Commodity Description and Coding System Explanatory Notes are not legally binding, they do represent the international interpretation of the Harmonized System and provide guidance in determining the scope of the various headings.

As Customs believes the garments in the previously named rulings were properly classified in heading 6208, HTSUS, based on the examination of the garments by Customs which determined that the garments were sleepwear, it is only the subheadings in which the garments were classified that is viewed as an error. Clearly, these garments were of a type which may be characterized as ''intimate apparel'', *i.e.*, garments which are either worn under other apparel (undergarments) or, garments which are not worn outside the home and when worn in the home would be worn only in the presence of family or intimate friends. Therefore, Customs is modifying these decisions to reflect the proper classification of the garments in subheading 6208.91.3010, HTSUSA, if of cotton or in subheading 6208.92.0030, HTSUSA, if of man-made fibers. These subheadings provide for, inter alia, women's other garments similar to nightdresses, pajamas, negligees, bathrobes, and dressing gowns.

Authority

This notice is published pursuant to 5 U.S.C. 552 (a)(1)(D). Publication of this notice in the Federal Register pursuant to the foregoing provision provides a higher degree of notice than that required under section 625 of the Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, (hereinafter section 625). Accordingly, it is Customs position that publication pursuant to section 625 is unnecessary. Customs is using Federal Register publication 1) because all rulings to which this notice relates may not have been identified, 2) in order to ensure a uniform and consistent position with respect to classification of this merchandise at an early date, 3) to assist Customs in its responsibility to administer informed compliance with respect to the trade community, and 4) as an aid to the importing community in exercising reasonable care with respect to importations of merchandise subject to this notice.

George J. Weise,

Commissioner of Customs.

Approved: November 29, 1995.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 95–31499 Filed 12–29–95; 8:45 am]

BILLING CODE 4820–02–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.

SUMMARY: The Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. The Commission seeks comment on the proposed amendments, alternative proposed amendments, and any other aspect of the sentencing guidelines, policy statements, and commentary. The Commission may submit amendments to the Congress not later than May 1, 1996.

DATES: Written public comment should be received by the Commission not later than March 6, 1996, in order to be considered by the Commission in the promulgation of amendments and in the possible submission of those amendments to the Congress by May 1, 1996.

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

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

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

Ordinarily, the rule-making requirements of the Administrative Procedure Act are inapplicable to judicial agencies; however, 28 U.S.C. 994(x) makes the rule-making provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions of a guideline, policy statement, or commentary. Second, the Commission has highlighted certain issues for comment and invites suggestions for specific amendment language and, in the case of penalties for cocaine offenses, related legislative proposals.

Section 1B1.10 of the United States Sentencing Commission Guidelines Manual sets forth the Commission's policy statement regarding retroactivity of amended guideline ranges. The Commission requests comment as to whether any of the proposed amendments should be made retroactive under this policy statement.

As set forth more fully in its notice dated September 22, 1995, (see 60 F.R. 49316–17), the Commission currently is engaged in a comprehensive guideline assessment and simplification effort. This project is expected to be a two-year initiative that may produce amendments in the 1996–97 amendment cycle for submission to Congress not later than May 1, 1997. During this initial year of the project, the Commission generally plans to promulgate no guideline amendments, except as may be necessary to implement legislation enacted by Congress. The Commission believes that a one-year hiatus in the heretofore annual amendment process is appropriate at this juncture to allow a guideline settling period and to permit more deliberate consideration of broader guideline concerns.

The matters published for comment in this notice pertaining to sentencing policy for cocaine and money laundering offenses are responsive to Pub. L. 104–38 (Oct. 30, 1995). The matters relating to proposed guideline amendments for food and drug offenses are a product of a staff working group that has considered these issues during the past two years. The Commission voted at its September 5, 1995, meeting, prior to its subsequent decision declaring a one-year hiatus on Commission amendment initiatives, to

publish these amendments for comment.

Publication of these matters for comment reflects only the Commission's determination that public comment on the amendment or issue would be welcome and helpful at this time. The Commission may or may not act upon these proposals in the current amendment cycle.

Authority. 28 U.S.C. 994 (a), (o), (p), (x).

Richard P. Conaboy,

Chairman.

