. That data does not suggest a need to increase offense levels under § 2K2.1.

The synopsis states that, “According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under § 2K2.1 for trafficking in more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the encouraged upward departure provided in Application Note 15 to § 2K2.1.” This assertion is not as alarming as ATF may have intended it to be. The unstated assumption behind that assertion is that the sentences were inappropriately lenient, but there is no evidence to support such an assumption. There has to have been good reasons why the defendants sentenced to probation or to imprisonment for less than a year received those sentences. Federal judges, in our experience,

⁵⁸U.S. Sentencing Com’n, 1999 Sourcebook of Federal Sentencing Statistics table 27.

⁵⁹*Id.* at table 29.

⁶⁰*Id.* at table 27. There are substantial assistance departures in 11.5% of the cases. *Id.*

are not going to impose such sentences if they are not warranted.

We recommend not promulgating proposed amendment 15.

PROPOSED AMENDMENT 16

Prohibited Person Definition

Proposed amendment 16 would amend § 2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and § 2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition) in two respects. Both guidelines require the court to select from among several base offense levels. Several variables are involved, including whether the defendant was a “prohibited person.” Thus, for example, § 2K2.1(a)(6) calls for a base offense level of 14 if the defendant is a prohibited person. Both guidelines define the term “prohibited person” in commentary. The definition in the commentary to § 2K1.3 tracks the definition in 18 U.S.C. § 842(i), which sets forth the classes of persons forbidden to ship, transport, or possess an explosive device in interstate or foreign commerce. The definition in the commentary to § 2K2.1 is similar to, but not identical with, the definition in 18 U.S.C. § 922(g).

Proposed amendment 16 would make two principal changes in these guidelines. First, the amendment would add a definition of the term “prohibited person” to the commentary to each guideline. The amendment would change the definition in the commentary to § 2K1.3 to incorporate by reference the definition in 18 U.S.C. § 842(i), and would change the definition in the commentary to § 2K2.1 to that “a ‘prohibited person’ is any person designated in 18 U.S.C. § 922(g) or § 922(n).” We have no objections to this change.

The second part of the amendment would specify that a defendant’s status as a prohibited person for purposes of selecting the appropriate base offense level is to be determined as of the time of the commission of the instant offense. We support this change. The reason a person’s status as a prohibited person is a factor in determining the base offense level is that an explosives or firearms offense committed by such a person is more dangerous to public safety than an offense committed by someone who is not a prohibited person. The focus, therefore, properly belongs on the time of commission of the offense.

PROPOSED AMENDMENT 17

Prior Felonies

Proposed amendment 17 would amend § 2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and § 2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition). Both guidelines have several base offense levels to

select from, and a variable used in both is whether the defendant has a prior felony conviction, or more than one prior felony conviction, for a crime of violence or a controlled substance offense. The amendment would address a split among the circuits over the interpretation of the term “prior felony conviction(s)” as used in subsection (a) of each of those guidelines.

The issue is whether the word “prior” means before commission of the instant offense or before sentencing for the instant offense.⁶¹ The rationale for using a prior felony conviction for a violent crime or a drug-trafficking crime is that a person with such a conviction is more dangerous to the public than a person who has no criminal conviction or who has a conviction for a misdemeanor or felony other than a crime of violence or drug-trafficking crime. If that is so, then the relevant time, for the purpose of determining punishment, is whether the defendant had such a conviction at the time the explosives or firearms offense was committed. We therefore support the amendment.

PROPOSED AMENDMENT 18

Immigration

Unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement of § 2L1.2(b)(1) is applicable. The unfair disparity arises from treating similar defendants differently, as well as from treating dissimilar defendants the same. A defendant convicted of illegal reentry following deportation for possession of a gram of cocaine (a felony under state law) will receive a significantly shorter sentence in a district in which the United States attorney has a fast-track policy than in a district in which the United States attorney does not have such a policy. Further, a defendant whose aggravated felony is a conviction for passing a bad check gets the same 16-level enhancement as the defendant whose aggravated felony is murder.

