Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. Phlx–2002–79 and should be submitted by February 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–1049 Filed 1–16–03; 8:45 am]

BILLING CODE 8010–01–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments.

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

The specific amendments proposed in this notice are as follows: (1) A proposed amendment to repromulgate the temporary, emergency amendment implementing the Sarbanes-Oxley Act, Public Law. 107–204, as a permanent, non-emergency amendment, and issues for comment; (2) a proposed amendment to repromulgate the temporary, emergency amendment implementing the Bipartisan Campaign Reform Act of 2002, Public Law. 107–155, as a permanent, non-emergency amendment; (3) a proposed amendment implementing section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Public Law. 107–273, which directs the Commission to review and amend the sentencing guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence or drug trafficking crime in which the defendant used body armor; (4) a proposed amendment to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that provides increased penalties for offenses involving oxycodone; (5) issues for comment addressing section 11008 of the 21st Century Department of Justice Appropriations Authorization Act, Public Law. 107–273, regarding an appropriate enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a federal judge, magistrate judge, or any other official described in section 111 or section 115 of title 18, United States Code; and (6) an issue for comment regarding section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Public Law. 107–296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code. Additional issues for comment regarding the 21st Century Department of Justice Appropriations Authorization Act and the Cyber Security Enhancement Act of 2002 were published in the **Federal Register** on December 18, 2002 (*see* 67 FR 77532).

DATES: Written public comment regarding the proposed amendments set forth in this notice, including public comment regarding retroactive application of any of these proposed amendments, should be received by the Commission not later than March 17, 2003.

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

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

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

The Commission seeks comment on the proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

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

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at *http://www.ussc.gov*.

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

Diana E. Murphy,

Chair.

1. Corporate Fraud

Synopsis of Proposed Amendment

This proposed amendment implements directives to the

[8] 17 CFR 200.30–3(a)(12).

Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the ''Act''), Public Law 107–204. The directives pertain to fraud and obstruction of justice offenses and require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. Under emergency amendment authority, the Commission promulgated guideline amendments, effective January 25, 2003, to implement these directives and now seeks comment on the following proposed permanent amendment.

First, the proposed amendment addresses the directive contained in section 1104 of the Act regarding fraud offenses involving significantly greater than 50 victims by expanding the victims table in § 2B1.1(b)(2). Currently, subsection (b)(2) provides a two level enhancement if the offense involved more than 10 but less than 50 victims, or was committed through mass-marketing, or a four level enhancement if the offense involved 50 or more victims. The proposed amendment provides an additional two levels, for a total of six levels, if the offense involved 250 or more victims.

Second, the proposed amendment modifies § 2B1.1(b)(12)(B) to address directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Subsection (b)(12)(B) currently provides a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The proposed amendment expands the scope of this enhancement by providing two additional prongs in response to the directive. The first prong applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. This prong of the enhancement is based on a presumption that if the offense endangered the solvency or financial security of an organization that was a publicly traded company or had 1,000 or more employees, the offense similarly affected a substantial number of individual victims. As a result, the court is not required to determine whether the offense endangered the solvency or financial security of each individual victim. The second prong applies to offenses that substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense. The court could apply this prong as an alternative to the first prong in cases in which there is sufficient evidence to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of the victims.

The corresponding application note to the new enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. The note includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce among the list of factors that the court shall consider when applying the new enhancement.

The proposed amendment also modifies application of the other prong of subsection (b)(12), the financial institutions enhancement, to be consistent structurally with the new enhancement. Currently, the presence of any one of the enumerated factors automatically triggers application of the financial institutions enhancement. Under the proposed amendment, the application note to the financial institutions enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense substantially jeopardized the safety and soundness of a financial institution. The note includes references to insolvency, substantially reducing benefits to pensioners and insureds, and inability on demand to refund fully any deposit, payment, or investment, among the factors that the court shall consider when applying this enhancement.

Third, the proposed amendment addresses the directive contained in section 1104 of the Act pertaining to fraud offenses committed by officers or directors of publicly traded corporations by providing a new four level enhancement at § 2B1.1(b)(13). The enhancement applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute (*e.g.*, 18 U.S.C. 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (*e.g.*, 18 U.S.C. 1341 prohibiting wire fraud), provided that the offense involved a violation of securities law. The corresponding application note provides that in cases in which the new enhancement applies, the current enhancement for abuse of position of trust at § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply.

Pursuant to the corresponding application note, ''securities law'' (1) means 18 U.S.C. 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)); and (2) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in section 3(a)(47).

Fourth, the proposed amendment expands the loss table at subsection (b)(1). Currently, the loss table provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The proposed amendment provides two additional levels to the table; an increase of 28 levels for offenses in which the loss exceeded $200,000,000, and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. These proposed additions to the loss table would address congressional concern expressed in the Act regarding particularly extensive and serious fraud offenses, and would more fully effectuate increases in statutory maximum penalties, for example, the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). The proposed amendment also amends the tax table in § 2T4.1 to conform to the proposed changes made to the loss table in § 2B1.1.

Also with respect to loss, the proposed amendment includes the reduction that resulted from the offense in the value of equity securities or other corporate assets among the factors the court may consider in estimating loss under subsection (b)(1).

Fifth, the proposed amendment implements the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. First, the proposed amendment increases the base offense level in § 2J1.2 (Obstruction of Justice) from level 12 to level 14. Second, the proposed amendment adds a new two

level enhancement to § 2J1.2 that applies if the offense (1) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation.

Sixth, the proposed amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, is referenced to § 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act). This offense provides a statutory maximum of 10 years' imprisonment if the defendant certifies the publicly traded company's periodic financial report knowing that the statement does not comply with all requirements of the Securities and Exchange Commission (and 20 years' imprisonment if that certification is done willfully). The proposed amendment also expands the current cross reference in § 2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant who is convicted under 18 U.S.C. 1520 certified the financial report of a publicly traded company in order to facilitate a fraud, the proposed change to the cross reference provision would require the court to apply § 2B1.1 instead of § 2E5.3. Other new offenses are proposed to be included in Appendix A (Statutory Index) as well as the statutory provisions of the relevant guidelines.

Proposed Amendment

Section 2B1.1(b)(1) is amended by striking the period; and by adding at the end the following:

''(O) More than $200,000,000 add 28

(P) More than $400,000,000 add 30.''.

Section 2B1.1(b)(2) is amended to read as follows:

''(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.''.

Section 2B1.1(b)(12)(B) is amended to read as follows:

''(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.''.

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

''(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by 4 levels.''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1348, 1350,'' after ''1341–1344,''.

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

'' 'Equity securities' has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(11)).'';

by inserting after ''Secretary of the Interior.'' the following new paragraph:

'' 'Publicly traded company' means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). 'Issuer' has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).'';

and by adding at the end the following:

'' 'Victim' means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 2(C) by redesignating subdivision (iv) as (v); and by adding after subdivision (iii) the following new subdivision:

''(iv) The reduction that resulted from the offense in the value of equity securities or other corporate assets.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''Victim and Mass-Marketing Enhancement under'' in the heading and inserting ''Application of''; by striking subdivision (A) and inserting the following:

''(A) Definition.—For purposes of subsection (b)(2), 'mass-marketing' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. 'Mass-marketing' includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.'';

In subdivision (B)(i)(I) by striking ''described in subdivision (A)(ii) of this note;'' and inserting ''any victim as defined in Application Note 1;'';

In subdivision (B)(ii)(IV) by inserting ''at least'' after ''to have involved''; and in subdivision (C) by inserting ''or (C)'' after ''(B)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by redesignating Notes 11 through 15 as Notes 12 through 16, respectively.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 10 and inserting the following:

''10. Application of Subsection (b)(12)(B).—

(A) Application of Subsection (b)(12)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

(i) The financial institution became insolvent.