Cocaine Offenses

Chapter Two, Part D (Offenses Involving Drugs)

1. Issue for Comment: The Violent Crime Control and Law Enforcement Act of 1994 directed the Commission to issue a report and recommendations on the issue of cocaine and federal sentencing policy. On February 28, 1995, the Commission issued its report to Congress in which it recommended that changes be made to the current cocaine sentencing scheme, including changes to the 100-to-1 quantity ratio between crack cocaine and powder cocaine used in calculating sentences in the current guidelines. The report indicated that the Commission would investigate the feasibility of creating new guideline enhancements and amending current enhancements to more fully and fairly address the harms associated with cocaine offenses generally and the harms associated with crack cocaine offenses, specifically. Based on these new enhancements, the Commission would make appropriate adjustments in the guideline quantity ratio.

On May 1, 1995, the Commission sent to Congress proposed changes to the sentencing guidelines implementing the recommendations made in the report. See 60 Fed. Reg. 25074, 25075–77 (May 10, 1995). The proposed guidelines included provisions that would have enhanced penalties for drug offenders, including crack cocaine offenders, who used weapons during their drug crimes, involved minors in the drug crimes, or committed their crimes near a school, or for other specified reasons that made those crimes more dangerous to society. In addition, the proposed amendments adjusted the guideline quantity ratio so that the base sentences, from which the enhancements would be added, would be the same for both powder cocaine and crack cocaine offenses.

Pursuant to 28 U.S.C. 994(p), Congress subsequently enacted legislation disapproving the Commission's proposed amendments. See Pub. L. 104–38, 109 Stat. 334 (Oct. 30, 1995). In the legislation, Congress directed the Commission to:

''(1) * * * submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, trafficking of cocaine, and like offenses, including unlawful possession with intent to commit any of the foregoing offenses, and attempt and conspiracy to commit any of the foregoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon;

(iii) uses or possesses a firearm;

(iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;

(vi) knows, or should know, that he is involving an unusually vulnerable person;

(vii) restrains a victim;

(viii) traffics in cocaine within 500 feet of a school;

(ix) obstructs justice;

(x) has a significant prior criminal record; or

(xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) Ratio.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.''

The Commission invites comment regarding implementation of this congressional directive, including comment on appropriate enhancements for violence and other harms associated with crack and powder cocaine, as well as the quantity ratio that should be substituted for the current 100-to-1 ratio. (Note that the reference in the congressional directive to section 3553(a) of title 28, United States Code, should be a reference to section 3553(a) of title 18, United States Code.)

A number of amendment proposals and issues for comment relating to cocaine sentencing policy are set forth in the Federal Registers of January 9 and March 15, 1995. See 60 Fed. Reg. 2430, 2445–51; 14054–55.

Money Laundering Offenses

Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting)

2. Synopsis of Proposed Amendment: In 1992, the Commission formed a staff working group to assess the operation of the guidelines for money laundering and monetary transaction reporting offenses. The group produced a report and recommended amendments. The Commission subsequently adopted a revised guideline covering monetary transaction reporting offenses. See Guidelines Manual, Appendix C, Amendment 490 (effective November 1, 1993). In 1995, after considering an updated analysis prepared by the working group, the Commission adopted a revised, consolidated guideline for money laundering offenses. See amendment 18, 60 Fed. Reg. 25074, 25085–86 (May 10, 1995). This amendment subsequently was disapproved by Congress. See Pub. L. 104–38, 109 Stat. 334 (Oct. 30, 1995). Congressional debate related to the disapproval legislation appears to suggest, however, that the Commission is expected to modify and resubmit appropriate amendments to the money laundering guidelines, taking into account concerns that serious money laundering offenses continue to receive appropriately severe punishment. See generally 14 Cong. Rec. H10,255–84 (daily ed. Oct. 18, 1995).

Accordingly, to frame the discussion for continued efforts to develop appropriate revisions to the money laundering guidelines, the Commission is republishing for comment the amendment submitted to Congress in 1995 along with a Department of Justice alternative. The Commission invites

comment on these alternative proposals or on some variation of them that appropriately addresses the goals of: (1) Assuring that offense levels comport with the seriousness of the defendant's offense conduct; and (2) avoiding unwarranted sentencing disparities as a result of charging practices.