Proposed amendment 18 seeks to address the unfair-disparity problem by modifying the aggravated-felony enhancement. The purpose, in the words of the synopsis of proposed amendment, is “to provide more graduated enhancements based on the seriousness of the prior aggravated felony.” We recommend promulgation of amendment 18. We do not support either

⁶¹*Compare* United States v. Barton, 100 F.3d 43, 45-46 (6th Cir. 1996) (prior to commission), *with* United States v. Gooden, 116 F.3d 721, 724-25 (5th Cir. 1997) (prior to sentencing); United States v. McCary, 14 F.3d 1502-1505-6 (10th Cir. 1994) (same); United States v. Laihben, 167 F.3d 1364 (11th Cir. 1999) (same); United States v. Pugh, 158 F.3d 1308 (D.C. Cir. 1998) (same). The cases have arisen in the context of construing the language of § 2K2.1. The same result should be reached under § 2K1.3 because the language of that provision is identical to the language of § 2K2.1.

option 1 or option 2.

Until 1988, the maximum prison term for an illegal reentry offense was two years. The Anti-Drug Abuse Act of 1988 modified the law to increase the maximum prison term to 15 years if the defendant was deported following conviction of an aggravated felony and 5 years if the defendant was deported following conviction of a felony other than an aggravated felony.⁶² The apparent congressional policy is that the seriousness of an illegal-reentry offense is directly related to the seriousness of an offense committed by the defendant before deportation. If the defendant has no criminal record or was convicted of a misdemeanor before deportation, the statutory maximum is the lowest. If the defendant was convicted of an “aggravated felony,” the statutory maximum is the highest. The statutory maximum is in the middle if the defendant was convicted before deportation of a felony other than an aggravated felony.

Congress specially defined the term “aggravated felony” for purposes of the illegal reentry offense in 8 U.S.C. § 1101(a)(43). Unfortunately, Congress has expanded the definition over the years to the point that nearly any felony is an aggravated felony. The original definition specified murder, a drug-trafficking offense with a maximum prison term of at least 10 years, illicit trafficking in a firearm or destructive device, and an attempt or conspiracy to commit any of those offenses.⁶³ Congress subsequently expanded the definition on several occasions, resulting in a definition with 20 parts, some of which have two or three subparts.

Not all of the offenses encompassed by the present definition of “aggravated felony” are of equal seriousness. A receipt of stolen property offense for which the defendant received a prison term of one year is not as serious as an aggravated sexual abuse offense. Nevertheless, the aggravated-felony enhancement of § 2L1.2(b)(1) treats all aggravated felonies as if they are of equal seriousness. We believe that a better policy is to base the extent of the aggravated-felony enhancement on the actual seriousness of the aggravated felony.

The question, then, is how best to measure seriousness. Perhaps the most accurate way to measure seriousness would be to score the prior offense using the *Guidelines Manual*. Although that method would result in a uniform assessment of seriousness, that method is also the highly impractical and, therefore, the least desirable.

The least accurate measure of seriousness is the category-of-offense approach, which is used in option one. Relying on a category of offense assumes – wrongly – that all defendants who commit a given category of offense have engaged in equally serious conduct. A conviction for drug distribution, however, may have been for serving as a courier transporting 500 grams of cocaine powder or for having been the head of an organization responsible for distributing 250

⁶²Pub. L. No. 1000-690, § 7345, 102 Stat. 2023.

⁶³*Id.* at § 7342, 102 Stat. 4469.

kilograms of cocaine powder. Because an offense category encompasses a broad range of conduct, treating all violations of a particular type, such as drug distribution, does not accurately measure the seriousness of a particular violation.

We believe that the punishment meted out to a defendant is the most appropriate measure of seriousness. There are two ways to determine the punishment meted out, one is by sentence imposed and the other is by time served. We believe time served is the better measure because time served is the actual punishment that has been meted out. Sentence imposed sets the maximum time that will be served, but most defendants do not serve the maximum because of good time credits or parole. Thus, a four-year prison term in one state may result in the same time served as a six-year term in another state. If five years is a cut point, persons who are imprisoned for four years in those states will receive different enhancements.