(ii) The financial institution substantially reduced benefits to pensioners or insureds.

(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.

(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.

(B) Application of Subsection (b)(12)(B)(ii).—

(i) Definition.—For purposes of this subsection, 'organization' has the meaning given that term in Application Note 1 of § 8A1.1 (Applicability of Chapter Eight).

(ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1000 employees was substantially endangered:

(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.

(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).

(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.

(IV) The organization substantially reduced its workforce.

(V) The organization substantially reduced its employee pension benefits.

(VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

11. Application of Subsection (b)(13).—

(A) Definition.—For purposes of this subsection, 'securities law' (i) means 18 U.S.C. 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

(B) In General.—A conviction under a securities law is not required in order for subsection (b)(13) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply § 3B1.3.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 16, as redesignated by this amendment, by striking subdivision (v); and by redesignating subdivisions (vi) and (vii) as subdivisions (v) and (vi), respectively.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the last paragraph by inserting ''(i)'' after ''(B)''.

Section 2E5.3 is amended in the heading by adding at the end; ''Destruction and Failure to Maintain Corporate Audit Records''.

Section 2E5.3(a)(2) is amended to read as follows:

''(2) If the offense was committed to facilitate or conceal (A) an offense involving a theft, a fraud, or an embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply § 2B1.1 (Theft, Property Destruction, and Fraud), § 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or § 2J1.2 (Obstruction of Justice), as applicable.''.

The Commentary to § 2E5.3 captioned ''Statutory Provisions'' is amended by inserting ''§'' before ''1027''; and by inserting '', 1520'' after ''1027''.

Section 2J1.2(a) is amended by striking ''12'' and inserting ''14''.

Section 2J1.2(b) is amended by adding at the end the following:

''(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by 2 levels.''.

The Commentary to § 2J1.2 captioned ''Statutory Provisions'' is amended by inserting '', 1519'' after ''1516''.

Section 2T4.1 is amended in the table by striking the period and adding at the end the following:

''(O) More than $200,000,000 34

''(P) More than $400,000,000 36.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1347 the following new lines:

''18 U.S.C. 1348 2B1.1

18 U.S.C. 1349 2X1.1

18 U.S.C. 1350 2B1.1''.''

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1512(c) by striking ''(c)'' and inserting ''(d)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1512(b) the following new line:

''18 U.S.C. 1512(c) 2J1.2''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1518 the following new lines:

''18 U.S.C. 1519 2J1.2

18 U.S.C. 1520 2E5.3''.

Issues for Comment: Corporate Fraud

1. On January 8, 2003, the Commission promulgated a temporary, emergency amendment in response to directives contained in the Sarbanes-Oxley Act of 2002. The Commission specified an effective date of January 25, 2003, for the amendment. The amendment will remain in effect until the Commission repromulgates the emergency amendment as a permanent amendment under the Commission's general promulgation authority at 28 U.S.C. 994(p).

(A) As part of that emergency amendment, the Commission expanded the loss table in § 2B1.1(b)(1). The amendment provided two additional levels to the table; an increase of 28 levels for offenses in which the loss exceeded $200,000,000 and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. The Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, the loss table should be modified more extensively to provide increased offenses levels for offenses involving lower loss amounts. The Commission requests comment specifically on the following three options and invites public comment on any other alternative loss table:

Section § 2B1.1(b)(1) is amended to read as follows:

Option A:

''(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $25,000	add 6
(E) More than $60,000	add 8
(F) More than $100,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $700,000	add 16
(J) More than $1,000,000	add 18
(K) More than $2,500,000	add 20
(L) More than $7,000,000	add 22
(M) More than $20,000,000	add 24
(N) More than $50,000,000	add 26
(O) More than $100,000,000	add 28
(P) More than $200,000,000	add 30.''.

Option B:

''(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4

Loss (apply the greatest)	Increase in level
(D) More than $25,000	add 6
(E) More than $50,000	add 8
(F) More than $100,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $800,000	add 16
(J) More than $1,600,000	add 18
(K) More than $3,200,000	add 20
(L) More than $7,000,000	add 22
(M) More than $20,000,000 ...	add 24
(N) More than $50,000,000 ...	add 26
(O) More than $100,000,000	add 28
(P) More than $200,000,000 ..	add 30.''.

Option C:

''(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $30,000	add 6
(E) More than $70,000	add 8
(F) More than $100,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $600,000	add 16
(J) More than $800,000	add 18
(K) More than $1,000,000	add 20
(L) More than $2,500,000	add 22
(M) More than $7,000,000	add 24
(N) More than $20,000,000 ...	add 26
(O) More than $50,000,000 ...	add 28
(P) More than $100,000,000 ..	add 30
(Q) More than $200,000,000	add 32
(R) More than $400,000,000	add 34.''.

Additionally, the Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should amend § 2B1.1(a) to provide an alternative base offense level, either in conjunction with, or in lieu of, an amendment to the loss table, that would apply based on the statutory maximum term of imprisonment applicable to the offense of conviction. Specifically, the Commission requests comment on amending § 2B1.1(a) to read as follows:

''(a) Base Offense Level:

(1) 7, if the defendant was convicted of an offense referenced to this guideline for which the maximum term of imprisonment prescribed by law is [5][10][15][20] years or more; or

(2) 6, otherwise.''.

(B) As part of the emergency amendment, the Commission promulgated a new enhancement at § 2B1.1(b)(13) that provides a four level enhancement if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should expand the scope of § 2B1.1(b)(13) to include other individuals or entities who may have a fiduciary or similar statutory duty of trust and confidence to the investor. For example, should the Commission include in § 2B1.1(b)(13) a registered broker or dealer (*see* 15 U.S.C. 78c(a)(47)), an associated person of a registered broker or dealer (*see* 15 U.S.C. 78c(18)), an investment adviser (*see* 15 U.S.C. 80b-2(a)(11)), or a person associated with an investment adviser (*see* 15 U.S.C. 80b-2(a)(17))? Additionally, should the Commission expand the scope of the enhancement to apply to entities or individuals that offer and manage securities, commodities, and futures but who are not regulated under securities law (as defined by the Commission in Application Note 11 of § 2B1.1, effective January 25, 2003)? For example, should the enhancement apply in cases involving violations of the Commodities Exchange Act (7 U.S.C. 1 *et seq.*) or other federal laws that govern the regulation of securities, commodities, and futures?

The Commission additionally requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should maintain the magnitude of the enhancement in § 2B1.1(b)(13) at four levels. If not, what should be the magnitude of the enhancement?

2. The Commission requests comment regarding whether it should provide separate guidelines for theft, property destruction, and fraud offenses that currently are referenced to § 2B1.1. If the Commission provided separate guidelines for these offenses, what components of current § 2B1.1 would be appropriate for each of the separate guidelines? Would the definition of ''loss'' need to be modified in any fashion as a result of providing separate guidelines? Should the Commission, in conjunction with, or in lieu of, separate guidelines, amend § 2B1.1 to provide separate loss tables for theft and fraud offenses? If so, how should the Commission determine which table would be applicable to the offenses referenced to § 2B1.1? For example, should the Commission use the pre-consolidation Appendix A references to determine which table would be applicable to an offense?

