In accordance With 31 U.S.C. 5135, the CCAC:

• Advises the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals.

• Advises the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.

• Makes recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Greg Weinman, Acting United States Mint Liaison to the CCAC; 801 9th Street, NW.; Washington, DC 20220; or call 202–354–7200.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6525.

Authority: 31 U.S.C. 5135(b)(8)(C).

Dated: April 27, 2011.

Richard A. Peterson,

Acting Director, United States Mint.

[FR Doc. 2011–10710 Filed 5–2–11; 8:45 am]

BILLING CODE P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1) submission to Congress of amendments to the sentencing guidelines effective November 1, 2011; and (2) request for comment.

SUMMARY: The United States Sentencing Commission hereby gives notice of the following actions:

(1) Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

(2) Amendment 2, pertaining to drug offenses, has the effect of lowering guideline ranges. The Commission requests comment regarding whether that amendment should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. This notice sets forth the request for comment.

DATES: The Commission has specified an effective date of November 1, 2011, for the amendments set forth in this notice. Public comment regarding whether Amendment 2, pertaining to drug offenses, should be included as an amendment that may be applied retroactively to previously sentenced defendants should be received on or before June 2, 2011.

ADDRESSES: Comments should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC 20002–8002, *Attention:* Public Affairs—Retroactivity Public Comment.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Office of Legislative and Public Affairs, 202–502–4502. The amendments and the request for comment set forth in this notice also may be accessed through the Commission's Web site at *http://www.ussc.gov.*

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 generally submits guideline amendments to Congress pursuant to 28 U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

(1) Submission to Congress of Amendments to the Sentencing Guidelines

Notice of proposed amendments was published in the **Federal Register** on January 19, 2011 (*see* 76 FR 3193–02). The Commission held public hearings on the proposed amendments in Washington, DC, on February 16, 2011, and March 17, 2011. On April 28, 2011, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2011.

(2) Request for Comment on Amendment 2, Pertaining to Drug Offenses

Section 3582(c)(2) of title 18, United States Code, provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

The Commission lists in § 1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(c). To the extent practicable, public comment should address each of these factors.

Authority: 28 U.S.C. § 994(a), (o), (p), and (u); USSC Rules of Practice and Procedure 4.1, 4.3.

Patti B. Saris,

Chair.

(1) Submission to Congress of Amendments to the Sentencing Guidelines

1. *Amendment:* Section 2B1.1(b) is amended by redesignating subdivisions (8) through (17) as subdivisions (9) through (18); and by inserting after subdivision (7) the following:

"(8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.".

Section 2B1.1(b) is amended in subdivision (15), as redesignated by this amendment, by striking "(14)" and inserting "(15)".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins " 'Equity securities' " the following:

" 'Federal health care offense' has the meaning given that term in 18 U.S.C. 24."; and by inserting after the paragraph that begins " 'Foreign instrumentality' " the following:

" 'Government health care program' means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 3(F) by adding at the end the following:

"(viii) *Federal Health Care Offenses Involving Government Health Care Programs.* In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.,* is evidence sufficient to establish the amount of the intended loss, if not rebutted.".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 7 by striking "(8)" and inserting "(9)" each place it appears;

In Note 8 by striking "(9)" and inserting "(10)" each place it appears;

In Note 9 by striking "(10)" and inserting "(11)" each place it appears;

In Note 10 by striking "(12)" and inserting "(13)" in both places;

In Note 11 and Note 12 by striking "(14)" and inserting "(15)" each place it appears;

In Note 13 by striking "(16)" and inserting "(17)" each place it appears and by striking "(14)" and inserting "(15)" in both places;

In Note 14 by striking "(b)(17)" and inserting "(b)(18)" each place it appears;

In Note 19 by striking "(16)" and inserting "(17)" and by striking "(11)" and inserting "(12)".

The Commentary to § 2B1.1 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(6)" the following:

"Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111–148.".

The Commentary to § 2B1.1 captioned "Background" is amended in the paragraph that begins "Subsection (b)(8)(D)" by striking "(8)" and inserting "(9)";

In the paragraph that begins "Subsection (b)(9)" by striking "(9)" and inserting "(10)";

In the paragraph that begins "Subsections (b)(10)(A)(i)" by striking "(10)" and inserting "(11)";

In the paragraph that begins "Subsection (b)(10)(C)" by striking "(10)" and inserting "(11)";

In the paragraph that begins "Subsection (b)(11)" by striking "(11)" and inserting "(12)";

In the paragraph that begins "Subsection (b)(13)(B)" by striking "(13)" and inserting "(14)";

In the paragraph that begins "Subsection (b)(14)(A)" by striking "(14)" and inserting "(15)";

In the paragraph that begins "Subsection (b)(14)(B)(i)" by striking "(14)" and inserting "(15)";

In the paragraph that begins "Subsection (b)(15)" by striking "(15)" and inserting "(16)"; and

In the paragraph that begins "Subsection (b)(16)" by striking "(16)" and inserting "(17)" in both places.

The Commentary to § 3B1.2 captioned "Application Notes" is amended in Note 3(A) by adding at the end the following:

"Likewise, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 12 U.S.C. 4641 the following:

"12 U.S.C. 5382 2H3.1";

By inserting after the in the line referenced to 15 U.S.C. 78u(c) the following:

"15 U.S.C. 78jjj(c)(1),(2) 2B1.1
15 U.S.C. 78jjj(d) 2B1.1";

In the line referenced to 29 U.S.C. 1131 by inserting "(a)" after "1131"; and

By inserting after the line referenced to 29 U.S.C. § 1141 the following:

"29 U.S.C. 1149 2B1.1".

Reason for Amendment: This amendment responds to the directive in section 10606(a)(2) of the Patient Protection and Affordable Care Act of 2010, Public Law 111–148 (the "Patient Protection Act"), and addresses certain new offenses created by the Patient Protection Act and by the Dodd-Frank Wall Street and Consumer Protection Act, Public Law 111–203 (the "Dodd-Frank Act").

Response to Directive

Section 10606(a)(2)(B) of the Patient Protection Act directed the Commission to—

amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant[.]

Section 10606(a)(2)(C) directed the Commission to amend the guidelines to provide—

(i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $1,000,000 and less than $7,000,000;

(ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $7,000,000 and less than $20,000,000;

(iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $20,000,000; and

(iv) if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs.

Section 10606(a)(3) required the Commission, in carrying out the directive, to "ensure reasonable consistency with other relevant directives and with other guidelines" and to "account for any aggravating or mitigating circumstances that might justify exceptions," among other requirements.

The amendment implements the directive by adding two provisions to § 2B1.1 (Theft, Property Destruction, and Fraud), both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program".

The first provision is a new tiered enhancement at subsection (b)(8) that applies in such cases (*i.e.,* Federal health care offenses involving a Government health care program) if the loss is more than $1,000,000. The enhancement is 2 levels if the loss is more than $1,000,000, 3 levels if the loss is more than $7,000,000, and 4 levels if the loss is more than $20,000,000. The tiers of the enhancement apply to loss amounts "more than" the specified dollar amounts rather than to loss amounts "not less than" the specified dollar amounts to "ensure reasonable consistency" as required by the directive. The consistent practice in the

Guidelines Manual is to apply enhancements to loss amounts "more than" specified dollar amounts.

