UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES:

Written Public Comment. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than February 22, 2024. Any public comment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at *www.ussc.gov.*

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at *https://comment.ussc.gov.* Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs—Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502–4597.

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 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 submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id.* 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A proposed amendment to § 2B1.1 (Theft, Property Destruction, and Fraud) that would create Notes to the loss table in § 2B1.1(b)(1) and move some of the general rules relating to loss from the commentary to the guideline itself as part of the Notes, as well as make corresponding changes to the Commentary of certain guidelines that refer to the loss rules in § 2B1.1, and a related issue for comment.

(2) A two-part proposed amendment relating to the provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) that cover criminal history calculations for offenses committed prior to age eighteen and on § 5H1.1 (Age (Policy Statement)), including (A) three options for amending § 4A1.2 to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score, and related issues for comment; and (B) an amendment to § 5H1.1 to address unique sentencing considerations relating to youthful individuals, and related issues for comment.

(3) A proposed amendment to the *Guidelines Manual* that includes three options to address the use of acquitted conduct for purposes of determining a sentence, and related issues for comment.

(4) A two-part proposed amendment addressing certain circuit conflicts involving § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), including (A) two options for amending § 2K2.1(b)(4)(B)(i) to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase for a firearm that ''had an altered or obliterated serial number,'' and a related issue for comment; and (B) amendments to the Commentary to § 2K2.4 to address a circuit conflict concerning whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count, and a related issue for comment.

(5) A multi-part proposed amendment in response to recently enacted legislation and miscellaneous guideline issues, including (A) amendments to Appendix A (Statutory Index) and the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) in response to the Safeguard Tribal Objects of Patrimony (''STOP'') Act of 2021, Public Law 117–258 (2022), and a related issue for comment; (B) amendments to Appendix A and § 2M5.1 (Evasion of

Export Controls; Financial Transactions with Countries Supporting International Terrorism) in response to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security), and related issues for comment; (C) an amendment to subsection (b)(2)(B) of § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) to reflect the enhanced penalty applicable to offenses under 31 U.S.C. 5322 and 5336; (D) amendments to Appendix A and the Commentary to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) to replace references to 15 U.S.C. 3(b) with references to 15 U.S.C. 3(a); (E) two options for amending § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4); and (F) two options for amending § 4C1.1 (Adjustment for Certain Zero-Point Offenders) to address concerns raised by the Department of Justice relating to the scope of the definition of ''sex offense'' in subsection (b)(2).

(6) A two-part proposed amendment to make technical and other non-substantive changes to the *Guidelines Manual,* including (A) technical and conforming changes relating to § 4C1.1 (Adjustment for Certain Zero-Point Offenders); and (B) technical and clerical changes to several guidelines and their corresponding commentaries to add missing headings to application notes; provide stylistic consistency in how subdivisions are designated; provide consistency in the use of capitalization; correct certain references and typographical errors; and update an example in a Commentary that references 18 U.S.C. 924(c), which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018).

(7) A two-part proposed amendment to the *Guidelines Manual,* including (A) request for public comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in § 1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics; and (B) amendments that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is ''sufficient, but not greater than necessary,'' and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) 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 lists in § 1B1.10(d) 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(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at *www.ussc.gov.* In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at *https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,

Chair.

Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. Rule for Calculating Loss

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's continued study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023).

In *Stinson* v. *United States,* 508 U.S. 36, 38 (1993), the Supreme Court held that commentary ''that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'' In recent years, however, the deference afforded to various guideline commentary provisions has been debated, particularly since *Kisor* v. *Wilkie,* 139 S. Ct. 2400, 2415 (2019), which limited deference to agency interpretation of regulations to situations in which the regulation is ''genuinely ambiguous.'' Applying *Kisor,* the Third Circuit recently held that Application Note 3(A) of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *United States* v. *Banks,* 55 F.4th 246 (3d Cir. 2022).

Section 2B1.1 includes a loss table that increases the offense level based on the amount of loss resulting from an offense. USSG § 2B1.1(b)(1). Application Note 3(A) of the Commentary to § 2B1.1 provides a general rule for courts to use to calculate loss for purposes of the loss table. USSG § 2B1.1, comment. (n.3(A)). Under the rule, ''loss is the greater of actual loss or intended loss.'' *Id.* The commentary then defines the terms ''actual loss,'' ''intended loss,'' ''pecuniary harm,'' and ''reasonably foreseeable pecuniary harm.'' USSG § 2B1.1, comment. (n.3(A)(i)–(iv)). The commentary also provides that ''[t]he court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.'' USSG § 2B1.1, comment. (n.3(B)).