3. The Commission has received information suggesting that in certain cases involving fraud-related contempt, courts have not applied the appropriate guideline. The relevant guideline, § 2J1.1 (Contempt), directs the court to apply § 2X5.1 (Other Offenses), which in turn instructs the court to apply the ''most analogous guideline.'' Specifically, in certain cases in which the misconduct constituting contempt is a violation of a court order enjoining fraudulent behavior, courts inappropriately may have applied the obstruction of justice guideline, § 2J1.2, instead of the guideline relating to fraud, § 2B1.1 (Theft, Property Destruction, and Fraud). The Commission requests comment regarding whether this issue should be addressed and, if so, in what manner. For example, should the Commission add an application note to § 2J1.1 that clarifies that for offenses in which the misconduct constituting contempt is a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is § 2B1.1? Should the application note more generally state that for offenses in which the misconduct constituting contempt is fraud, the most analogous guideline is § 2B1.1? In addition, the Commission has received information suggesting that the enhancement in § 2B1.1(b)(7)(C) is not always applied as appropriate in cases involving fraud-related contempt. Should the Commission clarify, possibly in the same application note discussed above, that in contempt cases involving violations of court orders enjoining fraudulent behavior, the enhancement in § 2B1.1(b)(7)(C) should apply?

4. The emergency amendment effective January 25, 2003, increased the base offense level in § 2J1.2 (Obstruction of Justice) from level 12 to level 14 and provided a new enhancement in § 2J1.2 addressing the directive relating to the destruction of evidence and offenses that are otherwise extensive in scope, planning, or preparation. The Commission requests comment regarding whether, in light of these changes to § 2J1.2, modifications also should be made to § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) in order to maintain proportionate sentencing between these two guidelines. For example, should the Commission increase the base offense level in § 2J1.3 or increase the magnitude of the enhancement of the current specific offense characteristics?

2. Campaign Finance

Synopsis of Proposed Amendment

This proposed amendment responds to the Bipartisan Campaign Reform Act of 2002 (the ''Act''), Public Law 107–155. Under emergency amendment authority, the Commission promulgated a temporary amendment, effective January 25, 2003, to implement the Act.

The Commission now seeks comment on a proposed permanent amendment to implement the Act. The most pertinent provision for the Commission is section 314, which states:

''(a) IN GENERAL.—The United States Sentencing Commission shall—

(1) promulgate a guideline, or amend an existing guideline under section 994 of title 28, United States Code, in accordance with paragraph (2), for penalties for violations of the Federal Campaign Act of 1971 and related election laws; and

(2) submit to Congress an explanation of any guidelines promulgated under paragraph (1) and any legislative or administrative recommendations regarding enforcement of the Federal Campaign Act of 1971 and related election laws.

(b) CONSIDERATIONS.—The Commission shall provide guidelines under subsection (a) taking into account the following considerations:

(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement action to prevent such violations.

(2) Provide a sentencing enhancement for any person convicted of such violation if such violation involves—

(A) a contribution, donation, or expenditure from a foreign source;

(B) a large number of illegal transactions;

(C) a large aggregate amount of illegal contributions, donations, or expenditures;

(D) the receipt or disbursement of governmental funds; and

(E) an intent to achieve a benefit from the Federal Government.

(3) Assure reasonable consistency with other relevant directives and guidelines of the Commission.

(4) Account for aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements.

(5) Assure the guidelines adequately meet the purposes of sentencing under section 3553(a)(2) of title 18, United States Code.''.

Since section 314 directed the Commission to provide a guideline for violations of the Federal Election Campaign Act of 1971 (the ''FECA'') and related elections laws, examination of the FECA's criminal penalty provisions (and related criminal penalty provisions) is necessary. Section 309(d)(1) of the FECA sets forth the Act's criminal penalty provisions as follows:

(1) Violations of the FECA as Penalized Under Section 309(d)(1)(A)

Section 309(d)(1)(A) is the main penalty provision of the FECA (2 U.S.C. 437g(d)(1)(A)). As amended by section 312 of the Act, it states that ''[a]ny person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure (i) aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, imprisoned for not more than 1 year, or both.''. (Before amendment by the Act, section 309(d)(1)(A) of the FECA provided for a maximum term of imprisonment of one year, or a fine, or both.)

The major violations of the FECA to which section 309(d)(1)(A) applies are:

(A) The Ban on Soft Money

Section 323 of the FECA (2 U.S.C. 441i) prohibits national political party committees (including senatorial and congressional campaign committees) from accepting soft money from any person (including an individual) after November 6, 2002.

(B) Restrictions on Hard Money Contributions

The FECA limits the amount of hard money that may be contributed to a Federal campaign. The FECA limits the amount of hard money that persons other than multicandidate political committees may contribute as follows:

(i) The contribution to a candidate for Federal office may not exceed $2,000 per election. (The limit used to be $1,000; *see* section 315(a)(1)(A) of the FECA, as amended by section 307(a)(1) of the Act.)

(ii) The contribution to a national party committee may not exceed $25,000 per calendar year. (The limit used to be $20,000; *see* section 315(a)(1)(B) of the FECA, as amended by section 307(a)(2) of the Act.)

(iii) The contribution to any other political committee, including a political action committee (PAC), may not exceed $5,000 per calendar year. (No change in the former law; *see* section 315(a)(1)(C) of the FECA.)

(iv) The contribution to a State or local political party may not exceed $10,000 per calendar year. (The limit used to be $5,000; *see* section 315(a)(1)(D) of the FECA, as amended by section 102(3) of the Act.)

The FECA limits the amount of hard money that multicandidate political committees may contribute as follows:

(i) The contribution to a candidate for Federal office may not exceed $5,000 per election. (*See* section 315(a)(2)(A) of the FECA.)

(ii) The contribution to a national party committee may not exceed $15,000 per calendar year. (*See* section 315(a)(2)(B) of the FECA.)

(iii)The contribution to any other political committee, including a political action committee (PAC), may not exceed $5,000 per calendar year. (No change in the former law; *see* section 315(a)(2)(C) of the FECA.)

(iv) The contribution to a State or local political party may not exceed $5,000 per calendar year. (*See* section 315(a)(2)(C) of the FECA.)

(C) The Ban on Contributions and Donations by Foreign Nationals

Section 319 of the FECA (2 U.S.C. 441e) makes it ''unlawful for (1) a foreign national, directly or indirectly, to make (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.''.

''Foreign national'' is broadly defined to mean (1) a foreign principal, as defined in the Foreign Agent Registration Act of 1938 (22 U.S.C. 611(b)); or (2) an individual who is not a citizen or national of the United States or who is not lawfully admitted for permanent residence. The term ''foreign prinicipal'' includes foreign governments and corporations.

(D) Restrictions on Electioneering Communications

Section 304(f) of the FECA, as added by section 201 of the Act, requires any person who makes a disbursement for the direct costs of producing and airing electioneering communications exceeding $10,000 in a calendar year to file a disclosure statement to the Federal Election Commission.

Section 316 of the FECA (2 U.S.C. 441b) makes it unlawful for any national bank, a corporation organized by authority of any Federal law, or any labor union to make a contribution or

expenditure in connection with any federal election to any federal political office, or a disbursement, using non-PAC money, for an ''electioneering communication''.