The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a Federal health care offense involving a Government health care program. The special rule provides that, in such a case, "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.,* is evidence sufficient to establish the amount of the intended loss, if not rebutted". The special rule includes language making clear that the government's proof of intended loss may be rebutted by the defendant.

The amendment also adds definitions to the commentary in § 2B1.1 for the terms "Federal health care offense" and "Government health care program". "Federal health care offense" is defined to have the meaning given that term in 18 U.S.C. 24, as required by section 10606(a)(1) of the Patient Protection Act. "Government health care program" is defined to mean "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." The amendment lists the Medicare program, the Medicaid program, and the CHIP program as examples of such programs. The Commission adopted this definition because health care fraud involving federally funded programs and health care fraud involving state-funded programs are similar offenses, committed in similar ways and posing similar harms to the taxpaying public. In addition, defining "Government health care program" in this manner avoids application difficulties likely to arise from a narrower definition that would require the disaggregation of losses program by program in cases in which the defendant defrauded both federal and state health care programs. Finally, the statutory language in the directive indicates congressional concern with health care fraud that adversely affects the public fisc beyond health care programs funded solely with federal funds.

Finally, the amendment amends Application Note 3(A) to § 3B1.2 (Mitigating Role) to make clear that a defendant who is accountable under § 1B1.3 (Relevant Conduct) for a loss amount under § 2B1.1 that greatly exceeds the defendant's personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment. The amended commentary provides as an example "a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount". This part of the amendment is consistent with the directive in section 10606(a)(3)(D) of the Patient Protection Act that the Commission should "account for any aggravating or mitigating circumstances that might justify exceptions" to the new tiered enhancement.

New Offenses

In addition to responding to the directives, the amendment amends Appendix A (Statutory Index) to include offenses created by both the Patient Protection Act and the Dodd-Frank Act.

The Patient Protection Act created a new offense at 29 U.S.C. 1149 that prohibits making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. Pursuant to 29 U.S.C. § 1131(b), a person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The amendment references the new offense at 29 U.S.C. 1149 to 2B1.1 because the offense has fraud or misrepresentation as a element of the offense. As a clerical change, the amendment also amends Appendix A (Statutory Index) to make clear that 29 U.S.C. 1131(a), not the new § 1131(b), is referenced to § 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records).

The Dodd-Frank Act created two new offenses, 12 U.S.C. 5382 and 15 U.S.C. 78jjj(d). With regard to 12 U.S.C. 5382, under authority granted by sections 202–203 of the Dodd-Frank Act, the Secretary of the Treasury may make a "systemic risk determination" concerning a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for approval by a federal district court. The Dodd-Frank Act makes it a crime, codified at 12 U.S.C. 5382, to recklessly disclose a systemic risk determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. 5382 is subject to imprisonment for not more than five years. The amendment references 12 U.S.C. 5382 to 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Section 2H3.1 covers several criminal statutes with similar elements and the same maximum term of imprisonment.

The second new offense, 15 U.S.C. 78jjj(d), makes it a crime for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. *See* Dodd-Frank Act, Public Law 111–203, § 929V. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that are not referenced in Appendix A (Statutory Index). All three subsections are subject to the same maximum term of imprisonment of five years. In addition, all three concern fraud and deceit: the newly created 15 U.S.C. 78jjj(d) involves false representation; 15 U.S.C. 78jjj(c)(1) involves fraud in connection with or in contemplation of a liquidation proceeding; and 15 U.S.C. 78jjj(c)(2) involves fraudulent conversion of assets of the Security Investor Protection Corporation. The amendment references these offenses to § 2B1.1 because the elements of the offenses involve fraud and deceit.

2. *Amendment:* Sections 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, and 3C1.1, effective November 1, 2010 (*see* Appendix C, Amendment 748), as set forth in Supplement to the 2010 Guidelines Manual (effective November 1, 2010); *see also* 75 FR 66188 (October 27, 2010), are repromulgated as follows:

Part A

The Drug Quantity Table in § 2D1.1(c) and Note 10 of the Commentary to § 2D1.1 captioned "Application Notes" are repromulgated without change.

Part B

All provisions of § 2D1.1 not repromulgated by Part A of this amendment are repromulgated without change, except as follows:

The Commentary to § 2D1.1 captioned "Application Notes" is amended by striking Note 28 as follows:

"28. *Application of Subsection (b)(12).*—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.,* a 'building, room, or enclosure,' *see* '2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

Among the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a possessory interest in (*e.g.,* owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.",

and inserting a new Note 28 as follows:

"28. *Application of Subsection (b)(12).*—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.,* a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

Among the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a possessory interest in (*e.g.,* owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.".

Sections 2D1.14, 2K2.4, 3B1.4, and 3C1.1 are repromulgated without change.

Part C

Section 2D2.1 is repromulgated without change.

Reason for Amendment: This multi-part amendment re-promulgates as permanent the temporary, emergency amendment (effective Nov. 1, 2010) that implemented the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111–220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives to the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.

The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act. Pursuant to this emergency directive, the Commission promulgated an amendment effective November 1, 2010, that made temporary, emergency revisions to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and § 2D2.1 (Unlawful Possession; Attempt or Conspiracy). Conforming changes to certain other guidelines were also promulgated on a temporary, emergency basis. *See* USSG App. C, Amendment 748 (effective November 1, 2010).

This amendment re-promulgates the temporary, emergency amendment. Part A re-promulgates the revisions to the crack cocaine quantity levels in the Drug Quantity Table in § 2D1.1 without change. Part B re-promulgates the various aggravating and mitigating provisions in § 2D1.1 without change, except for a revision to the new Application Note 28 (relating to the new enhancement for maintaining premises). Part C re-promulgates the revision to § 2D2.1 accounting for the reduction in the statutory penalties for simple possession of crack cocaine without change.

Part A. Changes to the Drug Quantity Table for Offenses Involving Crack Cocaine

Part A re-promulgates without change the emergency, temporary revisions to the Drug Quantity Table in § 2D1.1 and related revisions to Application Note 10 to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). The new mandatory minimum quantity threshold levels for crack cocaine offenses are consistent with the Commission's 2007 report to Congress, *Cocaine and Federal Sentencing Policy,* in which the Commission, based on available information, defined crack cocaine offenders who deal in quantities of one ounce (approximately 28 grams) or more in a single transaction as wholesalers.

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.,* the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32, which was the approach used for crack cocaine offenses prior to November 1, 2007. *See* § 2D1.1, comment. (backg'd.); USSG App. C, Amendment 706 (effective November 1, 2007). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating proportionally upward and downward on the Drug Quantity Table. Conforming the guideline penalty structure for crack cocaine offenses to the approach followed for all other drugs ensures that the quantity-based relationship established by statute between crack cocaine offenses and offenses involving all other drugs is consistently and proportionally reflected throughout the Drug Quantity Table at all drug quantities.