In *Banks,* the Third Circuit held that ''the term 'loss' is unambiguous in the context of § 2B1.1''—meaning ''actual loss''—and that ''[b]ecause the commentary expands the definition of 'loss' by explaining that generally 'loss

is the greater of actual loss or intended loss,' we accord the commentary no weight.'' *Banks,* 55 F.4th at 253, 258. To date, the Third Circuit is the only appellate court to reach this conclusion. However, the loss calculations for defendants in this circuit are now computed differently than in circuits that continue to apply Application Note 3(A).

The Commission estimates that approximately one-fifth of individuals sentenced under § 2B1.1 in fiscal year 2022 were sentenced using intended loss. This estimate is based on the Commission's review of a 30 percent representative sample of the 3,811 individuals sentenced under § 2B1.1 in fiscal year 2022 with a known, non-zero loss amount. Intended loss was used for sentencing in 19.8 percent of cases in the sample. Using these findings to extrapolate to all § 2B1.1 cases with a loss amount, the Commission estimates that approximately 750 individuals were sentenced using intended loss in fiscal year 2022. Of those 750 individuals, approximately 50 were sentenced in the Third Circuit prior to the *Banks* decision.

This proposed amendment would address the decision from the Third Circuit regarding the validity and enforceability of Application Note 3(A) of the Commentary to § 2B1.1 to ensure consistent loss calculation across circuits.

The proposed amendment would create Notes to the loss table in § 2B1.1(b)(1) and move the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of ''actual loss,'' ''intended loss,'' ''pecuniary harm,'' and ''reasonably foreseeable pecuniary harm'' from the commentary to the Notes. In addition, the proposed amendment would make corresponding changes to the Commentary to §§ 2B2.3 (Trespass), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), and 8A1.2 (Application Instructions—Organizations), which calculate loss by reference to the Commentary to § 2B1.1.

An issue for comment is also provided.

Proposed Amendment: Section 2B1.1(b)(1) is amended by inserting the following at the end:

''*Notes to Table:*

(A) *Loss.*—Loss is the greater of actual loss or intended loss.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) 'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) '*Reasonably foreseeable pecuniary harm'* means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3—by striking subparagraphs (A) and (B) as follows:

''(A) *General Rule.*—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) *Actual Loss.*—'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) *Intended Loss.*—'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) *Pecuniary Harm.*—'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) *Reasonably Foreseeable Pecuniary Harm.*—For purposes of this guideline, 'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) *Rules of Construction in Certain Cases.*—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. 1030.*—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.'';

inserting the following new subparagraph (A):

''(A) *Rules of Construction in Certain Cases.*—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of

retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. 1030.*—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.'';

and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 2 by striking ''the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to § 2B1.1''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3 by striking ''the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1''.

Issue for Comment:

1. As part of the Commission's priority to address case law concerning the validity and enforceability of guideline commentary, the proposed amendment would address the Third Circuit's decision regarding the deference to be given to Application Note 3(A) of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud). *See United States* v. *Banks,* 55 F.4th 246 (3d Cir. 2022). The Commission's current priorities also include the ''[e]xamination of the *Guidelines Manual,* including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.'' See U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023). As part of that simplification priority, the Commission is considering conducting a comprehensive examination of § 2B1.1 during an upcoming amendment cycle.

The Commission seeks comment on whether it should adopt this proposed amendment addressing Application Note 3(A) of the Commentary to § 2B1.1 during this amendment cycle, or whether it should defer making changes to § 2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of § 2B1.1.

2. Youthful Individuals

Synopsis of Proposed Amendment: In September 2023, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2024, an examination of the treatment of youthful offenders and offenses involving youths under the *Guidelines Manual,* including possible consideration of amendments that might be appropriate. U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023). As part of this priority, the Commission is examining two provisions related to youthful individuals: (1) subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), which covers criminal history calculations for offenses committed prior to age eighteen; and (2) § 5H1.1 (Age (Policy Statement)), a departure provision related to age, including youth. Section 4A1.2(d) is unchanged from the original guideline enacted in 1987. Section 5H1.1 was last amended in 2010.

This proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive. Part A addresses the computation of criminal history points for offenses committed prior to age eighteen. Part B addresses the sentencing of youthful individuals.

Computing Criminal History for Offenses Committed Prior to Age Eighteen

Under Chapter Four, Part A (Criminal History), certain sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score. The guidelines distinguish between an ''adult sentence'' in which the defendant committed the offense before age eighteen and was convicted as an adult, and a ''juvenile sentence'' resulting from a juvenile adjudication. *See* USSG § 4A1.2(d).

The Commentary to § 4A1.2 (Definitions and Instructions for Computing Criminal History) provides that, to avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a ''juvenile,'' the rules set forth in § 4A1.2(d) apply to all offenses committed prior to age eighteen. *See* USSG § 4A1.2, comment. (n.7). The Commentary also states that ''[a]ttempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records,'' and thus only certain offenses committed prior to age eighteen are counted. *Id.*

Courts assign three criminal history points if a defendant was convicted as an adult for an offense committed before age eighteen and received a sentence of imprisonment exceeding one year and one month, if the sentence was imposed, or the defendant was incarcerated, within fifteen years of the commencement of the instant offense. *See* USSG § 4A1.2(d)(1), (e). Courts assign two criminal history points for ''each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense.'' USSG § 4A1.2(d)(2)(A). One criminal history point is added for ''each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).'' USSG § 4A1.2(d)(2)(B).

Juvenile offenses are also addressed in two other places in § 4A1.2. First, § 4A1.2(c)(2) provides a list of certain offenses that are ''never counted'' for purposes of the criminal history score, including ''juvenile status offenses and truancy.'' Second, § 4A1.2(f) provides that diversionary dispositions resulting from a finding or admission of guilt, or a plea of nolo contendere, are counted even if a conviction is not formally entered, but ''diversion from juvenile court is not counted.''

With this proposed amendment, the Commission seeks to strike the right balance between various considerations related to the sentencing of youthful individuals, including difficulties in obtaining supporting documentation for juvenile adjudications and in assessing ''confinement,'' recent brain development research, demographic

disparities, higher rearrest rates for younger individuals, and protection of the public.

Juvenile Proceedings in General

Juvenile adjudications involve some procedural safeguards akin to adult criminal proceedings (*e.g.,* right to counsel, privilege against self-incrimination), but not all criminal constitutional protections apply. For example, in most states, juveniles are not entitled to a jury trial, although some states provide juveniles with a jury trial upon request. Additionally, ''[i]n 2019, there were 24 states with statutes allowing delinquency adjudication hearings to be generally open to the public,'' while ''[i]n the remaining states and the District of Columbia the public is restricted from attending delinquency adjudication hearings,'' with possible limited exceptions. Charles Puzzanchera et al., Nat'l Ctr. for Juv. Just., Youth and the Juvenile Justice System: 2022 National Report 93 (2022). Dispositions of confinement and residential placement may also differ in manner and purpose from adult sentences of incarceration. Residential placement facilities vary in their degree of security and security features, with some having a ''secure prison-like environment'' and others ''a more open (even home-like) setting.'' *Id.* at 91. Almost all states and the District of Columbia have statutes or case law providing that a juvenile adjudication shall not be deemed a criminal conviction or impose any civil disabilities that ordinarily result from an adult conviction, though many states permit the use of juvenile adjudications to enhance a subsequent sentence.

With respect to records of juvenile proceedings, practices vary by state. Many states allow for sealing or expungement, though few states seal or expunge such records automatically, instead requiring a motion. *See, e.g.,* Riya Saha Shah, et al., Juv. L. Ctr., A National Review of State Laws on Confidentiality, Sealing and Expungement 36–39 (2014). States often include various eligibility requirements for sealing or expungement, such as that (1) a certain period of time has elapsed since the case concluded or the juvenile completed any sentence of supervision, (2) the person has not been convicted of certain types of offenses, such as drug or sex offenses or offenses against persons, and/or (3) the individual has reached a certain age. *Id.* at 32–35.

