2B1.1(b)(2)(A) provides for a one-level increase (to no less than level 7) if a firearm or destructive device was taken, compared with a base offense level 12 under § 2K2.1.

Two options are proposed to address the disparity in § 2B1.1 and § 2K2.1 penalties. Option 1 amends § 2B1.1 to include a cross reference to § 2K2.1. Option 2 amends § 2B1.1 to recommend an upward departure. The amendment also specifies a base offense level of 6 for convictions under 18 U.S.C. § 922 (s) or (t) and clarifies application of Note 6 only to cases in which the base offense level is determined under § 2K2.1(a)(7).

Proposed Amendment: Section 2K2.1(a)(8) is amended by deleting "or" and inserting in lieu thereof "(s), or (t)".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 12 by deleting "or (k)," and inserting in lieu thereof "(u), or § 924 (j) or (k),"; and by inserting "and the base offense level is determined under § 2K2.1(a)(7)," immediately following "guideline,".

[Option 1: Section 2B1.1(b) is amended by deleting subdivision (2). Section 2B1.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, if the resulting offense level is greater than that determined above.".]

[Option 2: Section 2B1.1(b) is amended by deleting subdivision (2).

The Commentary to § 2B1.1 captioned "Application Notes" is amended by inserting the following additional Note:

"15. If the offense involved the unlawful taking, receipt, transportation, transfer, transmittal, or possession of a firearm, destructive device, explosive material, or controlled substance, an upward departure to an offense level comparable to that provided under § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, may be warranted.".]

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"18 U.S.C. § 922(s)-(u) 2K2.1",

"18 U.S.C. § 924(k),(l) 2K2.1".

21. Synopsis of Proposed Amendment: Section 110518 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 924 to add a new subsection (n)

to provide that "[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life." This section also amends 18 U.S.C. § 844 to add a new subsection (m) increasing to 20 years the maximum imprisonment penalty for a conspiracy to violate 18 U.S.C. § 844(h). This section does not alter the fixed, mandatory consecutive penalty for the underlying substantive offenses of using or carrying a firearm or explosive during and in relation to a crime of violence or drug trafficking crime. Thus, identical offense conduct covered by these statutes may be subject, for example, to a fixed, mandatory five-year term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 924(c), a 5year mandatory minimum term and 15year maximum term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 844(h), a 5year maximum term under 18 U.S.C. § 371, or a 20-year maximum term under 18 U.S.C. § 924(n).

Guideline 2K2.4 provides for the term of imprisonment required by 18 U.S.C. § 924(c). Guideline 2K2.1 applies to an offense under 18 U.S.C. § 371 involving conspiracy to violate 18 U.S.C. § 924(c) and provides for an offense level of at least 18 (base offense level 12 plus increase to an offense level of at least 18 if the firearm or ammunition was used or intended to be used in connection with another offense). Additional adjustments may apply. The explosives guideline, § 2K1.3, also provides an offense level of at least 18 for a conviction under 18 U.S.C. § 371 for conspiracy to violate 18 U.S.C. § 844(h).

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 371 by inserting "2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c))," immediately before "2X1.1".

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"18 U.S.C. § 844(m) 2K1.3 18 U.S.C. § 924(n) 2K2.1".

Additional Issue for Comment: At the request of the Department of Justice, the Commission invites comment as to whether a conviction for a conspiracy to violate section 924(c) should be more closely referenced to the penalty in 18 U.S.C. § 924(c) or to the guideline for the underlying offense.

Chapter Two, Part L (Offenses Involving Immigration, Naturalization, and Passports)

22(A). Issue for Comment: Section 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory penalty for bringing in or harboring an alien from five to ten years, establishes a penalty of up to 20 years imprisonment if serious bodily injury results, and establishes a penalty of imprisonment for any term of years or life, if death results. In view of these statutory penalty changes, the Commission invites comment on whether the offense levels under the applicable guideline, § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), should be increased, and if so, by what amount.

(B). Issue for Comment: Section 130001 of the Violent Crime Control and Law Enforcement Act of 1994 alters the penalties for failing to depart and for reentering the United States in violation of 8 U.S.C. §§ 1252(e) and 1326(b), respectively. This provision reduces the statutory maximum penalties for some offenses from ten years to four years, and increases the statutory maximum penalties for reentry after commission of a felony or an aggravated felony from five to ten years, and from 15 to 20 years, respectively. This provision also establishes the offense of reentry after conviction for three or more misdemeanors involving drugs, crimes against the person, or both. The Commission invites comment on whether amendment of the applicable guideline is appropriate. Specifically, are the current offense levels provided for reentry after conviction of a felony or aggravated felony appropriate, and if not, how should the guidelines be amended? Should the offense level currently applicable for reentry after deportation for a felony also be applied to deportation after conviction of three or more misdemeanors involving drugs, crimes against the person, or both?

(C). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, increases the base offense level for immigration offenses committed by certain means and increases the offense level if any person sustained bodily injury.

Proposed Amendment: Section 2L1.1(a) is amended by redesignating subdivision (2) as subdivision (3) and inserting the following new subdivision:

"(2) 13, if the offense was committed by means set forth in 8 U.S.C. § 1324(a)(1)(A)(i) or 1324(a)(2)(B).".