The Justice Department has raised two principal objections to using time served. One is the difficulty in determining the amount of time served, and the other is that “[o]vercrowding in state prisons may result in early releases in some cases and understate the seriousness of the offense.” We do not find these reasons sufficient to reject the use of time served. We acknowledge that computing the time served can be difficult in some situations. When the calculation of time served is necessary for each and every conviction, the ease of computation can support a determination to use sentence imposed. In illegal reentry cases, however, there will be only one conviction for which time served will have to be computed, namely the aggravated felony that triggers application of the 16-level enhancement. Moreover, the kind of problems that give rise to the difficulty in computing time served ordinarily will not arise if the defendant is an alien because an alien convicted of a serious offense usually is deported upon release from imprisonment for that offense.

We think that the concern about early release for overcrowding overstates the impact of such early release upon time served generally. It is not simply overcrowding that compels courts to order early release, but overcrowding to such an extent that there is a violation of the Constitution. The remedy of wholesale early release to relieve overcrowding occurs rarely; it is not the norm, and can be accounted for adequately by departure.

The Justice Department also objects to the proposed amendment because it “fails to prevent creative bases for downward departure that have arisen, particularly in districts that do not have ‘fast track’ policies.” There can be no doubt that downward departures are frequent in illegal reentry cases. In fiscal year 1999, downward departures (for other than substantial assistance) occurred in 36.1% of the cases under § 2L1.2.⁶⁴ By comparison, the overall rate of downward departure (for other than substantial assistance) is 15.8%, less than half the rate in

⁶⁴U.S. Sentencing Com’n, 1999 Sourcebook of Federal Sentencing Statistics table 28.

illegal reentry cases.⁶⁵ The reason, we believe, is the unfairness of the current aggravated-felony enhancement. Not all aggravated felonies are serious enough to warrant a 16-level enhancement. Scaling the enhancement on the basis of the seriousness of the aggravated felony addresses the unfairness problem directly and obviates the need for “creative bases for downward departure.”

As indicated above, we support the proposed amendment. We recommend that the enhancement under proposed (b)(1)((A)(i) be 10 levels. We oppose options 1 and 2. Both options would introduce a category-of-offense approach that assumes that all offenses within a given category are of equal seriousness, an assumption that we believe to be inaccurate. That the aggravated felony involved use of a firearm, for example, will be taken into account by the court sentencing the defendant for the aggravated felony. Suppose, for example, that the aggravated felony involved the use of a gun and that the time served for that aggravated felony was four years. To require a 16-level enhancement because a gun was used, instead of the eight levels otherwise called for, not only treats identically offenses that are of different degrees of seriousness, but also questions the wisdom and appropriateness of the sentence imposed in the aggravated-felony case (and does so as a general matter, not based upon the totality of the circumstances of the particular aggravated felony).

PROPOSED AMENDMENT 19

Nuclear, Biological, and Chemical Weapons

Proposed amendment 19 would amend § 2M5.1 (evasion of export controls), § 2M5.2 (exportation of arms, munitions, or military equipment or services without required validated export license), and § 2M6.1 (unlawful acquisition, alteration, use transfer, or possession of nuclear material, weapons, or facilities). The changes to § 2M5.1 and § 2M5.2 respond to hortatory language in a provision of the National Defense Authorization Act for Fiscal Year 1997.⁶⁶ The amendment increases by four levels the base offense levels in § 2M5.1 (evasion of export controls) and § 2M5.2 (exportation of arms, munitions, or military equipment or services without required validated export license). The amendment also would revise § 2M6.1 (unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) to incorporate two new offenses at 18 U.S.C. § 175 (prohibitions with respect to biological weapons) and 18 U.S.C. § 229 (prohibited activities with respect to chemical weapons). We believe that the amendment sufficiently addresses offenses relating to biological and chemical weapons and threats to use such weapons.

⁶⁵*Id.* at table 27.

⁶⁶Pub. L. No. 104-201, § 1423, 110 Stat. 2725.

PROPOSED AMENDMENT 21
Miscellaneous New Legislation and Technical Amendments

Proposed amendment 21 would (1) respond to legislation enacted during the 106th Congress and (2) make technical and conforming changes to § 2J1.6 (failure to appear by defendant), and to the commentary to § 2K1.3 (unlawful receipt, possession, or transportation of explosive material) and § 2N2.1 (violations of statutes and regulations dealing with any food, drug, biological product, device, cosmetic, or agricultural product). We have no objection to the amendment.