

## **PROPOSED AMENDMENT AND ADDITIONAL ISSUES FOR COMMENT: IMPLEMENTATION OF THE DOJ REAUTHORIZATION ACT**

**Synopsis of Proposed Amendment:** *In November 2002, the Commission published general issues for comment on how to implement two directives in the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act (the "Act"), Pub.L. 107–273. This proposal provides (1) a proposed amendment to implement the directive to provide an enhancement for the use of body armor in a crime of violence or drug trafficking crime; and (2) additional issues for comment on implementation of the directive to provide an enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening Federal judges, magistrate judges, or certain other federal officials; as well as issues for comment regarding increased statutory maximum penalties provided for certain offenses by the Act and other miscellaneous provisions in the Act.*

### **1. PROPOSED AMENDMENT ON BODY ARMOR**

**Synopsis of Proposed Amendment:** *Section 11009 of the Act directs 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) in Chapter Three (Adjustments) 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, therefore, 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 on whether the adjustment for use of body armor should be defendant based or relevant conduct based.*

**Proposed Amendment:**

**CHAPTER THREE - ADJUSTMENTS**

**PART A - ~~VICTIM-RELATED~~ **GENERAL** ADJUSTMENTS**

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**§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 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub.L. 107–273).*

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**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 on 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 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 2 level increase if the offense generally involved the use of body armor and a heightened increase (4 or 6 levels) if the defendant used or directed the use of body armor? What should be the extent of the increase?*

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**2. ISSUES FOR COMMENT ON (A) ASSAULTS AND THREATS AGAINST FEDERAL JUDGES AND CERTAIN OTHER FEDERAL OFFICIALS, (B) INCREASED STATUTORY MAXIMUM PENALTIES, AND (C) OTHER MISCELLANEOUS PROVISIONS OF THE ACT**

*Section 11008(e) of the Act 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.*

*On November 27, 2002, the Commission published in the Federal Register the following issues for comment:*

- "(A) 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?*
- (B) Do the current base offense levels in each of the assault guidelines provide adequate punishment for the covered conduct? If not, what would be appropriate base offense levels for §§2A2.2, 2A2.3, and 2A2.4?*
- (C) 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?"*

*To provide further flexibility to implement the Act this amendment cycle, the Commission may wish to consider publishing the following revised and additional issues for comment (revisions to the November issues for comment and additional issues for comment are redlined):*

- (A) *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 3-level adjustment in §3A1.2 (Official Victims), and if so, what should be the extent of the enhancement (e.g., should the adjustment at §3A1.2 [4][5][6] levels)?*
- (B) *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, ~~and~~ 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?*
- (C) *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?*
- (D) *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 requests comment regarding whether the offense levels in §2J1.2 (Obstruction of Justice) 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 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 (6<sup>th</sup> 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?*

- (E) *The Act contains a number of miscellaneous provisions which may make amendments to the guidelines appropriate, as follows:*
- (i) *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.*

- (ii) 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.*
- (iii) 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 on whether §7B1.3 should be amended to more comprehensively address other provisions requiring mandatory revocation of probation of supervised release for certain violations.*
- (iv) 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.*