Estimating the likely future sentencing impact of the amendment to the Drug Quantity Table is difficult because the reductions in the statutory penalties for crack cocaine offenses may result in changes in prosecutorial and other practices. With that important caveat, the Commission estimates that approximately 63 percent of crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the

Drug Quantity Table, with an average sentence decrease of approximately 26 percent. For example, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 5 grams of crack cocaine was assigned a base offense level of 24, which corresponds to a guideline sentencing range of 51 to 63 months. Under the Drug Quantity Table as amended, 5 grams of crack cocaine is assigned a base offense level of 16, which corresponds to a guideline sentencing range of 21 to 27 months. Similarly, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 50 grams of crack cocaine was assigned a base offense level of 30, which corresponds to a guideline sentencing range of 97 to 121 months. Under the Drug Quantity Table as amended, 50 grams of crack cocaine is assigned a base offense level of 26, which corresponds to a guideline sentencing range of 63 to 78 months.

It is important to note that no crack cocaine offender will receive an increased sentence as a result of the amendment to the Drug Quantity Table. As indicated above, not all crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table. This is the case for a variety of reasons. Among the reasons, compared to the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, the amendment does not lower the base offense levels, and therefore does not lower the sentences, for offenses involving the following quantities of crack cocaine: less than 500 milligrams; at least 28 grams but less than 35 grams; at least 280 grams but less than 500 grams; at least 840 grams but less than 1.5 kilograms; at least 2.8 kilograms but less than 4.5 kilograms; and 8.5 kilograms or more. In addition, some offenders are sentenced at the statutory mandatory minimum and therefore cannot have their sentences lowered by an amendment to the guidelines. *See* § 5G1.1(b) (Sentencing on a Single Count of Conviction). Other offenders are sentenced pursuant to §§ 4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal), which result in sentencing guideline ranges that are unaffected by a reduction in the Drug Quantity Table.

To provide a means of obtaining a single offense level in cases involving crack cocaine and one or more other controlled substances, the amendment also establishes a marihuana equivalency for crack cocaine under which 1 gram of crack cocaine is equivalent to 3,571 grams of marihuana. (The marihuana equivalency for any controlled substance is a constant that can be calculated using any threshold in the Drug Quantity Table by dividing the amount of marihuana corresponding to that threshold by the amount of the other controlled substance corresponding to that threshold. For example, the threshold quantities at base offense level 26 are 100,000 grams of marihuana and 28 grams of crack cocaine; 100,000 grams divided by 28 is 3,571 grams.) In the commentary to § 2D1.1, the amendment makes a conforming change to the rules for cases involving both crack cocaine and one or more other controlled substances. The amendment deletes the special rules in Note 10(D) for cases involving crack cocaine and one or more other controlled substances, and revises Note 10(C) so that it provides an example of such a case.

Part B. Aggravating and Mitigating Factors in Drug Trafficking Cases

Part B re-promulgates the temporary, emergency revisions to § 2D1.1 and accompanying commentary that account for certain aggravating and mitigating factors in drug trafficking cases. These changes implement directives to the Commission in sections 5, 6, and 7 of the Act. The emergency revisions are re-promulgated without change, except for the new Application Note 28 (relating to the new enhancement for maintaining a premises), as explained below.

First, Part B amends § 2D1.1 to add a sentence at the end of subsection (a)(5) (often referred to as the "mitigating role cap"). The new provision provides that if the offense level otherwise resulting from subsection (a)(5) is greater than level 32, and the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of § 3B1.2 (Mitigating Role), the base offense level shall be decreased to level 32. This provision responds to section 7(1) of the Act, which directed the Commission to ensure that "if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32".

Second, Part B amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

The amendment also revises the commentary to § 2D1.1 to clarify how this new specific offense characteristic interacts with subsection (b)(1), which provides an enhancement of 2 levels if a dangerous weapon (including a firearm) was possessed. Specifically, Application Note 3 is amended to provide that the enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively. However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

In addition, the amendment makes a conforming change to the commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both § 2D1.1 (for a drug trafficking offense) and § 2K2.4 (for an offense under 18 U.S.C. § 924(c)). In such a case, the sentence under § 2K2.4 accounts for any weapon enhancement; therefore, in determining the sentence under § 2D1.1, the weapon enhancement in § 2D1.1(b)(1) does not apply. *See* § 2K2.4, comment. (n. 4). The amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§ 2D1.1 and 2K2.4, the new enhancement at § 2D1.1(b)(2) also is accounted for by § 2K2.4 and, therefore, does not apply.

Third, Part B amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(11) providing an enhancement of 2 levels if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense. The new specific offense characteristic responds to section 6(1) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if * * * the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense".

The amendment also revises the commentary to § 2D1.1 to clarify how this new specific offense characteristic interacts with the adjustment at § 3C1.1 (Obstructing or Impeding the Administration of Justice). Specifically, new Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by § 3C1.1.

Fourth, Part B amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(12) providing an enhancement of 2 levels if the defendant maintained premises for the purpose of manufacturing or distributing a controlled substance. The new specific offense characteristic responds to section 6(2) of the Act, which directed the Commission to "ensure an additional increase of at least 2 offense levels if * * * the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)."

The amendment also adds commentary in § 2D1.1 at Application Note 28 providing that the enhancement applies to a defendant who knowingly maintains premises (*i.e.,* a building, room, or enclosure) for the purpose of maintaining or distributing a controlled substance. The new amendment differs from the temporary, emergency revisions in clarifying that distribution includes storage of a controlled substance for the purpose of distribution.

Application Note 28 also provides that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (*e.g.,* owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Fifth, Part B amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(14) providing an enhancement of 2 levels if the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved one or more of five specified factors. The new specific offense characteristic responds to section 6(3) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if * * * (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

The amendment also revises the commentary to § 2D1.1 to provide guidance in applying the new specific offense characteristic at § 2D1.1(b)(14). Specifically, new Application Note 29 provides that if the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of subsection (b) of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim). Application Note 29 also provides that subsection (b)(14)(C) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance. Subsection (b)(14)(C), however, does not apply if subsection (b)(3) or (b)(5) (as redesignated by the amendment) applies because the defendant's involvement in importation is adequately accounted for by those subsections. In addition, Application Note 29 defines "pattern of criminal conduct" and "engaged in as a livelihood" for purposes of subsection (b)(14)(E) as those terms are defined in § 4B1.3 (Criminal Livelihood).

The amendment also revises the commentary in § 3B1.4 (Using a Minor To Commit a Crime) and § 3C1.1 (Obstructing or Impeding the Administration of Justice) to specify how those adjustments interact with § 2D1.1(b)(14)(B) and (D), respectively. Specifically, Application Note 2 to § 3B1.4 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under § 2D1.1(b)(14)(B). Similarly, Application Note 7 to § 3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under § 2D1.1(b)(14)(D).

Sixth, Part B amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(15) providing a 2-level downward adjustment if the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of § 3B1.2 (Mitigating Role) and the offense involved each of three additional specified factors: namely, the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and had minimal knowledge of the scope and structure of the enterprise. The specific offense characteristic responds to section 7(2) of the Act, which directed the Commission to ensure that "there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense."

Seventh, to reflect the renumbering of specific offense characteristics in § 2D1.1(b) by the amendment, technical and conforming changes are made to the commentary to § 2D1.1 and to § 2D1.14 (Narco-Terrorism).

Part C. Simple Possession of Crack Cocaine

Part C re-promulgates without change the temporary, emergency revisions to § 2D2.1 to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: For a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. *See* 21 U.S.C. 844(a). To account for this statutory change, the amendment deletes the cross-reference at § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, § 2D1.1.