An electioneering communication is any broadcast, cable, or satellite communication which (A) refers to a clearly identified candidate for Federal office; (B) is made within 60 days before a general election or 30 days before a primary election. The communication must be targeted to the pertinent electorate. *See* 2 U.S.C. 434(f)(3)(C).

(2) Violations of Section 316(b)

Section 309(d)(1)(B) of the FECA states that ''[i]n the case of a knowing and willful violation of section 316(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year.'' Such violation of section 316(b)(3) may incorporate a violation of section 317(b), 320, or 321.

Section 316(b)(3) of the FECA (2 U.S.C. 441b(b)(3)) makes it unlawful for a national bank, any corporation organized by authority of any law of Congress, or any labor union (A) to use a political fund to make a political contribution or expenditure from money or anything of value that was secured by physical force, job discrimination, financial reprisals (or the threat thereof), or from dues, fees, or other money required as a condition of membership in the labor organization or as a condition of employment; (B) who solicits an employee for contribution to a political fund to fail to inform the employee of the purposes of the fund at the time of the solicitation; and (C) who solicits an employee for contribution to a political fund to fail to inform the employee of his right to refuse to contribute without reprisal.

The sections which may incorporate violations of section 316(b)(3) of the FECA are section 317(b), which prohibits government contractors from making contributions of currency in excess of $100 for any candidate for Federal office, section 320 which prohibits a person from making a contribution in the name of another or accepting a contribution so made, and section 321, which prohibits any person from making contributions of currency in excess of $100 for any candidate for Federal office.

(3) Fraudulent Misrepresentations Under Section 322

Section 309(d)(1)(C) of the FECA states that ''[i]n the case of a knowing and willful violation of section 322, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.''.

Section 322(a) of the FECA (2 U.S.C. 441h) states that ''[n]o person who is a candidate for Federal office or an employee or agent of such a candidate shall (1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).''.

Section 322(b) states that ''[n]o person shall (1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).''.

(4) Conduit Contributions under Section 320

Section 309(d)(1)(D) of the FECA states that ''[a]ny person who knowingly and willfully commits a violation of section 320 involving an amount aggregating more than $10,000 during a calendar year shall be (i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more); (ii) fined not less than 300 percent of the amount of the violation and not more than the greater of (I) $50,000; or (II) 1,000 percent of the amount involved in the violation; or (iii) both imprisoned under clause (i) and fined under clause (ii).''.

Section 320 of the FECA (2 U.S.C. 441f) states that ''[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.''.

In addition to changes made to the FECA, section 302 of the Act amended section 607 of title 18, United States Code, to make it ''unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person.''. The penalty is a fine of not more than $5,000, not more than 3 years or imprisonment, or both.

In order to implement the directive in the Act, this proposed amendment expands the scope of Chapter Two, Part C (Offenses Involving Public Officials) by providing within that Part a new guideline for offenses under the FECA and related offenses. A new guideline, rather than amendment of an existing guideline, seems more appropriate to implement the directive. Currently there exists no guideline which already incorporates the elements of the FECA and related offenses, although the fraud guideline in particular (§ 2B1.1) and the public corruption guidelines to a lesser degree (Chapter Two, Part C) provide some overlap in the elements of the offense and aggravating conduct. In addition, the enhancements required to be added by the directive in the Act would fit nicely into a guideline devoted solely to campaign finance offenses but would prove unwieldy if added to the fraud or public corruption guidelines, which cover so many other non-campaign finance offenses.

The proposed amendment provides for a base offense level of level 8. The statutorily authorized maximum term of imprisonment for the conduct covered by the proposed guideline was raised by the Act from one year for all such offenses to two years for some offenses and five years for others. The base offense level is set at level 8 in recognition of the relative similarity of these offenses to fraud offenses covered by § 2B1.1 and public corruption offenses covered by Chapter Two, Part C. A base offense level of level 8 both insures proportionality with relatively similar offenses and permits various sentencing enhancements directed by the Act to operate as well.

The proposed amendment also creates a number of specific offense characteristics in response to the directive in section 314(b) of the Act. First, the directive requires the Commission to provide an enhancement if the offense involved a large aggregate amount of illegal contributions, donations, or expenditures. To address

this consideration, the proposed amendment provides a specific offense characteristic, at subsection (b)(1), that uses the fraud loss table in § 2B1.1 to incrementally increase the offense level according to the dollar amount of the illegal transactions. This approach would foster proportionality with related guidelines, notably the fraud guideline and the public corruption guidelines (which also reference the fraud loss table) and would provide incremental, rather than a flat, punishment according to the dollar amount involved in the offense.

The proposed amendment provides commentary to explain that ''illegal transactions'' include any conduct prohibited by the FECA and related election laws and, with respect to dollar amounts limited by the FECA, only those amounts that exceed the amount a person may legitimately contribute, solicit, or expend. The proposed amendment also provides references in the definition to the FECA's definitions of ''contribution'' and ''expenditure''.

Second, the proposed amendment provides a two part enhancement at subsection (b)(2), providing for the greater of a two level enhancement if the offense involved a contribution, donation, or expenditure from a foreign national and a four level enhancement if the offense involved a contribution, donation, or expenditure from a foreign government or organization.

Third, the proposed amendment provides an alternative pronged enhancement at subsection (b)(3) if (1) the offense involved a donation, contribution, or expenditure, disbursement, or receipt of government funds, or (2) the defendant committed the offense for the purpose of achieving a specific, identifiable nonmonetary Federal benefit. The proposed amendment defines ''governmental funds'' to mean any Federal, State, or local funds. It is anticipated that this enhancement will apply in situations such as using governmental funds awarded in a contract to make a donation or contribution. The FECA itself addresses this type of situation but in very few places. For example, section 317 of the FECA, 2 U.S.C. 441c, prohibits any person who enters into a contract with the United States for the rendition of services, the provision of materials, supplies, or equipment, or the selling of any land or property to the United States, if the payment from the United States is to be made in whole or in part from funds appropriated from Congress and before completion of or negotiation for the contract, to make or solicit a contribution of money or anything of value to a political party, committee, or candidate for public office or to any person for a political purpose. (This provision does not prohibit, however, the establishment of a segregated account to be used for political purposes.) The concern behind this provision of the FECA, therefore, is to prevent the use of federal funds for political purposes. The same concern pertains to State and local funds as well. It is also anticipated that this enhancement will apply in situations in which a State or local elected official uses State or local resources to finance his or her campaign for Federal office.

Commentary is provided for the alternative prong in subsection (b)(3)(B) on the intent to achieve a specific, identifiable nonmonetary Federal benefit to make clear that the intent of this prong is not to enhance the sentence for seeking heightened access to public officials generally; rather, the enhancement provides greater punishment for defendants who are seeking some specific benefit such as a Presidential pardon or information proprietary to the government.

Fourth, the amendment proposes to add an enhancement at subsection (b)(4) if the defendant engaged in thirty or more illegal transactions during the course of the offense, whether or not the defendant was convicted of the conduct. This enhancement is added in response to the directive to provide an enhancement if the offense involved a large number of illegal transactions.

Fifth, the amendment proposes to add an enhancement at subsection (b)(5) if the contribution, donation, or expenditure was obtained through, or a solicitation was made by, intimidation, threat of harm, including pecuniary harm, or coercion.

Sixth, the proposed amendment provides a cross reference in the new guideline to either the bribery guideline or the gratuity guideline, if the offense involved such conduct and the resulting offense level is greater than that determined under the new guideline.