(A) Proposed Amendment

Sections 2S1.1 and 2S1.2 are deleted and the following inserted in lieu thereof:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the Greatest)

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under § 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) 12 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of, or were to be used to promote, an offense involving the manufacture, importation, or distribution of controlled substances or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism; or

(3) 8 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers, transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957.

Application Notes

1. ''Value of the funds'' means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Criminally derived funds are any funds that are derived from a criminal offense; e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for $200,000 that is worth $120,000 and deposits the $200,000 in a bank; the value of the criminally derived funds is $200,000, but the loss is $80,000). If the defendant is able to establish that the loss, as defined in § 2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) provides an increase for those cases that involve efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e, criminal conduct beyond the underlying criminal conduct from which the funds were derived.

5. Subsection (b)(2) provides an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the 'layering' of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate.

Background

The statutes covered by this guideline were enacted as part of the Anti-Drug Abuse Act of 1986. These statutes cover a wide range of conduct. For example, they apply to large-scale operations that engage in international laundering of illegal drug proceeds. They also apply to a defendant who deposits $11,000 of fraudulently obtained funds in a bank. In order to achieve proportionality in sentencing, this guideline generally starts from a base offense level equivalent to that which would apply to the specified unlawful activity from which the funds were derived. The specific offense characteristics provide enhancements if the offense was designed to conceal or disguise the proceeds of criminal conduct and if the offense involved sophisticated money laundering.''.

Section 3D1.2(d) is amended in the second paragraph by deleting ''2S1.2,''.

Section 8C2.1(a) is amended by deleting ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by deleting ''§ 2S1.1 (Laundering of Monetary Instruments); § 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)''; and by inserting ''or'' immediately before ''§ 2R1.1''.

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. § 1957 by deleting ''2S1.2'' and inserting in lieu thereof ''2S1.1''.

(B) Proposed Amendment—Department of Justice Alternative

Sections 2S1.1 and 2S1.2 are deleted and the following inserted in lieu thereof:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the Greatest)

(1) the offense level for the underlying offense from which the funds were derived plus 2 levels, if the defendant committed the underlying offense and the offense level for that offense can be determined; or

(2) 16 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an unlawful activity involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substance, or were intended to promote those offenses; or

(3) 12 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) Apply the greater:

(A) If the defendant knew or believed that (i) the transactions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (ii) the funds were to be used to promote further criminal activity, increase by 2 levels; or

(B) If the defendant (i) intended to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986, or (ii) knew or believed that the transactions were designed in whole or in part to avoid a transaction reporting requirement under State or Federal law, increase by 1 level.

(2) If subsection (b)(1)(A) is applicable and the offense involved (A) placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved the used of a sophisticated form of money laundering, increase by 2 levels.

(c) Special Instruction for Receipt and Deposit Cases

The offense level is 8 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds where all of the following are present:

(1) the defendant's money laundering conduct is limited solely to the deposit of the unlawful proceeds into a domestic financial institution account that is readily identifiable as belonging to the person who committed the specified unlawful activity; (2) the offense was not intended or designed, either in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity, to violate section 7201 or 7206 of the Internal Revenue Code of 1986, or to avoid a transaction reporting requirement under State or Federal law; and

(3) the specified unlawful activity did not involve a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substance.

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957.

Application Notes

1. ''Value of the funds'' means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Where a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity, the value of the funds is the amount intended to promote the carrying on of specified unlawful activity.

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying criminal conduct from which the funds were derived.

5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the 'layering' of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate, or if the offense involved the use of individuals or organizations engaged in the business of money laundering, i.e., those who receive payment or other benefit for conducting or assisting in the transaction.

6. The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the defendant's money laundering conduct must be limited solely to the deposit of the unlawful proceeds into a domestic financial institution account that is readily identifiable as belonging to the person who committed the specified unlawful activity. Second, the offense cannot have been intended or designed, either in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity, to violate section 7201 or 7206 of the Internal Revenue Code of 1986, or to avoid a transaction reporting requirement under State or Federal law. Finally, the underlying unlawful activity must not have involved a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substance.