3. *Amendment:* The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8, in the first paragraph by adding at the end as the last sentence the following:

"Likewise, an adjustment under § 3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. 822(g).".

Reason for Amendment: This amendment makes changes to the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) in response to the Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273 (the "Act"). Section 3 of the Act amended 21 U.S.C. 822 (Persons required to register) to authorize certain persons in possession of controlled substances (*i.e.,* ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide "an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the *Guidelines Manual* if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3."

The amendment implements the directive by amending Application Note 8 to § 2D1.1 to provide that an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. The amendment reflects the likelihood that in such a case the offender abused a position of trust (*i.e.,* the authority provided by 21 U.S.C. § 822 to receive controlled substances for the purpose of disposal) to facilitate the commission or concealment of the offense.

4. *Amendment:* The Commentary to § 2J1.1 captioned "Application Notes" is amended in Note 2 by inserting "In such a case, do not apply § 2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order)." after "failed to pay.".

Reason for Amendment: This amendment addresses a circuit conflict on whether the specific offense characteristic at subsection (b)(8)(C) of § 2B1.1 (Theft, Property Destruction, and Fraud) applies to a defendant convicted of an offense involving the willful failure to pay court-ordered child support (*i.e.,* a violation of 18 U.S.C. 228). The specific offense characteristic in § 2B1.1(b)(8)(C) applies if the offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines."

It provides an enhancement of 2 levels and a minimum offense level of level 10.

Offenses under section 228 are referenced in Appendix A (Statutory Index) to § 2J1.1 (Contempt), which directs the court to apply § 2X5.1 (Other Offenses), which in turn directs the court to apply the most analogous offense guideline. The commentary to § 2J1.1 provides that, in a case involving a violation of section 228, the most analogous offense guideline is § 2B1.1. *See* § 2J1.1, comment. (n.2).

Some circuits have disagreed over whether to apply § 2B1.1(b)(8)(C) in a case involving a violation of section 228. The Second and Eleventh Circuits have held that applying § 2B1.1(b)(8)(C) in a section 228 case is permissible because the failure to pay the child support and the violation of the order are distinct harms. *See United States* v. *Maloney,* 406 F.3d 149, 153–54 (2d Cir. 2005); *United States* v. *Phillips,* 363 F.3d 1167, 1169 (11th Cir. 2004). However, the Seventh Circuit has held that applying § 2B1.1(b)(8)(C) in a section 228 case is impermissible double counting. *See United States* v. *Bell,* 598 F.3d 366 (7th Cir. 2010) ("apply[ing] both the cross-reference for § 228 and the enhancement for violation of a court or administrative order is impermissible double counting").

The amendment resolves the conflict by amending the commentary to § 2J1.1 to specify that, in a case involving a violation of section 228, § 2B1.1(b)(8)(C) does not apply. The Commission determined that in a section 228 case the fact that the offense involved a violation of a court order is adequately accounted for by the base offense level.

5. *Amendment:* Section 2K2.1(a) is amended in subdivision (4)(B) by striking "or" before "(II) is"; and by adding at the end the following:

"or (III) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;";

And in subdivision (6) by striking "or" before "(B)"; and by adding at the end the following:

"or (C) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;".

Section 2K2.1(b) is amended by striking subdivision (6) as follows:

"(6) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.", and inserting a new subdivision (6) as follows:

"(6) If the defendant—

(A) Possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) Used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 13(D) by inserting "(B)" after "(b)(6)".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 14 by inserting "(B)" after "(b)(6)" each place it appears.

The Commentary to § 2K2.1 captioned "Application Notes" is amended by adding at the end the following:

"15. *Certain Convictions Under 18 U.S.C. 922(a)(6), 922(d), and 924(a)(1)(A).*—In a case in which the defendant is convicted under 18 U.S.C. 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.".

The Commentary to § 2M5.1 captioned "Statutory Provisions" is amended by inserting "22 U.S.C. 8512; 50 U.S.C. 1705; " after "2332d;".

Section 2M5.2(a)(2) is amended by inserting "(A)" before "non-fully"; and by striking "ten" and inserting "two, (B) ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or (C) both".

The Commentary to § 2M5.2 captioned "Statutory Provisions" is amended by inserting ", 8512; 50 U.S.C. 1705" after "2780".

The Commentary to § 2M5.3 captioned "Statutory Provisions" is amended by inserting "22 U.S.C. 8512;" before "50 U.S.C. "; and by striking " §1701,".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 22 U.S.C. 4221 the following:

"22 U.S.C. 8512 2M5.1, 2M5.2, 2M5.3";

By striking the line referenced to 50 U.S.C. 1701;

And in the line referenced to 50 U.S.C. 1705 by inserting "2M5.1, 2M5.2," before "2M5.3".

Reason for Amendment: This multi-part amendment is a result of the Commission's review of offenses involving firearms crossing the border. The Commission undertook this review in response to concerns that the illegal flow of firearms across the southwestern border of the United States is contributing to violence along the border and ultimately harming the national security of the United States. The Commission has considered sentencing data, heard testimony, and received comment on the general concern of firearms crossing the border illegally and a specific concern that "straw purchasers" (*i.e.,* individuals who buy firearms on behalf of others, typically "prohibited persons" who are not allowed to buy or possess firearms themselves) are contributing to this illegal flow of firearms to a significant degree.

The amendment amends the primary firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), to address the general concern of firearms crossing the border and the specific concern about straw purchasers. The amendment also amends the guideline for arms export violations, § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), to provide greater penalties for export offenses involving small arms and more guidance on export offenses involving ammunition. Finally, the amendment revises the references in Appendix A (Statutory Index) for certain offenses, including providing a reference for a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Public Law 111–195.

Firearms Leaving the United States

Subsection (b)(6) provides a 4-level enhancement, and a minimum offense level of 18, if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. The amendment establishes a new prong (A) in subsection (b)(6) that applies "if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States", and redesignates the existing provision as prong (B). Under the amendment, a defendant receives the 4-level enhancement and minimum offense level 18 if either prong applies. The Commission determined that possessing a firearm while leaving or attempting to leave the United States is conduct sufficiently similar in seriousness to possessing a firearm in connection with another felony offense to warrant similar punishment. Likewise, possessing or transferring a firearm with knowledge, intent, or reason to believe that it would be transported out of the United States is conduct sufficiently similar in seriousness to possessing or transferring a firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense to warrant similar punishment.

Prior to the amendment, some courts have applied subsection (b)(6) to cases in which the defendant has transported or attempted to transport firearms across the border. These courts have concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as "another felony offense" for purposes of subsection (b)(6). *See, e.g., United States* v. *Juarez,* 626 F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying § 2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such violations by up to 20 years' imprisonment). However, for clarity and to promote consistency of application, the Commission created a separate, distinct prong (A) in subsection (b)(6) to cover this conduct.

Straw Purchasers

Second, the amendment amends § 2K2.1 to address the concerns about straw purchasers. The amendment increases penalties for certain defendants convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction. Specifically, the amendment increases penalties for a defendant who is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The base offense level for a defendant convicted under either of these statutes has been level 12, or level 18 if the offense involved a firearm described in 26 U.S.C. 5845(a). *See*

§ 2K2.1(a)(5), (7). The amendment amends subsections (a)(4)(B) and (a)(6) to increase the base offense level for these defendants to level 14, or 20 if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a).