The proposed amendment also amends the guideline on fines for individual defendants, § 5E1.2, to set forth the fine provisions unique to FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission pursuant to section 309 of the FECA may be a potentially legitimate factor for the court to consider in evaluating where to sentence an offender within the presumptive fine guideline range.

The proposed amendment also includes counts under this proposed guideline under the grouping provision under § 3D1.2(d). Finally, the Statutory Index is amended to incorporate these offenses.

Proposed Amendment

Chapter Two, Part C is amended in the heading by adding at the end ''AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS''.

Chapter Two, Part C is amended by striking the introductory commentary in its entirety.

Chapter Two, Part C is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—

(A) a foreign national, increase by 2 levels; or

(B) a government of a foreign country, increase by 4 levels.

(3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by 2 levels.

(4) If the defendant engaged in 30 or more illegal transactions, increase by 2 levels.

(5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. 607. For additional provision(s), *see* Statutory Index (Appendix A).

Application Notes

1. Definitions.—For purposes of this guideline:

'Foreign national' has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. 441e(b).

'Government of a foreign country' has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(e)).

'Governmental funds' means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. 'State' means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. 'Local government' means the government of a political subdivision of a State.

'Illegal transaction' means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq;* (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. 607, any solicitation or receipt of money or anything of value under that section. The terms 'contribution' and 'expenditure' have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(8) and (9)), respectively.

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity.

Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.

3. Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.

4. Departure Provision.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.''.

Section 3D1.2(d) is amended by inserting '', 2C1.8'' after ''2C1.7''.

The Commentary to § 5E1.2 captioned ''Application Notes'' is amended in the second sentence of Note 5 by striking ''and'' after ''Control Act;'' and by inserting before the period at the end the following:

''; and 2 U.S.C. 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. 441f, a fine up to the greater of $50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation''.

Appendix A (Statutory Index) is amended by inserting before the line referenced to 7 U.S.C. 6 the following new lines:

''2 U.S.C. 437g(d) 2C1.8
2 U.S.C. 439a 2C1.8
2 U.S.C. 441a 2C1.8
2 U.S.C. 441a-1 2C1.8
2 U.S.C. 441b 2C1.8
2 U.S.C. 441c 2C1.8
2 U.S.C. 441d 2C1.8
2 U.S.C. 441e 2C1.8
2 U.S.C. 441f 2C1.8
2 U.S.C. 441g 2C1.8
2 U.S.C. 441h(a) 2C1.8
2 U.S.C. 441i 2C1.8
2 U.S.C. 441k 2C1.8''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 597 the following new line:

''18 U.S.C. 607 2C1.8''.

3. Use of Body Armor in a Crime of Violence or Drug Trafficking Crime

Synopsis of Proposed Amendment

In December 2002, the Commission published general issues for comment (*see* 67 FR 77532) regarding how to implement the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the ''Act''), Public Law 107–273. The directive requires the Sentencing Commission to ''review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in section 16 of title 18, United States Code) or drug trafficking crime (as defined in section 924(c) of title 18, United States Code) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor.'' The Act further states that it is the sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the proposed amendment provides for a new adjustment at § 3A1.5 (Use of Body Armor) for the use of body armor in an offense involving a crime of violence or drug trafficking crime. A proposed application note provides definitions of ''crime of violence'', ''drug trafficking crime'', and ''body armor''.

The definitions of ''crime of violence'' and ''drug trafficking crime'' are those required by the directive. Consequently, the definition of ''drug trafficking crime'' (taken from 18 U.S.C. 924(c)(2)) includes any felony punishable under the Controlled Substances Act, and the definition of ''crime of violence'' (taken from 18 U.S.C. 16) includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of ''crime of violence'' and drug trafficking offense'' used in a number of other guidelines. The definition of ''body armor'' is borrowed from the statutory definition provided in 18 U.S.C. 921(a)(35).

Background commentary is proposed to provide a cite for the directive

underpinning the new guideline. A conforming amendment is proposed for the heading of Part A of Chapter Three to accommodate the expanding scope of that part.

An issue for comment follows the proposed amendment requesting comment regarding whether the adjustment for use of body armor should be defendant based or relevant conduct based.

Proposed Amendment

Chapter Three, Part A, is amended in the heading by striking ''VICTIM-RELATED'' and inserting ''GENERAL''.

Chapter Three, Part A, is amended by adding at the end the following new guideline:

''§ 3A1.5. Use of Body Armor in Drug Trafficking Offenses and Crimes of Violence

If the offense (1) was a drug trafficking crime or a crime of violence; and (2) involved the use of body armor, increase by [2][4][6] levels.

Commentary

Application Note:

1. Definitions.—For purposes of this guideline:

'Body armor' means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. *See* 18 U.S.C. 921(a)(35).

'Crime of violence' has the meaning given that term in 18 U.S.C. 16.

'Drug trafficking crime' has the meaning given that term in 18 U.S.C. 924(c)(2).

Background: This section implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law. 107–273).''.

Issue for Comment

The proposed amendment provides an increase if the offense was a drug trafficking crime or a crime of violence and involved the use of body armor. The Commission requests comment regarding whether the adjustment for body armor should be based on all conduct within the scope of relevant conduct, as proposed, or based on the actions of only the defendant; *i.e.*, should the enhancement apply only if the defendant used or directed the use of body armor, rather than if the offense generally involved the use of body armor? Alternatively, should the enhancement provide a two level increase if the offense generally involved the use of body armor and a heightened increase (*e.g.*, 4 or 6 levels) if the defendant used or directed the use of body armor? If so, what should be the extent of the increase?

4. Oxycodone

Synopsis of Proposed Amendment

This proposed amendment responds to proportionality issues in the sentencing of oxycodone trafficking. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and Oxycontin. This prescription drug is generally sold in pill form, and the sentencing guidelines currently establish penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise because of the formulations of the different medicines and because different amounts of oxycodone are found in pills of identical weight.

As an example of the first issue, the drug Percocet contains the non-prescription pain reliever acetaminophen in addition to oxycodone. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. This is in contrast to Oxycontin in which the weight of the oxycodone accounts for a substantially greater proportion of the weight of the pill. For example, a Percocet pill containing five milligrams of oxycodone weighs approximately 550 milligrams (oxycodone accounting for 0.9 percent of the total weight of the pill) while the weight of an Oxycontin pill containing 10 milligrams of oxycodone is approximately 135 milligrams (oxycodone accounting for 7.4 percent of the total weight). Consequently, at sentencing, the same five year sentence results from the trafficking of 364 Percocet pills or 1,481 Oxycontin pills. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.6 grams of actual oxycodone while the 1,481 Oxycontin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of Oxycontin. Three different amounts of oxycodone (10, 20, and 40 milligrams) are contained in pills of identical weight (135 milligrams). As a result, an individual trafficking in a particular number of Oxycontin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues it is proposed that sentences for oxycodone offenses be calculated using the weight of the actual oxycodone instead of the current mechanism of calculating the weight of the entire pill. Currently, the Drug Equivalency Tables in § 2D1.1 equate 1 gram of oxycodone mixture to 500 grams of marihuana. The proposal would equate 1 gram of actual oxycodone to 6,700 grams of marihuana. This equivalency would keep penalties for offenses involving 10 milligrams of Oxycontin identical to current levels but would increase penalties for all other doses of Oxycontin. At the same time, penalties for Percocet would be substantially reduced.