The determination of whether a person under the age of eighteen may be tried as an adult varies by jurisdiction and often may be based on certain offense types or a finding that the individual would not benefit from the juvenile court. In 2019, 47 states allowed juvenile court judges to make the transfer decision, 27 states had statutory provisions that mandated transfer to criminal court for certain cases, and 14 states gave prosecutors discretion on where to file charges. Puzzanchera et al., *supra,* at 95–97. States vary with respect to the minimum age at which an individual can be transferred to criminal court to be tried as an adult; where specified, the minimum age ranges from ten to sixteen. *Id.* at 97–99. For juveniles who had been tried as adults, 35 states had ''once an adult, always an adult'' provisions requiring that they be prosecuted in criminal court for any subsequent offense. *Id.* at 95–96.

Sentencing of Youthful Individuals

Chapter Five, Part H (Specific Offender Characteristics) sets forth policy statements addressing the relevance of certain specific offender characteristics in sentencing. Specifically, § 5H1.1 (Age (Policy Statement)) provides, in relevant part, that ''[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.''

Studies on Age and Brain Development

Research has shown that brain development continues until the mid-20s on average, potentially contributing to impulsive actions and reward-seeking behavior, although a more precise age would have to be determined on an individualized basis. *See, e.g.,* U.S. Sent'g Comm'n, Youthful Offenders in the Federal System 6–7 (2017); Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context,* 27 Developmental Cognitive Neuroscience 19 (2017); Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law,* 1 Ann. Rev. Developmental Psych. 21 (2019).

Studies on Age and Rearrest Rates

Research has shown a correlation between age and rearrest rates, with younger individuals being rearrested at higher rates, and sooner after release, than older individuals. *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, Recidivism of Federal Offenders Released in 2010 (2021); *see also* Kim Steven Hunt & Billy Easley II, U.S. Sent'g Comm'n, The Effects of Aging on Recidivism Among Federal Offenders (2017).

Part A of the Proposed Amendment

Part A of the proposed amendment sets forth three options to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score.

Option 1 would amend § 4A1.2(d)(2)(A) to exclude juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences of imprisonment of at least 60 days. As a result, juvenile sentences, including those that involved confinement, would receive at most one criminal history point under § 4A1.2(d)(2)(B). In addition, Option 1 would amend § 4A1.2(k)(2)(B) to explain how the applicable time period for revocations would work in light of the proposed changes. Finally, Option 1 would make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Option 2 would amend § 4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score. It also includes bracketed language providing that such sentences may be considered for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). In addition, Option 2 would amend § 4A1.2(k)(2)(B) to explain how the applicable time period for revocations would work in light of the proposed changes. It also would amend § 4A1.2(c)(2) to delete the reference to ''juvenile status offenses and truancy'' and amend § 4A1.2(f) to delete the reference to ''diversion from juvenile court.'' Finally, Option 2 would make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Option 3 would amend § 4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. It also includes bracketed language providing that such sentences may be considered for purposes of an upward departure under § 4A1.3. In addition, Option 3 would amend § 4A1.2(e) and (k) to delete all references to sentences resulting from offenses committed prior to age eighteen. It also would amend § 4A1.2(c)(2) to delete the reference to ''juvenile status offenses and truancy'' and amend § 4A1.2(f) to delete the reference to ''diversion from juvenile court.'' Additionally, Option 3 would

make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Finally, Option 3 would make changes to the Commentary to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and 2L1.2 (Unlawfully Entering or Remaining in the United States), and to subsection (e)(4) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), to delete references to convictions for offenses committed prior to age eighteen being used to increase offense levels.

Issues for comment are provided.

Part B of the Proposed Amendment

Part B of the proposed amendment would amend the first sentence in § 5H1.1 to delete ''(including youth)'' and ''if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.'' Thus, the first sentence in § 5H1.1 would provide solely that ''[a]ge may be relevant in determining whether a departure is warranted.'' It would also add language specifically providing for a downward departure for cases in which the defendant was youthful at the time of the offense and set forth considerations for the court in determining whether a departure based on youth is warranted.

Issues for comment are provided.

(A) Computing Criminal History for Offenses Committed Prior to Age Eighteen

Proposed Amendment:

[Option 1 (Deleting the references to juvenile sentences that require a determination of ''confinement''):

Section 4A1.2(d)(2)(A) is amended by striking: ''add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense'' and inserting ''add 2 points under § 4A1.1(b) for each adult sentence of imprisonment of at least sixty days that resulted in the defendant being incarcerated within five years of his commencement of the instant offense''.