The amendment ensures that defendants convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under a third statute used to prosecute straw purchasers, 18 U.S.C. 922(d), when the conduct is similar. Section 922(d) differs from 18 U.S.C. 922(a)(6) and 924(a)(1)(A) in that it requires as an element of the offense that the defendant sell or otherwise dispose of a firearm or ammunition to a prohibited person knowing or having reasonable cause to believe that such person is a prohibited person. Section 2K2.1 has accounted for the increased offense seriousness and offender culpability in violations of 18 U.S.C. 922(d) by providing base offense levels for convictions under section 922(d) that are generally 2 levels higher than for convictions under 18 U.S.C. 922(a)(6) and 924(a)(1)(A). *See* § 2K2.1(a)(4)(B), (a)(6)(B). The Commission determined that defendants who are convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person have engaged in conduct similar to the elements of 18 U.S.C. 922(d), are similarly culpable, and therefore warrant a similar sentence under § 2K2.1.

In addition, the amendment provides a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of § 2K2.1 apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense. The Commission determined that a defendant meeting these criteria may be less culpable than the typical straw purchaser.

Export Offenses Involving Small Arms or Ammunition

Third, the amendment amends § 2M5.2 to narrow the application of the alternative base offense level of 14 at subsection (a)(2). The alternative base offense level of 14 has applied "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." *See* § 2M5.2(a)(2). The amendment reduces the threshold number of small arms in subsection (a)(2) from ten to two. The Commission determined that export offenses involving more than two firearms are more serious and more likely to involve trafficking. Narrowing the application of subsection (a)(2) also brings § 2M5.2 into greater conformity with § 2K2.1 in how it accounts for the number of firearms involved in the offense. *See* § 2K2.1(b)(1) (providing a tiered enhancement of 2 to 10 levels if the offense involved three or more firearms); § 2K2.1, comment. (n.13) (specifying that the trafficking enhancement in § 2K2.1(b)(5) applies if the offense involved two or more firearms and other requirements are also met).

The amendment also amends § 2M5.2 to address cases in which the defendant possessed ammunition, either in a case involving ammunition only or in a case involving ammunition and small arms. There appears to be differences in how § 2M5.2 is being applied by the courts in such cases. Under the amendment, a defendant with ammunition will receive the alternative base offense level of 14 if the ammunition consisted of not more than 500 rounds of ammunition for small arms. Such ammunition typically is sold in quantities of not more than 500 rounds, depending on the manufacturer and the type of ammunition. The Commission determined that, as with export offenses involving more than two firearms, export offenses involving more than 500 rounds of ammunition are more serious and more likely to involve trafficking.

References in Appendix A (Statutory Index)

Fourth, the amendment amends Appendix A (Statutory Index) to expand the number of guidelines to which offenses under 50 U.S.C. 1705 are referenced. Section 1705 makes it unlawful to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*). Any person who willfully commits, willfully attempts or conspires to commit, or aids or abets in the commission of such an unlawful act may be imprisoned for not more than 20 years. *See* 50 U.S.C. 1705(c). Appendix A (Statutory Index) previously contained two separate entries: the criminal offense, 50 U.S.C. 1705, was referenced to § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose), while another statute that contains no criminal offense, 50 U.S.C. 1701, was referenced to § 2M5.3 as well as to §§ 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). The amendment revises the entry for 50 U.S.C. 1705 to include all three guidelines, §§ 2M5.1, 2M5.2, and 2M5.3, and deletes as unnecessary the entry for 50 U.S.C. 1701.

Finally, the amendment addresses a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Public Law 111–195. Section 103 of that Act (22 U.S.C. 8512) makes it unlawful to import into the United States certain goods or services of Iranian origin, or export to Iran certain goods, services, or technology, and provides that the penalties under 50 U.S.C. 1705 apply to a violation. The amendment amends Appendix A (Statutory Index) to reference the new offense at 22 U.S.C. 8512 to 2M5.1, 2M5.2, and 2M5.3.

6. *Amendment:* Section 2L1.2(b)(1)(A) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points" after "16 levels".

Section 2L1.2(b)(1)(B) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points" after "12 levels".

The Commentary to 2L1.2 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

"(C) *Prior Convictions.*—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.".

The Commentary to 2L1.2 captioned "Application Notes" is amended in Note 7 by inserting after "warranted. (B)" the following: "In a case in which the 12-

level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C)".

Reason for Amendment: This amendment amends § 2L1.2 (Unlawfully Entering or Remaining in the United States) to limit the extent of the enhancement at subsection (b)(1) provided for certain offenders. Subsection (b)(1) provides an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a predicate conviction. The amount of the enhancement ranges from 16 levels to 4 levels, depending on the nature of the prior conviction. Specifically, prior to the amendment, subsection (b)(1)(A) has provided a 16-level increase for a prior conviction for a felony that is (i) A drug trafficking offense for which the sentence imposed exceeded 13 months, (ii) a crime of violence, (iii) a firearms offense, (iv) a child pornography offense, (v) a national security or terrorism offense, (vi) a human trafficking offense, or (vii) an alien smuggling offense; and subsection (b)(1)(B) has provided a 12-level increase for a felony drug trafficking offense for which the sentence imposed was 13 months or less. Both of these enhancements have applied regardless of whether the prior conviction received criminal history points under Chapter Four (Criminal History and Criminal Livelihood).

The amendment reduces the enhancements at subsections (b)(1)(A) and (B) to 12 or 8 levels, respectively, if the prior conviction does not receive criminal history points under Chapter Four. Subsections (b)(1)(A) and (B) as amended continue to provide a 16- or 12-level enhancement, as applicable, if the prior conviction receives criminal history points under Chapter Four. Thus, for reasons of proportionality, the amendment maintains the 4-level distinction between defendants who receive an enhancement under subsection (b)(1)(A) and those who receive an enhancement under subsection (b)(1)(B), regardless of whether the prior conviction receives criminal history points.

The amendment responds to case law and public comment regarding the magnitude of the enhancement when a defendant's predicate conviction does not receive criminal history points. *Compare United States* v. *Amezcua-Vasquez,* 567 F.3d 1050, 1055 (9th Cir. 2009) (defendant had two convictions that were 25 years old; court stated that the 16-level enhancement in § 2L1.2(b)(1)(A) "addresses the seriousness of the offense" but "does not * * * justify increasing a defendant's sentence *by the same magnitude* irrespective of the age of the prior conviction at the time of reentry" [emphasis in originall]); *with United States* v. *Chavez-Suarez,* 597 F.3d 1137, 1139 (10th Cir. 2010) (defendant had a conviction that was 11 years old; court discussed *Amezcua-Vasquez* but was "not convinced that this conviction was so stale" as to require the sentencing court to vary downward from the 16-level enhancement).

Under the amendment, defendants with predicate offenses that qualify for an enhancement under subsections (b)(1)(A) and (B) continue to receive an enhancement, regardless of whether the prior convictions receive criminal history points under Chapter Four. Other provisions in the guidelines exclude consideration of a predicate conviction because of the age of the predicate conviction. *See, e.g.,* § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); § 4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3). The amendment conforms § 2L1.2(b)(1)(A) and (B) more closely to those provisions, but because of the seriousness of the predicate offenses covered by subsection (b)(1)(A) and (B) reduces, rather than eliminates, the 16- and 12-level enhancements. *See, e.g., Amezcua-Vasquez,* 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). *See also id.* at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same magnitude"); *Chavez-Suarez,* 597 F.3d at 1139 (same). For similar reasons, the amendment also adds an upward departure provision at Application Note 7 for cases in which the lower 12- or 8-level enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction. Conforming changes to the Commentary are also made.