Proposed Amendment

Section 2D1.1 is amended in subdivision (B) of the ''*Notes to Drug Quantity Table'' by adding at the end the following new paragraph:

''The term 'Oxycodone (actual)' refers to the weight of the controlled substance, itself, contained in the pill or capsule.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 by striking ''or methamphetamine'' and inserting ''methamphetamine, or oxycodone''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Schedule I or II Opiates*'' by striking ''1 gm of Oxycodone = 500 gm of marihuana'' and inserting ''1 gm of Oxycodone (actual) = 6700 gm of marihuana''.

5. The 21st Century Department of Justice Appropriations Authorization Act

Issue for Comment

In December 2002, the Commission published general issues for comment (*see* 67 FR 77532) on implementation of directives in the 21st Century Department of Justice Appropriations Authorization Act (the ''Act''), Pub. L. 107–273. The Commission seeks additional public comment on the issues pertaining to section 11008(e) of the Act, as set forth herein. Section 11008(e) directs the Commission as follows:

''(1) IN GENERAL.—Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and the policy statements of the commission, if appropriate, to provide an appropriate sentencing

enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18, United States Code.

(2) FACTORS FOR CONSIDERATION.—In carrying out this section, the United States Sentencing Commission shall consider, with respect to each offense described in paragraph (1)—

(A) any expression of congressional intent regarding the appropriate penalties for the offense;

(B) the range of conduct covered by the offense;

(C) the existing sentences for the offense;

(D) the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;

(E) the extent to which the Federal sentencing guideline sentences for the offense have been constrained by statutory maximum penalties;

(F) the extent to which the Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(G) the relationship of the Federal sentencing guidelines for the offense to the Federal sentencing guidelines for other offenses of comparable seriousness;

(H) any other factors that the Commission considers to be appropriate.''.

Section 111 of title 18, United States Code, makes it unlawful to forcibly assault, resist, oppose, impede, intimidate, or interfere with (A) any person designated in section 1114 of title 18 (*i.e.*, any officer or employee of the United States, including any member of the uniformed services in the performance of that person's official duties, or any person assisting that person in the performance of those official duties); or (B) any person who formerly served as a person designated in section 1114 on account of that person's performance of official duties during the term of service.

The Act increased the statutory maximum term of imprisonment for offenses under 18 U.S.C. 111 from three years to eight years; and for the use of a dangerous weapon or inflicting bodily injury in the commission of an offense under 18 U.S.C. 111, from ten to 20 years.

Section 115 of title 18, United States Code, makes it unlawful to (A) assault, kidnap, or murder, attempt or conspire to kidnap or murder, or threaten to assault, kidnap, or murder, a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114; or (B) threaten to assault, kidnap, or murder a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114; in order to impede, intimidate, or interfere with the performance of the official's official duties.

Section 115 of title 18, United States Code, also makes it unlawful to assault, kidnap, or murder, attempt or conspire to kidnap or murder, or threaten to assault, kidnap, or murder, a former United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114, or a member of the former official's immediate family, in retaliation for the performance of the official's duties during the official's term of service.

The Act increased the maximum terms of imprisonment for threatened assaults under 18 U.S.C. 115 from three to six years, and for all other threats under 18 U.S.C. 115, from five to ten years.

In addition, the Act also increased the maximum term of imprisonment under 18 U.S.C. 876 from five years to 10 years for mailing a communication to a United States judge, a Federal law enforcement officer, or an official covered by 18 U.S.C. 1114 containing a threat to kidnap or injure any person (the penalty remained five years for mailing such a communication to any other person).

The Act also increased the maximum term of imprisonment under 18 U.S.C. 876 from two years to 10 years for mailing, with the intent to extort anything of value, a communication to a United States judge, a Federal law enforcement officer, or an official covered by 18 U.S.C. 1114 containing a threat to injury another's property or reputation or a threat to accuse another of a crime (the penalty remained two years for mailing such a communication to any other person). The other statutory maximum terms of imprisonment for offenses under 18 U.S.C. 876 were not changed by the Act. Mailing threatening communications containing a ransom demand for the release of a kidnapped person or containing a threat to kidnap with the intent to extort something of value remain punishable by up to 20 years' imprisonment.

The Act contained a number of other miscellaneous provisions directly or indirectly affecting the guidelines, as described below.

The Commission requests comment on the following:

1. Should the Commission provide an enhancement in the assault guidelines for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in 18 U.S.C. 111 or 115? If so, what would be an appropriate increase for such enhancement? Are there additional, related enhancements that the Commission should provide in the assault guidelines, particularly given the directive to consider providing sentences at or near the statutory maximum for the most egregious cases? Would such an enhancement be appropriate for other Chapter Two guidelines that cover these offenses, such as the guidelines covering attempted murder (§ 2A2.1), kidnapping (§ 2A4.1), and threatening communications (§ 2A6.1)? Should the Commission increase the three level adjustment in § 3A1.2 (Official Victims), and if so, what should be the extent of the adjustment (*e.g.*, should the adjustment at § 3A1.2 be [4][5][6] levels)?

2. Do the current base offense levels in each of the assault and threatening communications guidelines provide adequate punishment for the covered conduct? If not, what would be appropriate base offense levels for §§ 2A2.2, 2A2.3, 2A2.4, and 2A6.1? For example, should the base offense level for offenses involving obstructing or impeding officers under § 2A2.4 be level 15, the same as for aggravated assault, and contain the same enhancements as the aggravated assault guideline, so that an assault of an official unaccompanied by serious bodily injury would nevertheless be severely punished?

3. Should the Commission consider more comprehensive amendments to the assault guidelines as part of, or in addition to, its response to the directives? For example, should the Commission consolidate §§ 2A2.3 and 2A2.4? Should the Commission amend § 2A2.3(b)(1) to provide a two level enhancement for bodily injury? Some commentators have argued that such an amendment would bring the minor and aggravated assault guidelines more in line with one another because there may be cases in which an assault that does not qualify as an aggravated assault

under § 2A2.2 nevertheless involves bodily injury. Are there any other application issues pertaining to the assault guidelines that the Commission should address?

4. Section 3001 of the Act amends 18 U.S.C. 1512 (relating to tampering with a witness, victim, or an informant) in a number of ways. Section 3001 expands the scope of section 1512 to cover the use of physical force or threat of physical force with the intent to influence, delay, or prevent the testimony of any person in an official proceeding, or induce any person to withhold testimony or alter, destroy, mutilate, or conceal an object with the intent to impair the integrity or availability of the object for use in an official proceeding.

Section 3001 also increases the statutory maximum penalties for violations of section 1512 that involve the use or attempted use of physical force from 10 years' to 20 years' imprisonment (statutory maximum term of imprisonment under section 1512 is 20 years for attempted murder and 10 years for the threatened use of physical force). Additionally, conspiracy to commit an offense under section 1512 or under 18 U.S.C. 1513 (relating to retaliating against a witness, victim, or an informant) are now subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

The Commission, as part of the emergency amendment implementing the Sarbanes-Oxley Act, increased the base offense level in § 2J1.2 (Obstruction of Justice) from level 12 to level 14 (*see* Proposed Amendment 1, proposing to repromulgate the temporary, emergency amendment as a permanent amendment). The Commission requests comment regarding whether the offense levels in § 2J1.2 further should be increased in response to the maximum statutory penalties provided for these offenses, and if so, what should be the extent of the increase? For example, should the Commission increase further the base offense level in § 2J1.2 and, if so, to what offense level? Should the Commission increase the magnitude of the eight level enhancement at subsection (b)(1) for offenses that involve causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice? Alternatively, should the Commission increase the magnitude of the enhancement at subsection (b)(1) only for offenses which involve actual physical injury to a person? In addition, are higher offense levels needed specifically for cases under section 1513 involving particularly severe retaliation against government witnesses, or is the availability of departures for such cases sufficient? *See, e.g., United States* v. *Levy,* 250 F.3d 1015 (6th Cir. 2001). Should an enhancement be added to § 3C1.1 (Obstructing or Impeding the Administration of Justice) for threatening, intimidating, tampering with, or retaliating against, a witness, and if so, what should be the extent of the enhancement?