Section 4A1.2(k)(2)(B) is amended by striking ''in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* § 4A1.2(d)(2)(A))'' and inserting ''in the case of an adult term of imprisonment of at least sixty days for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from incarceration on such sentence (*see* § 4A1.2(d)(2)(A))''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 7 by striking ''Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted'' and inserting ''Therefore, for offenses committed prior to age eighteen, only certain adult or juvenile sentences are counted''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense'' and inserting ''An adult sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if the defendant's incarceration resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense''.]

[Option 2 (Deleting all references to juvenile sentences as part of the criminal history calculation rules):

Section 4A1.2(c)(2) is amended by striking ''Juvenile status offenses and truancy''.

Section 4A1.2(d) is amended—

in paragraph (2)(A) by striking: ''add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense'' and inserting ''add 2 points under § 4A1.1(b) for each adult sentence of imprisonment of at least sixty days that resulted in the defendant being incarcerated within five years of his commencement of the instant offense'';

in paragraph (2)(B) by striking ''adult or juvenile sentence'' and inserting ''adult sentence'';

and by inserting at the end the following new paragraph (3):

''(3) Sentences resulting from juvenile adjudications are not counted[, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))].''.

Section 4A1.2(f) is amended by striking '', except that diversion from juvenile court is not counted''.

Section 4A1.2(k)(2)(B) is amended by striking ''in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* § 4A1.2(d)(2)(A))'' and inserting ''in the case of an adult term of imprisonment of at least sixty days for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from incarceration on such sentence (*see* § 4A1.2(d)(2)(A))''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 7 by striking the following:

''*Offenses Committed Prior to Age Eighteen.*—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a 'juvenile,' this provision applies to all offenses committed prior to age eighteen.'';

and inserting the following:

''*Offenses Committed Prior to Age Eighteen.*—Section 4A1.2(d) covers offenses committed prior to age eighteen. Offenses prior to age eighteen are counted only if the defendant was convicted and sentenced as an adult. If the defendant was convicted as an adult for an offense committed before age eighteen and received a sentence exceeding one year and one month, § 4A1.2(e) provides the applicable time period for counting the sentence. All other adult sentences for offenses committed prior to age eighteen are counted in accordance with § 4A1.2(d)(2).''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended—

in Note 2 by striking ''An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense'' and inserting ''An adult sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if the defendant's incarceration resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense'';

and in Note 3 by striking ''An adult or juvenile sentence'' and inserting ''An adult sentence''.]

[Option 3 (Deleting all criminal history rules requiring counting of offenses committed prior to age eighteen):

Section 4A1.2(c)(2) is amended by striking ''Juvenile status offenses and truancy''.

Section 4A1.2(d) is amended by striking the following:

''(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.

(2) In any other case,

(A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).'';

and inserting the following:

''Sentences resulting from offenses committed prior to age eighteen are not counted[, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))].''.

Section 4A1.2(e) is amended by striking paragraph (4) as follows:

''(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2).''.

Section 4A1.2(f) is amended by striking '', except that diversion from juvenile court is not counted''.

Section 4A1.2(k)(2) is amended by striking the following:

''Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* § 4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (*see* § 4A1.2(d)(2)(B) and (e)(2)).'';

and inserting the following:

''Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1)); and (B) in any other case, the date of the original sentence (*see* § 4A1.2(e)).''.

The Commentary to § 4A1.2 captioned ''Application Notes'' is amended—

in Note 7 by striking the following:

''*Offenses Committed Prior to Age Eighteen.*—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a 'juvenile,' this provision applies to all offenses committed prior to age eighteen.'';

and inserting the following:

''*Offenses Committed Prior to Age Eighteen.*—Sentences resulting from offenses committed prior to age eighteen are not counted. [Nonetheless, the criminal conduct underlying any conviction resulting from offenses committed prior to age eighteen may be considered pursuant to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).]'';

and in Note 8 by striking ''Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in § 4A1.2(d)(2) and (e), the term 'commencement of the instant offense' includes any relevant conduct'' and inserting ''Section 4A1.2(e) establishes the time period within which prior sentences are counted. As used in § 4A1.2(e), the term 'commencement of the instant offense' includes any relevant conduct''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended—

in note 1 by striking ''A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction'' and inserting ''A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted'';

in Note 2 by striking ''An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense'' and inserting ''A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted'';

and in Note 3 by striking ''An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense'' and inserting ''A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 2, in the paragraph that begins '' 'Felony conviction' means'', by striking ''A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Felony conviction' means'', by striking ''A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the

defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking the following:

''*In General.*—

(A) *'Ordered Deported or Ordered Removed from the United States for the First Time'.*—For purposes of this guideline, a defendant shall be considered 'ordered deported or ordered removed from the United States' if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. 'For the first time' refers to the first time the defendant was ever the subject of such an order.

(B) *Offenses Committed Prior to Age Eighteen.*—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.'';

and inserting the following:

'' *'Ordered Deported or Ordered Removed from the United States for the First Time'.*—For purposes of this guideline, a defendant shall be considered 'ordered deported or ordered removed from the United States' if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. 'For the first time' refers to the first time the defendant was ever the subject of such an order.''.

Section 4B1.2(e)(4) is amended by striking ''A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.]

Issues for Comment:

1. The Commission seeks general comment on juvenile court systems and sentencing of youthful individuals. In particular, the Commission requests input on: (a) how different jurisdictions sentence younger individuals (*e.g.,* youthful rehabilitation statutes); (b) how judges make decisions regarding residential placement or confinement upon an adjudication of guilt; (c) the factors that influence transfer to adult court for offenses committed prior to age eighteen; (d) racial disparities; and (e) practices related to expungement and sealing of records in different jurisdictions. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

2. The Commission seeks comment on whether it should make any of the changes set forth in Part A of the proposed amendment with respect to juvenile sentences and sentences for offenses committed prior to age eighteen for purposes of Chapter Four, Part A (Criminal History). Should the Commission limit any of the options based on: (a) the type of crime involved in the offense committed prior to age eighteen; (b) the age of the individual at the time of the offense committed prior to age eighteen; or (c) any other factor? Should the Commission consider an alternative approach in accounting for offenses committed prior to age eighteen, such as a downward departure?

3. If the Commission were to promulgate Option 2 (exclude juvenile sentences) or Option 3 (exclude all sentences for offenses committed prior to age eighteen) in Part A of the proposed amendment, should the Commission provide that any such sentence may be considered for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) as provided in the bracketed language? If so, should the Commission limit the consideration of such departures to certain offenses?

4. Option 3 would amend subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. This change would impact the use of predicate offenses in multiple guidelines, including §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2L1.2 (Unlawfully Entering or Remaining in the United States), and 4B1.2 (Definitions of Terms Used in Section 4B1.1). Some of these guideline provisions were promulgated in response to directives, such as 28 U.S.C. 994(h). The Commission invites comment on whether Option 3 exceeds the Commission's authority under 28 U.S.C. 994(h) or any other congressional directives.

5. If the Commission were to promulgate any of the options in Part A of the proposed amendment and amend subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), should the Commission make any changes to § 3B1.4 (Using a Minor to Commit a Crime)? If so, what changes should the Commission make? For example, should the Commission expand the scope of application or increase the magnitude of the adjustment? If so, how?

(B) Sentencing of Youthful Individuals

Proposed Amendment:

Section 5H1.1 is amended by striking the following:

''Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).'';

and inserting the following:

''Age may be relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing. In determining whether a departure based on youth is warranted, and the extent of such departure, the court should consider the following:

(1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision-making, and resistance to peer pressure, is generally not developed until the mid-20s.

(2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher

rates and sooner after release than older individuals.

Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).''.

Issues for Comment:

1. The Commission seeks general comment on sentencing of younger individuals, including how to balance brain development research suggesting potentially lower culpability with research on higher rearrest rates and potential dangerousness. The Commission further seeks comment on any relevant developments in legal or scientific literature relating to the impact of brain development and age on youthful criminal behavior. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

2. The Commission seeks comment on whether it should amend § 5H1.1 (Age (Policy Statement)) as set forth in Part B of the proposed amendment or otherwise change the provision in any other way with respect to youthful individuals. Should the Commission include additional or different factors for courts to consider in determining whether a downward departure based on youth may be warranted?

3. Acquitted Conduct

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023).