For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced level of subsection (c) if all the other limitations are present.''.

Food and Drug Offenses

Chapter Two, Parts D (Offenses Involving Drugs), F (Offenses Involving Fraud or Deceit), and N (Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws); Chapter Eight, Part C (Fines)

3. Synopsis of Proposed Amendment: In 1993, the Commission established a Food and Drug Working Group to study the application of the guidelines to food and drug offenses and to assess the feasibility of developing organizational guidelines for offenses covered by § 2N2.1. During the first year of its work, the group studied food and drug offenses and the operation of § 2N2.1 as it applied to individual defendants. In its second year, the group focussed its attention on the development of organizational guidelines for these offenses. In February 1995, a final report was submitted to the Commission outlining the group's findings and conclusions. The report is available for inspection at the Commission or through the Depository Library System of the U.S. Government Printing Office. The report also can be downloaded through USSC OnLine, the Commission's public access electronic bulletin board, by dialing (202) 273–4709.

On September 5, 1995, the Commission voted to publish for comment the working group's proposals for handling food and drug offenses under the guidelines. With minor changes to the fraud guideline (§ 2F1.1), the working group determined that food and drug cases for individuals and organizations could appropriately be sentenced under that guideline. The working group's proposal would delete existing § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in its entirety and replace references to that guideline in the statutory index with references to § 2F1.1. To address concerns about risk of harm associated with these offenses, the working group recommended adding an application note to § 2F1.1 inviting an upward departure in circumstances in which the offense placed a large number of persons at risk of serious bodily injury.

(A) Proposed Amendment—Consolidation of §§ 2F1.1 and 2N2.1

Section 2N2.1 is deleted in its entirety.

Section 2F1.1 is amended in the title by inserting ''; Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product'' at the end thereof.

The Commentary to § 2F1.1 captioned ''Statutory Provisions'' is amended by inserting ''21 U.S.C. §§ 101–105, 111, 115, 117, 120– 122, 124, 126, 134(a)–(e), 135a, 141, 143–145, 151–158, 331, 333(a)(1)–(2), 333(b), 458–461, 463, 466, 610–611, 614, 617, 619– 620, 642–644, 676'' immediately following ''2315''.

The Commentary to § 8C2.1 captioned ''Application Notes'' is amended in Note 2 by deleting the second sentence.

Appendix A is amended as follows:

in the line beginning ''7 U.S.C. § 87b'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the lines beginning ''7 U.S.C. § 149'' through ''7 U.S.C. § 195'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the lines beginning ''7 U.S.C. § 281'' through ''7 U.S.C. § 516'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the lines beginning ''21 U.S.C. § 101'' through ''21 U.S.C. § 333(a)(1)'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the line beginning ''21 U.S.C. § 333(a)(2)'' by deleting '', 2N2.1'';

in the lines beginning ''21 U.S.C. § 333(b)'' through ''21 U.S.C. § 620'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the lines beginning ''21 U.S.C. § 642'' through ''21 U.S.C. § 644'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the line beginning ''21 U.S.C. § 676'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1'';

in the line beginning ''42 U.S.C. § 262'' by deleting ''2N2.1'' and inserting in lieu thereof ''2F1.1''.

(B) Proposed Amendment—Upward Departures for Offenses Involving Risk to a Large Number of Persons

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

''11. Subsection (b)(4) applies when the offense caused a conscious or reckless risk of serious bodily injury to one or more persons. If the risk affected a large number of persons, an upward departure may be warranted.''

and by renumbering notes 11–18 as 12–19, respectively.

(C) Additional Issue for Comment

The Commission invites comment as to whether ''gain'' should be a substitute for ''loss'' when the essence of the offense is fraud against regulatory authorities with no economic loss. Currently, Application Note 8 of § 2F1.1 provides that gain realized from a covered offense is an alternative estimate that ordinarily will underestimate the loss. The Fourth and Seventh Circuits have held, however, that when a case involves no loss, the defendant's gain may not be used to calculate loss under § 2F1.1. See United States v. Chatterji, 46 F. 3d 1336 (4th Cir. 1995) and *United States* v. *Anderson,* 45 F. 3d 217 (7th Cir. 1995).

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