7. *Amendment:* The Commentary to § 3B1.2 captioned "Application Notes" is amended in Note 3(C) by inserting "is based on the totality of the circumstances and" after "adjustment,"; and by striking the last sentence.

The Commentary to § 3B1.2 captioned "Application Notes" is amended in Note 4 by striking the last sentence.

Reason for Amendment: This amendment deletes two sentences from the commentary to § 3B1.2 (Mitigating Role). Specifically, in Application Note 3(C), the amendment deletes the statement that "[a]s with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted," while retaining the "totality of the circumstances" approach. In Application Note 4, the amendment deletes the sentence, "It is intended that the downward adjustment for a minimal participant will be used infrequently". The Commission determined that these two sentences are unnecessary and may have the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

8. *Amendment:* Section 5D1.1 is amended by striking subsection (a) and inserting the following:

"(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (*see* 18 U.S.C. 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.";

and in subsection (b) by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

Section 5D1.1 is amended by adding at the end the following:

"(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.".

The Commentary to § 5D1.1 captioned "Application Notes" is amended by striking Notes 1 and 2 and inserting the following:

"1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. *Application of Subsection (b).*—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. *Factors to Be Considered*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) The nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) The need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) The need to provide restitution to any victims of the offense.

See 18 U.S.C. 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

4. *Community Confinement or Home Detention Following Imprisonment.*—A term of supervised release must be imposed if the court wishes to impose a 'split sentence' under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of § 5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

5. *Application of Subsection (c).*—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.".

Section 5D1.2(a) is amended in subdivision (1) by striking "three" and inserting "two"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(1).".

Section 5D1.2(a) is amended in subdivision (2) by striking "two years" and inserting "one year"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(2).".

Section 5D1.2(a) is amended in subdivision (3) by adding at the end the following: "*See* 18 U.S.C. 3583(b)(3).".

The Commentary to § 5D1.2 captioned "Application Notes" is amended by adding at the end the following:

"4. *Factors Considered.*—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. 3583(c); Application Note 3 to § 5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.".

Reason for Amendment: This amendment makes revisions to the supervised release guidelines, § 5D1.1 (Imposition of a Term of Supervised Release) and § 5D1.2 (Term of Supervised Release), in response to both the findings in the Commission's July 2010 report, *Federal Offenders Sentenced to Supervised Release,* and changes in federal immigration law and the federal offender population in recent years.

First, the amendment creates an exception to the general rule in § 5D1.1(a) that a term of supervised release be imposed when a sentence of imprisonment of more than one year is imposed or when required by statute. The exception, which appears in a new subsection (c) in § 5D1.1, states that supervised release ordinarily should not be imposed in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment. A corresponding application note explains that imposing supervised release in such a case is generally unnecessary, although there may be particular cases in which it is appropriate. Non-citizens now are approximately half of the overall population of federal offenders, *see 2010 Sourcebook of Federal Sentencing Statistics,* Table 9 (showing that 47.5% of federal offenders in fiscal year 2010 were non-citizens), and supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen, *see Federal Offenders Sentenced to Supervised Release* at 60. The Commission determined that such a high rate of imposition of supervised release for non-citizen offenders is unnecessary because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Padilla* v. *Kentucky,* 130 S. Ct. 1473, 1481 (2010); *see also id.* at 1478 ("[D]eportation or removal * * * is now virtually inevitable for a vast number of noncitizens convicted of crimes."). Furthermore, such offenders likely would face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States.

Second, the amendment lowers the minimum term of supervised release required by the guidelines for certain defendants (regardless of their citizenship status) when a statute does not require a higher minimum term. Section 5D1.2 requires the court to impose a term of supervised release of at least three years when the defendant is convicted of a Class A or B felony and at least two years when the defendant is convicted of a Class C or D felony. The amendment lowers these minimum terms to two years for a defendant convicted of a Class A and B felony and one year for a defendant convicted of a Class C or D felony. Thus, for reasons of proportionality, the amendment maintains a 1-year distinction in the minimum term of supervised release between a defendant convicted of a Class A or B felony and a defendant convicted of a Class C or D felony. The Commission determined that these lesser minimum terms should be sufficient in most cases because research indicates that the majority of defendants who violate a condition of supervised release do so during the first year of the term of supervised release. *See Federal Offenders Sentenced to Supervised Release* at 63 & n. 265. Furthermore, if an offender shows non-compliance during such a minimum term, the court may extend the term of supervision up to the statutory maximum. *See* 18 U.S.C. 3583(e)(2). The amendment also adds commentary at new Application Note 5 encouraging courts to exercise their authority to terminate supervised release at any time after the expiration of one year of supervised release in appropriate cases. *See* 18 U.S.C. 3583(e)(1).

Finally, the amendment adds commentary in §§ 5D1.1 and 5D1.2 that provides guidance on the factors a court should consider in deciding whether to order a term of supervised release (when not required by statute) and, if so, how long such a term should be. Such factors include the extent of an offender's criminal record, which research shows to be predictive of an offender's likelihood of complying with the conditions of supervision. *See Federal Offenders Sentenced to Supervised Release* at 66–67 (Figure 4) (noting that the rates of revocation for offenders increased steadily across the six Criminal History Categories (CHC), from 18.7% for offenders in CHC I to 59.8% in CHC VI).

9. *Amendment:* Section 5K2.0(e) is amended by striking "written judgment and commitment order" and inserting "statement of reasons form".

The Commentary to § 5K2.0 captioned "Application Notes" is amended in Note 3(C) in the second paragraph by striking "written judgment and commitment order" and inserting "statement of reasons form"; and in Note 5 by striking "written judgment and commitment order" and inserting "statement of reasons form".

Section 6B1.2(b)(2) is amended by striking "departs from" and inserting "is outside"; and by striking "specifically set forth" and all that follows through "order" and inserting "set forth with specificity in the statement of reasons form".

Section 6B1.2(c)(2) is amended by striking "departs from" and inserting "is outside"; and by striking "specifically set forth" and all that follows through "order" and inserting "set forth with specificity in the statement of reasons form".

The Commentary to § 6B1.2 is amended in the second paragraph by striking "departs from" and inserting "is outside"; by striking "(*i.e.,* that such departure" and all that follows through "order" and inserting "and those reasons are set forth with specificity in the statement of reasons form. *See* 18 U.S.C. § 3553(c)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2237(a)(2)(B) the following:

"18 U.S.C. 2237(b)(2)(B)(i) 2A1.3, 2A1.4

18 U.S.C. 2237(b)(2)(B)(ii)(I) 2A2.1, 2A2.2

18 U.S.C. 2237(b)(2)(B)(ii)(II) 2A4.1

18 U.S.C. 2237(b)(2)(B)(ii)(III) 2A3.1

18 U.S.C. § 2237(b)(3) 2A2.2

18 U.S.C. 2237(b)(4) 2A2.1, 2A2.2, 2G1.1, 2G1.3, 2G2.1, 2H4.1, 2L1.1";

and by inserting after the line referenced to 33 U.S.C. 1908 the following:

"33 U.S.C. 3851 2Q1.2".