Acquitted conduct is not expressly addressed in the *Guidelines Manual,* except for a reference in the parenthetical summary of the holding in *United States* v. *Watts,* 519 U.S. 148 (1997). *See* USSG § 6A1.3, comment. However, consistent with the Supreme Court's holding in *Watts,* consideration of acquitted conduct is permitted under the guidelines through the operation of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with § 1B1.4 (Information to be Used in Imposing Sentence) and § 6A1.3 (Resolution of Disputed Factors (Policy Statement)).

Section 1B1.3 sets forth the principles and limits of sentencing accountability for purposes of determining a defendant's guideline range, a concept referred to as ''relevant conduct.'' Relevant conduct impacts nearly every aspect of guidelines application, including the determination of: base offense levels where more than one level is provided, specific offense characteristics, and any cross references in Chapter Two (Offense Conduct); any adjustments in Chapter Three (Adjustment); and certain departures and adjustments in Chapter Five (Determining the Sentence).

Specifically, § 1B1.3(a)(1) provides that relevant conduct comprises ''all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,'' and all acts and omissions of others ''in the case of a jointly undertaken criminal activity,'' that ''occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.''

Relevant conduct also includes, for some offense types, ''all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction,'' ''all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions,'' and ''any other information specified in the applicable guideline.'' *See* USSG § 1B1.3(a)(2)–(a)(4). The background commentary to § 1B1.3 explains that ''[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.''

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, § 6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Section 6A1.3(a) provides, in pertinent part, that ''[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.'' The Commentary to § 6A1.3 instructs that ''[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial'' and that ''[a]ny information may be considered'' so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. 3661 and Supreme Court case law upholding the sentencing court's discretion in considering any information at sentencing, so long as it is proved by a preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that ''[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.''

In fiscal year 2022, nearly all sentenced individuals (62,529; 97.5%) were convicted through a guilty plea. The remaining 1,613 sentenced individuals (2.5% of all sentenced individuals) were convicted and sentenced after a trial, and 286 of those sentenced individuals (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

The proposed amendment would amend the *Guidelines Manual* to address the use of acquitted conduct for purposes of determining a sentence. Three options are presented.

Option 1 would amend § 1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range. It would define ''acquitted conduct'' as conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. It brackets possible language that would exclude from the definition of ''acquitted conduct'' conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. The proposed amendment further brackets the possibility of clarifying that such conduct is excluded from the definition regardless of whether the conduct also underlies a charge of which the defendant has been acquitted.

Option 1 would also amend the Commentary to § 6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Option 2 would amend the Commentary to § 1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction. It brackets the possibility of limiting the departure's application to cases in which the impact

is ''extremely'' disproportionate. It clarifies in a parenthetical that acquitted conduct is conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 3 would amend § 6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors. It provides that a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving such disputes. However, it further provides that acquitted conduct should not be considered unless it is established by clear and convincing evidence.

It would define ''acquitted conduct'' as conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 3 would also make conforming changes to the Commentary of §§ 6A1.3 and 1B1.3.

Issues for comment are also provided.

Proposed Amendment:

[Option 1 (Acquitted conduct excluded from guideline range):

Section 1B1.3 is amended—

in subsection (a), in the heading, by striking ''*Chapters Two (Offense Conduct) and Three (Adjustments).*'' and inserting ''*Chapters Two (Offense Conduct) and Three (Adjustments).*—'';

in subsection (b), in the heading, by striking ''*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*'' and inserting ''*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*—'';

and by inserting at the end the following new subsection (c):

''(c) *Acquitted Conduct.*—

(1) *Exclusion.*—Acquitted conduct is not relevant conduct for purposes of determining the guideline range.

(2) *Definition of Acquitted Conduct.*—'Acquitted conduct' means conduct (*i.e.,* any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

['Acquitted conduct' does not include conduct that—

(A) was admitted by the defendant during a guilty plea colloquy; or

(B) was found by the trier of fact beyond a reasonable doubt;

to establish, in whole or in part, the instant offense of conviction[, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted].]''.

The Commentary to § 6A1.3 is amended—

by striking ''*see also United States* v. *Watts,* 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte* v. *United States,* 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);'' and inserting ''*Witte* v. *United States,* 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);'';

by striking ''*Watts,* 519 U.S. at 157'' and inserting ''*Witte,* 515 U.S. at 399–401'';

and by inserting at the end of the paragraph that begins ''The Commission believes that use of a preponderance of the evidence standard'' the following: ''Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* subsection (c) of § 1B1.3 (Relevant Conduct). The court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* § 1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).''.]