5. The Act contains a number of miscellaneous provisions that may make amendments to the guidelines appropriate as follows:

(A) Section 14102 amends section 3 of the Sherman Act (15 U.S.C. 3) by providing a maximum fine of $10,000,000 for any corporation, and a maximum fine of $350,000 and three years' imprisonment for any person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons, to monopolize any part of the trade or commerce in or between any of the States, the District of Columbia, the territories of the United States, and foreign states. Should the Commission provide a Statutory Index reference to § 2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors) for this offense? In addition, an amendment to Application Note 5 of § 5E1.2 (Fines for Individual Defendants) may be appropriate to incorporate the special fine provision.

(B) Section 3005 of the Act amends 21 U.S.C. 841 (relating to drug penalties) and 960 (relating to drug import and export penalties) to clarify that supervised release requirements for violations of those sections apply notwithstanding 18 U.S.C. 3583. An amendment to § 5D1.2 (Term of Supervised Release) may be appropriate to incorporate this provision.

(C) Section 2103 of the Act amends 18 U.S.C. 3565(b) and 3583(g) to require mandatory revocation of probation and supervised release, respectively, for testing positive, as part of drug testing, of illegal controlled substances more than three times over the course of one year. Amendments to § 7B1.3 (Revocation of Probation or Supervised Release) may be appropriate to incorporate this provision. In addition, the Commission requests comment regarding whether § 7B1.3 should be amended to address more comprehensively other provisions requiring mandatory revocation of probation of supervised release for certain violations.

(D) Section 3007 of the Act made a technical amendment to 18 U.S.C. 3583(d) to clarify that restitution is an appropriate condition of supervised release. An amendment to § 5D1.3 (Conditions of Supervised Release) may be appropriate to incorporate this provision.

6. Cybercrime

Issue for Comment

On December 18, 2002, the Commission published a general issue for comment regarding section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Public Law 107–296. *See* 67 FR 77532. The Commission seeks additional public comment on more detailed questions pertaining to section 225 as set forth herein.

Section 225 directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code, to ensure that the sentencing guidelines and policy statements reflect the serious nature of such offenses, the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.

The directive also includes a number of factors for the Commission to consider, including the potential and actual loss resulting from the offense, the level of sophistication and planning involved in the offense, whether the offense was committed for purposes of commercial advantage or private financial benefit, whether the defendant acted with malicious intent to cause harm in committing the offense, the extent to which the offense violated the privacy rights of individuals harmed, whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, whether the violation was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure, and whether the violation was intended to, or had the effect of, creating a threat to public health or safety, or injury to any person.

Section 1030 of title 18, United States Code, proscribes a variety of conduct relating to the misuse of computers, including conduct relating to the obtaining and communicating of restricted information (*see* 18 U.S.C. 1030(a)(1)), the unauthorized accessing of information from financial institutions, the United States government and ''protected computers'' (*see* 18 U.S.C. 1030(a)(2)), the unauthorized accessing of a government computer (*see* 18 U.S.C. 1030(a)(3)),

fraud (*see* 18 U.S.C. 1030(a)(4)), the damaging of a protected computer resulting in certain types of specified harms (*see* 18 U.S.C. 1030(a)(5)), trafficking in passwords (*see* 18 U.S.C. 1030(a)(6)), and extortionate threats to cause damage to a ''protected computer'' (*see* 18 U.S.C. 1030(a)(7)). The statutory maximums for violations of section 1030 range from one year to life, depending upon the subsection violated and, in certain cases, whether certain aggravating factors are present. For example, although a violation of subsection (a)(2) generally carries a statutory maximum term of imprisonment of one year, if the offense was committed for purposes of commercial advantage or private financial gain (or one of the other aggravating conditions is met) the statutory maximum term of imprisonment is five years (*see* 18 U.S.C. 1030(c)(2)(B)). Section 1030 also provides heightened penalties for subsequent offenses. Currently Appendix A (Statutory Index) references convictions of section 1030 to §§ 2B1.1 (Theft, Fraud, and Property Destruction), 2B2.3 (Trespass), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and 2M3.2 (Gathering National Defense Information) depending on the conduct involved in the offense.

In response to the directive, the Commission is required to consider the eight identified factors and ''the extent to which the guidelines may or may not account for them.'' Certain factors that the Commission must consider relate to, and in some instances mirror, either aggravating factors that result in higher statutory penalties under 18 U.S.C. 1030, or elements of certain offenses under 18 U.S.C. 1030. For example, the Commission has been directed to consider ''whether the offense was committed for purposes of commercial advantage or private financial benefit.'' As noted above, this factor is specifically referenced in the statute as an aggravating factor with respect to violations of section 1030(a)(2). The current guidelines, however, do not provide for enhanced punishment for violations of section 1030(a)(2) that involve this aggravated purpose. Similarly, the Commission has been directed to consider ''whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice.'' Violations of section 1030(a)(5) require proof of one of five specified harms, one of which is ''damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.'' (*see* 18 U.S.C. 1030(a)(5)(A) and (B)). The guidelines currently do not provide for an enhanced punishment when this type of harm results from a violation of section 1030(a)(5). Certain other factors that the Commission must consider already may be taken into account, in part or in whole, by the existing guidelines. For example, one factor that the Commission must consider is ''the level of sophistication and planning involved in the offense.'' Currently, § 2B1.1(b)(8)(C) provides a two level increase and a minimum offense level of 12 for offenses that involve sophisticated means. This factor, therefore, may be at least partially accounted for by the existing guidelines.

The Commission requests comment regarding how it should address the directive and the extent to which the eight factors have or have not been accounted for by the guidelines. In addition, the Commission requests comment regarding whether it should provide enhancements in any of the guidelines that pertain to violations of 18 U.S.C. 1030 (*e.g.*, §§ 2B1.1, 2B2.3, 2B3.2, and 2M3.2) based on any of the factors listed in the directive? If so, which factors should be the bases for enhancements? What level enhancements (*e.g.*, [2] or [4] levels) would be appropriate and should the Commission provide a minimum offense level for any enhancement? Should any of the factors listed in the directive be identified in the guidelines as encouraged bases for upward departure? If so, for which violations of section 1030 and under which guidelines? Should any such enhancements or departure provisions be limited so as to apply only to specific violations of 18 U.S.C. 1030, and if so, which ones?

Alternatively, should the Commission structure an enhancement in any of the relevant guidelines to apply to convictions under 18 U.S.C. 1030, in general, or under certain subsections of section 1030 that the Commission may identify as warranting increased punishment? If any such enhancement is limited to certain subsections, what subsections should trigger that enhancement? Should the Commission provide an enhancement in the relevant guidelines that applies based on a combination of a conviction under section 1030 and certain serious conduct (*e.g.*, conduct relating to one of the eight factors contained in the directive, an aggravating factor resulting in an increased statutory maximum under the statute, or a particular element of an offense under section 1030) that may be pertinent to the particular guideline under which the defendant is being sentenced? For any enhancement that the Commission may promulgate in response to this directive, what level enhancement would be appropriate (*e.g.*, [2] [4] levels)?