Reason for Amendment: This two-part amendment addresses miscellaneous issues arising from recently enacted legislation and other guideline application issues.

Plea Agreements

First, the amendment updates the policy statement at § 6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States* v. *Booker,* 543 U.S. 220 (2005). Specifically, it amends § 6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range, including when the sentence is a "variance" (*i.e.,* a sentence that is outside the guidelines framework). These changes to § 6B1.2 are consistent with the changes to § 1B1.1 (Application Instructions) that the Commission promulgated last year, *see* USSG App. C, Amendment 741 (effective November 1, 2010), and reflect *Booker* and subsequent case law.

The amendment also responds to the Federal Judiciary Administrative Improvements Act of 2010, Public Law 111B174 (enacted May 27, 2010), which amended 18 U.S.C. 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). The amendment makes appropriate clerical changes to § 6B1.2 and subsection (e) of § 5K2.0 (Grounds for Departure) to reflect this statutory change.

Coast Guard Authorization Act of 2010

Second, the amendment responds to the Coast Guard Authorization Act of 2010, Public Law 111B281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. 3851.

The amendment addresses the section 2237 offenses by expanding the range of guidelines to which certain section 2237 offenses are referenced. Section 2237 makes it unlawful for—

The operator of a vessel to knowingly fail to obey a law enforcement order to heave to, *see* 18 U.S.C. ' 2237(a)(1);

A person on board a vessel to forcibly interfere with a law enforcement boarding or other law enforcement action, or to resist arrest, *see* 18 U.S.C. § 2237(a)(2)(A); or

A person on board a vessel to provide materially false information to a law enforcement officer during a boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew, *see* 18 U.S.C. § 2237(a)(2)(B).

All three of these offenses are punishable by not more than 5 years of imprisonment. The first two are referenced in Appendix A (Statutory Index) to § 2A2.4 (Obstructing or Impeding Officers); the third is referenced to § 2B1.1 (Theft, Property Destruction, and Fraud). However, the Coast Guard Authorization Act of 2010 provided statutory sentencing enhancements that apply to persons convicted under either of the first two offenses under section 2237 (*i.e.,* the failure-to-heave-to and forcible-interference offenses referenced to § 2A2.4; the statutory sentencing enhancements do not apply to the false-information offense referenced to § 2B1.1). The amendment addresses these new statutory sentencing enhancements by referencing them in Appendix A (Statutory Index) to Chapter Two offense guidelines most analogous to the conduct forming the basis for the statutory sentencing enhancements, as follows.

If the section 2237 offense results in death, the statutory maximum term of imprisonment is raised to any term of years or life. *See* 18 U.S.C. 2237(b)(2)(B)(i). The Commission referenced this statutory sentencing enhancement to §§ 2A1.3 (Voluntary Manslaughter) and 2A1.4 (Involuntary Manslaughter) because the statutory sentencing enhancement involves death without proof of malice aforethought.

If the section 2237 offense involves an attempt to kill, kidnapping or an attempt to kidnap, or an offense under

18 U.S.C. 2241 (aggravated sexual abuse), the statutory maximum term of imprisonment likewise is raised to any term of years or life. *See* 18 U.S.C. 2237(b)(2)(B)(ii). The Commission referenced this statutory sentencing enhancement to §§ 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and 2A2.2 (Aggravated Assault) to account for when the section 2237 offense involves an attempt to kill, because those guidelines apply to attempted murder and attempted manslaughter, respectively; to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) to account for when the section 2237 offense involves an offense under 18 U.S.C. § 2241, because offenses under section 2241 are referenced to that guideline; and to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) to account for when the section 2237 offense involves kidnapping or attempted kidnapping, because that guideline applies to kidnapping.

If the section 2237 offense results in serious bodily injury, the statutory maximum term of imprisonment is raised to 15 years. *See* 18 U.S.C. 2237(b)(3). The Commission referenced this statutory sentencing enhancement to § 2A2.2 because a section 2237 offense involving this statutory sentencing enhancement is similar to an assault that results in bodily injury, and that guideline applies to such an assault. *See* USSG § 2A2.2, comment. (n.1) (defining aggravated assault to include any assault that involved serious bodily injury).

If the section 2237 offense involves knowing transportation under inhumane conditions, and is committed in the course of a violation of 8 U.S.C. 1324; chapter 77 of title 18, United States Code; or section 113 or 117 of such title, the statutory maximum term of imprisonment is raised to 15 years. *See* 18 U.S.C. § 2237(b)(4). The Commission referenced this statutory sentencing enhancement to the following guidelines:

To §§ 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and 2A2.2 to account for when the section 2237 offense involves a violation of section 113, because section 113 offenses are referenced to those guidelines;

To §§ 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to account for when the section 2237 offense involves a violation of 18 U.S.C. § 1591 (which is within chapter 77), because offenses under section 1591 are referenced to those guidelines;

To § 2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers) to account for when the section 2237 offense involves a violation of any provision of chapter 77 other than 18 U.S.C. § 1591, because such violations generally are referenced to that guideline; and

to § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to account for when the section 2237 offense involves a violation of 8 U.S.C. § 1324, because section 1324 offenses are referenced to that guideline.

Finally, the amendment addresses the new criminal offense at 33 U.S.C. 3851, which makes it a felony, punishable by imprisonment for not more than six years, to sell or distribute an organotin or to sell, distribute, make, use, or apply an anti-fouling system (*e.g.,* paint) containing an organotin. The Commission referenced this offense to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) because the offense involves pesticides known to be toxic.

10. *Amendment:* Chapter Two is amended in the introductory commentary by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 2(A) by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 2J1.6 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 4 by striking "Obstruction of Justice" and inserting "Obstructing or Impeding the Administration of Justice".

The Commentary to § 2J1.9 captioned "Application Notes" is amended in Note 1 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 2Q2.1(c)(1) is amended by inserting "or paleontological resource" after "heritage resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" in both places.

Section 3C1.1 is amended by striking "(A)" and inserting "(1)"; by striking "(B)" and inserting "(2)"; by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

Section 4A1.2(k)(2) is amended by striking "(i)" and inserting "(A)"; by striking "(ii)" and inserting "(B)"; and by striking "(iii)" and inserting "(C)".

Section 4B1.1(b) is amended by redesignating (A) through (G) as (1) through (7).

The Commentary to § 5E1.2 captioned "Application Notes" is amended in Note 6 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to § 8A1.2 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 8B2.1(a) is amended by striking "(c)" and inserting "(b)".

The Commentary to § 8C2.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Reason for Amendment: This amendment makes various technical and conforming changes to the guidelines.

First, the amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. *See* 75 FR 27388 (May 14, 2010); USSG App. C, Amendments 738B746. Those changes are as follows:

(1) Amendment 744 made changes to the organizational guidelines in Chapter Eight, including a change that consolidated subsections (b) and (c) of § 8D1.4 (Recommended Conditions of Probation—Organizations) into a single subsection (b). To reflect this consolidation, subsection (a) of § 8B2.1 (Effective Compliance and Ethics Program) is changed so that it refers to the correct subsection of § 8D1.4.

