offenses involving individual rights (hate crimes or other offenses committed under color of law). These enhanced penalties reflect that, in such offenses, the harm includes both the underlying criminal conduct and an added civil rights component. Under the current civil rights offense guidelines, there is a two-level enhancement for hate crimes committed by a person other than a public official. There is a six-level enhancement for all offenses committed under color of law, including both hate and non-hate crimes.

The existing civil rights offense guidelines provide alternative base offense levels: (1) the offense level applicable to the underlying offense plus the additional levels for the civil rights component; and (2) a minimum or "default" offense level. The enhanced offense levels for civil rights offenses do not apply to hate crimes prosecuted under other statutes. Official misconduct offenses (offenses committed under color of law) prosecuted under other statutes generally receive an enhanced penalty of two levels under § 3B1.3 (Abuse of Position of Special Trust) rather than the six levels applicable under the civil rights offense guidelines.

The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where "the finder of fact at trial determines beyond a reasonable doubt" that the offense of conviction was a hate crime. The proposed amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing, determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, the Commission will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's authority, pursuant to 28 U.S.C. § 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline.

Proposed § 2H1.1 provides alternative offense levels using the greatest of the following: (1) the base offense level for the underlying offense; (2) level 10, for offenses involving the use or threatened use of force or the actual or threatened destruction of property; or (3) level 6,

otherwise. In addition, two options for setting the default offense level for conspiracies involving individual rights are shown. One option sets a default level of 12 for offenses involving two or more participants. This option is two levels higher than the default offense level for substantive offenses involving force or the threat of force and six levels higher than the default offense level for substantive offenses not involving force or the threat of force. A second option sets the default offense level of 10. which is consistent with the default offense level for substantive civil rights offenses involving force or the threat of force and four levels higher than the offense level for substantive civil rights offenses not involving force or the threat of force.

Proposed § 2H1.1, working together with the proposed § 3A1.1, provides enhanced penalties for civil rights offenses. For hate crimes committed by persons who are not public officials, the enhancement is three levels under proposed § 3A1.1, one level greater than under the current guidelines. Unlike the current guidelines, however, the proposed guideline differentiates between hate crimes and non-hate crimes committed under color of law, punishing hate crimes committed by public officials more severely than nonhate crimes. Proposed § 2H1.1 provides an enhancement for non-hate crimes committed under color of law of either two, three, or four levels above the offense level for the underlying offense. A two-level enhancement would be consistent with the generally applicable enhancement under § 3B1.3 (Abuse of Position of Special Trust). A three- or four-level enhancement would be higher than the generally applicable enhancement under § 3B1.3 and arguably would reflect the greater harm done by those in positions of authority when the harm involves violations of individual rights. Because of the additional three-level hate crime enhancement under § 3A1.1, the proposed amendment would provide a combined enhancement for hate crimes committed by public officials of five, six, or seven levels.

The clinic access law, like the other criminal civil rights statutes, criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The proposed amendment treats these violations in the same way as other offenses involving individual rights.

Two options are shown. Option 1 sets forth an amendment consistent with the preceding discussion. An alternative to this proposed amendment, published at the request of the Department of Justice, is set forth as Option 2.

Proposed Amendment: [Option 1: Section 3A1.1 and accompanying commentary is deleted in its entirety and the following inserted in lieu thereof:

"§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels; or

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Commentary

Application Notes:

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

2. Subsection (b) applies to offenses in which an unusually vulnerable victim is made a target of criminal activity by the defendant and the defendant knew or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

3. Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline.

4. Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

5. If subsection (a) applies, do not apply subsection (b). In the case of an offense that both is a "hate" crime and involves an unusually vulnerable