Law Enforcement Act of 1994 directs the Commission to "appropriately enhance penalties for cases in which a defendant convicted under 18 U.S.C. § 844(h) has previously been convicted under that section." Section 320106 revises the previous fixed, mandatory consecutive 5-year penalty for a first offense under 18 U.S.C. § 844(h) to provide a range of 5 to 15 years, and changes the previous fixed, mandatory consecutive penalty for a second offense from 10 years to a range of 10 to 25 years. The Commission requests comment as to how § 2K2.4 can be amended appropriately to address this directive and statutory change. Possible approaches might include: (1) an amendment to § 2K2.4 to increase the sentence by a specific amount if the defendant previously has been convicted under 18 U.S.C. § 844(h); (2) application under § 2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment; or (3) an amendment to § 2K2.4 to reference the underlying offense plus an appropriate enhancement for the weapon or explosive, and a provision for apportioning the sentence imposed to avoid double counting.

19. Issue for Comment: Section 110513 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to "appropriately enhance" penalties (1) for cases in which a defendant convicted under 18 U.S.C. § 922(g) has one prior conviction for a violent felony (as defined in 18 U.S.C. § 924(e)(2)(B)) or a serious drug offense (as defined in 18 U.S.C. § 924(e)(2)(A)); and (2) for cases in which a defendant has two such prior convictions. The statutory maximum for the offense remains at ten years.

Guideline 2K2.1 covers violations of 18 U.S.C. § 922(g). Alternative base offense level apply depending on the number of prior convictions of one or more "crime[s] of violence" or "controlled substance offense[s]." For example, a defendant with one such prior conviction would receive a base offense level of at least 20. A defendant with two or more such prior convictions would receive a base offense level of at least 24. In addition, a four-level enhancement or a cross reference may apply if the weapon was to be used in another felony. Other enhancements may apply depending on the type and number of weapons, and whether the weapon was stolen.

The Commission's definitions of "crime of violence" and "controlled

substance offense" are similar but not identical to those referenced in the directive. Guideline 2K2.1 draws its definition of "crime of violence" from 18 U.S.C. § 924(e) with a minor modification. Whereas the section 924(e) definition of "violent felony" includes any burglary, including a burglary of an abandoned commercial building, Taylor v. United States, 495 U.S. 575, 602 (1990), the definition of "crime of violence" in § 2K2.1 includes only burglary of a dwelling, consistent with the career offender provisions of the guidelines. United States v. Talbott, 902 F.2d 1129, 1133 (4th Cir. 1990).

Further, the § 2K2.1 definition of "controlled substance offense," drawn from 18 U.S.C. § 924(c) and the career offender provisions of the guidelines, is slightly different from that in 18 U.S.C. § 924(e). The section 924(e) definition of serious drug offense" requires that the drug offense (whether federal or state) have a maximum term of imprisonment of ten years or more. This narrower definition precludes, for example, counting a federal conviction under 21 U.S.C. §843(b) (four year statutory maximum for using a communication facility to facilitate drug distribution). By contrast, the definition of "controlled substance offense" in § 2K2.1 includes such "telephone counts." United States v. Vea-Gonzales, 999 F.2d 1326, 1329-30 (9th Cir. 1993). Moreover, where one state imposes a five-year maximum for certain drug conduct while another state imposes a ten-year maximum for the identical conduct, the section 924(e) definition would not count a defendant's conviction in the first state but would count the defendant's conviction in the second state.

The Commission invites comment on whether the current offense levels in these guidelines should be increased and, if so, by what amount. The Commission also invites comment on whether, for consistency, the definitions and counting of prior conviction of crime of violence and drug trafficking offense used in these guidelines should be the same as those used in § 4B1.1 (Career Offender).

20. Synopsis of Proposed
Amendment: Section 110504 of the
Violent Crime Control and Law
Enforcement Act of 1994 amends 18
U.S.C. § 924 to add subsection (k)
making it unlawful to steal any firearm
that is moving or has moved in
interstate commerce. Likewise, 18
U.S.C. § 844 is amended to add
subsection (k) making it unlawful to
steal any explosive that is moving or has
moved in interstate commerce.

Section 110511 amends 18 U.S.C. § 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce regardless of whether the movement occurred "before or after it [the firearm] was stolen."

Section 110515 amends 18 U.S.C. § 924 to add a new subsection (l) making it a federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector. The section also amends 18 U.S.C. § 844 to add a new subsection (l) with regard to stealing explosives from licensees.

Current law also proscribes shipping a stolen firearm (18 U.S.C. § 922(i)), stealing from the person or premises of a licensee any firearm in the business inventory (18 U.S.C. § 922(u)), and shipping stolen explosives (18 U.S.C. §842(h)). Further, the general theft statute, 18 U.S.C. § 659, provides a maximum imprisonment penalty of ten years for stealing "goods or chattels," including a firearm, "moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property." Other theft and receipt of stolen property statutes may also apply to a theft of a firearm.

Guideline 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. Additional adjustments may also apply. A two-level enhancement applies if a firearm is stolen unless the only count of conviction is a stolen firearm offense. This conditional adjustment has resulted in several calls to the Commission's hotline regarding cases involving a felon in possession of a stolen firearm who may be charged either under 18 U.S.C. § 922(g) (felon in possession) or with 18 U.S.C. § 922(j) (receipt of stolen firearm). A conviction under section 922(g) will result in a total offense level of 16 (base offense level of 14 plus two-level adjustment for stolen firearm). A conviction under section 922(j) will result in a total offense level of 14 (base offense level of 14 but, per application note 12, no twolevel adjustment for stolen firearm because the only offense of conviction is a stolen firearm offense). Further, the list of stolen firearm statutes has not been updated to reflect recent amendments to the code. Indeed, 18 U.S.C. § 922(u) (theft from dealer) as well as 18 U.S.C. §§ 922(s) and 922(t) (Brady bill provisions) are not listed in the Statutory Index.

Guideline 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce and offenses within the special federal maritime or territorial jurisdiction or within Indian territory. Guideline