The Cyber Security Enhancement Act of 2002 also increased the statutory maximum term of imprisonment for convictions under 18 U.S.C. 1030(a)(5)(A)(i) (intentional damage to a protected computer) when certain aggravating conduct is present. The statute now provides a maximum term of imprisonment of twenty years' imprisonment if the offender knowingly or recklessly caused or attempted to cause serious bodily injury and provides a statutory maximum of life imprisonment if the offender knowingly or recklessly caused or attempted to cause death. The Commission requests comment regarding whether the current enhancement for an offense involving a conscious or reckless risk of death or serious bodily injury in § 2B1.1(b)(11), which provides a two level enhancement and a minimum offense level of 14, is sufficient in light of the increased statutory maximum terms of imprisonment for convictions with aggravating conduct under 18 U.S.C. 1030(a)(5)(A)(i). Alternatively, should the Commission provide an upward departure for such convictions? Should the Commission provide a cross reference in § 2B1.1 to the appropriate Chapter Two, Part A, Subpart 1 (Homicide) guideline in order to account for 18 U.S.C. 1030(a)(5)(A)(i) offenses that result in death?

Application Note 2(A)(v)(III) of § 2B1.1 provides a special rule of construction regarding offenses involving unlawful access to a protected computer. That rule states that for such offenses, actual loss includes the pecuniary harm of reasonable costs to the victim of conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service. This rule differs slightly from the statutory definition of loss provided in 18 U.S.C. 1030(e)(11), which was amended by the USA PATRIOT Act, Public Law 107–56, to include, in addition to the factors already included in the guidelines, the cost of responding to an offense, the cost of restoring the program or information to its condition prior to the offense, and any cost incurred or other consequential damages incurred because of interruption of service. Should the Commission modify the guidelines' rule to mirror the statutory definition of loss?

Should the Commission provide any additional clarification of the definition of loss for cybercrime offenses in any of the relevant guidelines, including § 2B3.2 (Extortion)?

Additionally, the Act increased the statutory maximum term of imprisonment for offenses under 18 U.S.C. 2701 (unlawful access to stored communications). In particular, the Act increased the maximum penalty for a first offense committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain from one year to five years' imprisonment, and for subsequent offenses from two years' to ten years' imprisonment. The scope of these heightened penalties (as set forth in 18 U.S.C. 2701(b)(1)) also was expanded to apply to offenses committed ''in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State.'' The penalties for all other offenses under 18 U.S.C. 2701 were increased from a statutory maximum of six months' imprisonment to a maximum of one year imprisonment for a first offense, and a maximum of five years' imprisonment for subsequent offenses. Currently, the guidelines do not reference 18 U.S.C. 2701 offenses. The Commission requests comment regarding whether it should amend Appendix A (Statutory Index) to include a reference to 18 U.S.C. 2701, and if so, to which guideline or guidelines should the statute be referenced? Additionally, if the Commission does reference the statute in Appendix A, are there any enhancements that the Commission should provide in any relevant guideline in light of, or relating to, the heightened penalties set forth in 18 U.S.C. 2701(b)?

[FR Doc. 03–1123 Filed 1–16–03; 8:45 am]

BILLING CODE 2210–01–U

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of meeting.

DATES: February 10, 2003, 10 a.m.—3 p.m.*; February 11, 2003, 5 a.m.—5 p.m.; February 12, 2003, 9 a.m.—1 p.m.

*The full deliberative panel meeting ends at 3 p.m. The standing committees of the Panel will meet from 3:15 p.m. until 6:15 p.m.

ADDRESSES: Ritz-Carlton Hotel (Pentagon City), 1250 South Hayes Street, Arlington, VA 22202, Phone: (703) 415–5000.

SUPPLEMENTARY INFORMATION:

Type of meeting: This is a quarterly meeting open to the public. The public is invited to participate by coming to the address listed above. Public comment will be taken during the quarterly meeting. The public is also invited to submit comments in writing on the implementation of the Ticket to Work and Work Incentives Improvement Act (TWWIIA) of 1999 at any time.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, the Social Security Administration (SSA) announces a meeting of the Ticket to Work and Work Incentives Advisory Panel (the Panel). Section 101(f) of Public Law 106–170 establishes the Panel to advise the Commissioner of SSA, the President, and the Congress on issues related to work incentives programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the TWWIIA. The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a) of that Act.

Interested parties are invited to attend the meeting. The Panel will use the meeting time to receive briefings, hear presentations, conduct full Panel deliberations on the implementation of TWWIIA and receive public testimony. The topics for the meeting will include discussion of the Panel's Third Annual Interim Report to Congress, SSA's early intervention demonstration project and agency updates from SSA and HHS.

The Panel will meet in person commencing on Monday, February 10, 2003 from 10 a.m. to 3 p.m. (standing committee meetings from 3:15 p.m. to 6:15 p.m.); Tuesday, February 11, 2003 from 9 a.m. to 5 p.m.; and Wednesday, February 12, 2003 from 9 a.m. to 1 p.m.

Agenda: The Panel will hold a quarterly meeting. Briefings, presentations, full Panel deliberations and other Panel business will be held Monday, Tuesday and Wednesday, February 10, 11, and 12, 2003. Public testimony will be heard in person Monday, February 10, 2003 from 2:30 p.m. to 3 p.m. and on Wednesday, February 12, 2002 from 9 a.m. to 9:30 a.m. Members of the public must schedule a timeslot in order to comment. In the event that the public comments do not take up the scheduled time period for public comment, the Panel will use that time to deliberate and conduct other Panel business.

Individuals interested in providing testimony in person should contact the Panel staff as outlined below to schedule time slots. Each presenter will be called on by the Chair in the order in which they are scheduled to testify and is limited to a maximum five-minute verbal presentation. Full written testimony on TWWIIA Implementation, no longer than 5 pages, may be submitted in person or by mail, fax or email on an on-going basis to the Panel for consideration.

Since seating may be limited, persons interested in providing testimony at the meeting should contact the Panel staff by e-mailing Kristen M. Breland, at *kristen.m.breland@ssa.gov* or calling (202) 358–6423.

The full agenda for the meeting will be posted on the Internet at *http://www.ssa.gov/work/panel* at least one week before the meeting or can be received in advance electronically or by fax upon request.

Contact Information: Anyone requiring information regarding the Panel should contact the TWWIIA Panel staff. Records are being kept of all Panel proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring information regarding the Panel should contact the Panel staff by:

- Mail addressed to Social Security Administration, Ticket to Work and Work Incentives Advisory Panel Staff, 400 Virginia Avenue, SW, Suite 700, Washington, DC, 20024.
- Telephone contact with Kristen Breland at (202) 358–6423.
- Fax at (202) 358–6440.
- E-mail to *TWWIIAPanel@ssa.gov*.

Dated: January 10, 2003.

Deborah M. Morrison,

Designated Federal Officer.

[FR Doc. 03–1084 Filed 1–16–03; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice Before Waiver With Respect to Land at Luray Caverns Airport, Luray, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The FAA is publishing notice of proposed release of approximately eight (8) acres of land at the Luray Caverns Airport, Luray, Virginia to the