(2) Amendment 745 expanded the scope of § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources but also paleontological resources. To reflect this expanded scope, a conforming change is made to subsection (c)(1) of § 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

Second, the amendment makes technical changes to § 3C1.1 (Obstructing or Impeding the Administration of Justice), subsection (k)(2) of § 4A1.2 (Definitions and

Instructions for Computing Criminal History), and subsection (b) of § 4B1.1 (Career Offender) to promote stylistic consistency in how subdivisions are designated throughout the *Guidelines Manual.*

Finally, the amendment makes a series of changes throughout the *Guidelines Manual* to provide full and accurate references to the titles of Chapter Three, Part C (Obstruction and Related Adjustments) and § 3C1.1.

(2) Request for Comment on Amendment 2, Pertaining to Drug Offenses.

On April 28, 2011, the Commission submitted to the Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2011, unless Congress acts to the contrary. Such amendments and the reasons for amendment are set forth in this notice.

Amendment 2, pertaining to drug offenses, has the effect of lowering guideline ranges. *See* 28 U.S.C. 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."). The Commission seeks comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), this amendment, or any part thereof, should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants.

The Commission also requests comment regarding whether, if it amends § 1B1.10(c) to include this amendment, it also should amend § 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. 3582(c)(2).

Part-by-Part Consideration

Amendment 2, pertaining to drug offenses, contains three parts. The Commission seeks comment on whether it should list the entire amendment, or one or more parts of the amendment, in subsection (c) of § 1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants.

Part A changes the Drug Quantity Table in § 2D1.1 for offenses involving crack cocaine. This has the effect of lowering guideline ranges for certain defendants for offenses involving crack cocaine.

Part B contains both mitigating and aggravating provisions for offenses involving drugs, regardless of drug type. The mitigating provisions have the effect of lowering guideline ranges for certain defendants in drug cases, and the aggravating provisions have the effect of raising guideline ranges for certain defendants in drug cases.

Part C deletes the cross reference in § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1. This has the effect of lowering guideline ranges for certain defendants for offenses involving simple possession of crack cocaine.

For each of these three parts, the Commission requests comment on whether that part should be listed in subsection (c) of § 1B1.10 as an amendment that may be applied retroactively. Note that if Part B were applied retroactively (in isolation, or in combination with Parts A and/or C), the court would determine not only whether any mitigating provisions in Part B applied, but also whether any aggravating provisions in Part B applied. To the extent any aggravating provisions applied, the aggravating effect of those provisions would act to offset the mitigating effect of changes made by Parts A, B, and C, to the extent they apply, but in no event could the net effect result in the defendant receiving a sentence higher than the sentence previously imposed. *See* 18 U.S.C. 3582(c)(2) (authorizing the court to "reduce", but not increase, the defendant's term of imprisonment).

For its consideration of Parts A and B, the Commission seeks comment on two options in particular. Option 1 would include Part A as an amendment that may be applied retroactively, but would not include Part B. Option 2 would include both Part A and Part B.

Other Guidance or Limitations

If the Commission does list the entire amendment, or one or more parts of the amendment, in subsection (c) of § 1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?

In particular, should the Commission limit retroactivity only to a particular category of defendants, such as (A) defendants in a particular criminal history category or categories (*e.g.,* defendants in Criminal History Category I) or (B) defendants who received an adjustment under the guidelines' "safety valve" provision (currently § 2D1.1(b)(16))?

Should the Commission exclude from retroactivity certain categories of defendants whose offense involved aggravating conduct such as, for example, (A) defendants who received an enhanced penalty under § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), (B) defendants who received an adjustment under § 3B1.1 (Aggravating Role), (C) defendants who received an adjustment under § 3B1.4 (Using a Minor to Commit a Crime), (D) defendants who received an enhancement under § 2D1.1(b)(1) (*i.e.,* if "a dangerous weapon (including a firearm) was possessed"), (E) defendants who were sentenced to a mandatory minimum term of imprisonment because of a conviction for a firearms offense (*i.e.,* a conviction under 18 U.S.C. §§ 844(h), 924(c), or 929(a)), or (F) defendants who are career offenders under § 4B1.1 (Career Offender)?

In considering whether to limit retroactivity to a particular category or categories of defendants, how, if at all, should the Commission account for the fact that the jurisprudence that applies to sentencing has changed to expand the discretionary authority of a sentencing court to impose a sentence outside the guidelines framework? Should the Commission limit retroactivity only to, for example, (A) defendants who were sentenced within the guideline range, (B) defendants who were sentenced within the guideline range or who received a departure under Chapter Five, Part K, (C) defendants sentenced before *United States* v. *Booker,* 543 U.S. 220 (2005), (D) defendants sentenced before *Kimbrough* v. *United States,* 552 U.S. 85, 110 (2007) ("it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"), or (E) defendants sentenced before *Spears* v. *United States,* 555 U.S. 261, 129 S.Ct. 840, 844 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines")? Section 1B1.10 addresses this factor as follows:

> If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range

determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker,* 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

Should the Commission amend § 1B1.10 to provide further guidance on how the sentencing court, in considering retroactivity, should account for this factor?

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DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board; Notice of Meeting Amendment

The Department of Veterans Affairs gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the meetings for the following four panels of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board have been rescheduled and not as originally announced in the **Federal Register** on April 6, 2011.

Panel	Date(s)	Time	Location
Cellular and Molecular Medicine	June 5, 2011	6 p.m.–10 p.m.	Crowne Plaza DC/Silver Spring.
	June 6, 2011	8 a.m.–5 p.m.	Crowne Plaza DC/Silver Spring.
Mental Health and Behav Sci-B	June 7, 2011	8 a.m.–5 p.m.	L'Enfant Plaza Hotel.
Neurobiology-C	June 8, 2011	6 p.m.–10 p.m.	Crowne Plaza DC/Silver Spring.
	June 9–10, 2011	8 a.m.–5 p.m.	Crowne Plaza Hotel Silver Spring.
Mental Health and Behav Sci-A	June 9, 2011	8 a.m.–5 p.m.	L'Enfant Plaza Hotel.

The addresses of the hotels and VA Central Office are:

Crowne Plaza Washington DC/Silver Spring, 8777 Georgia Avenue, Silver Spring, MD

L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC

The purpose of the Merit Review Board is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review consideration. Proposals submitted for review by the Board involve a wide range of medical specialties within the general areas of biomedical, behavioral and clinical science research.

The panel meetings will be open to the public for approximately one hour at the start of each meeting to discuss the general status of the program. The remaining portion of each panel meeting will be closed to the public for the review, discussion, and evaluation of initial and renewal research proposals.

The closed portion of each meeting involves discussion, examination, reference to staff and consultant critiques of research proposals. During this portion of each meeting, discussion and recommendations will deal with qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, as well as research information, the premature disclosure of which could significantly frustrate implementation of proposed agency action regarding such research proposals.

As provided by subsection 10(d) of Public Law 92–463, as amended, closing portions of these panel meetings is in accordance with 5 U.S.C., 552b(c)(6) and (9)(B). Those who plan to attend or would like to obtain a copy of minutes of the panel meetings and rosters of the members of the panels should contact LeRoy G. Frey, Ph.D., Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 at (202) 443–5674.

Dated: April 27, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of General Counsel.

[FR Doc. 2011–10680 Filed 5–2–11; 8:45 am]

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