[Option 2 (Downward departure):

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by inserting at the end the following new Note 10:

''10. *Downward Departure Consideration for Acquitted Conduct.*—If the use of acquitted conduct (*i.e.,* conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure) has [an extremely] [a] disproportionate impact in determining the guideline range relative to the offense of conviction, a downward departure may be warranted.''.]

[Option 3 (Clear and convincing evidence standard):

Section 6A1.3 is amended—

in subsection (a) by inserting at the beginning the following new heading: ''*Presentation of Information.*—'';

in subsection (b) by inserting at the beginning the following new heading: ''*Sentencing Hearing.*—'';

and by inserting at the end the following new subsection (c):

''(c) *Standard of Proof.*—The use of a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. However, the court shall not consider acquitted conduct unless such conduct is established by clear and convincing evidence.

For purposes of this guideline, 'acquitted conduct' means conduct (*i.e.,* any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.''.

The Commentary to § 6A1.3 is amended by striking the last paragraph as follows:

''The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by inserting at the end the following new Note 10:

''10. *Acquitted Conduct.*—In accordance with § 6A1.3 (Resolution of Disputed Factors (Policy Statement), a court may not consider acquitted conduct for purposes of determining the guideline range unless such conduct is established by clear and convincing evidence.''.]

Issues for Comment:

1. Option 1 of the proposed amendment would provide that acquitted conduct is not relevant conduct for purposes of determining the guideline range. It clarifies that a court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. The Commission seeks comment on whether it should prohibit the consideration of acquitted conduct for purposes other than determining the guideline range.

For example, should the Commission prohibit a court from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted? Should the Commission go further by prohibiting the consideration of acquitted conduct for all purposes when imposing a sentence? The Commission seeks comment on the interaction between these more expansive potential prohibitions and 18 U.S.C. 3661, which provides that ''[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'' The Commission further seeks comment on whether any of these more expansive potential prohibitions exceeds the Commission's authority under 28 U.S.C. 994 or any other congressional directives.

The Commission further seeks comment on whether alternatively it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps. If so, what steps in the sentencing process should be included in such a policy statement? For example, should the policy statement recommend against the consideration of acquitted conduct for purposes of determining the guideline range, the sentence to impose within the guideline range, whether a departure from the guidelines is warranted, or any factor when imposing a sentence?

2. The proposed amendment would define ''acquitted conduct'' as ''conduct (*i.e.,* any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.'' The Commission seeks comment on whether it should expand the proposed definition of ''acquitted conduct'' to also include acquittals from state, local, or tribal jurisdictions. Alternatively, should the Commission adopt the definition used in the ''Prohibiting Punishment of Acquitted Conduct Act of 2023,'' S. 2788, 118th Cong. (1st Sess. 2023)? That bill would define ''acquitted conduct'' as ''(1) an act (A) for which a person was criminally charged and adjudicated not guilty after trial in a Federal, State, or Tribal court; or (B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication hearing; or (2) any act underlying a criminal charge or juvenile information dismissed (A) in a Federal court upon a motion for acquittal under rule 29 of the Federal Rules of Criminal Procedure; or (B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.''

3. Option 1 of the proposed amendment brackets language that would exclude from the definition of ''acquitted conduct'' conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. This exclusion is meant to address cases in which conduct underlying an acquitted charge overlaps with conduct that establishes the instant offense of conviction. The Commission seeks comment on whether such an exclusion is necessary to address ''overlapping'' conduct. If so, does the proposed exclusion adequately address overlapping conduct, or should the Commission provide additional or different guidance to address overlapping conduct? Alternatively, should the Commission add commentary to § 1B1.3 providing that courts should use their discretion under 18 U.S.C. 3553(a) when considering acquitted conduct in anomalous cases involving overlapping conduct, such as cases involving interrelated charges (*e.g.,* charges for inchoate offenses and the underlying offense)?

4. The Commission seeks comment on whether any or all of the options presented should be revised to specifically address acquittals based on reasons unrelated to the substantive evidence, such as jurisdiction, venue, or statute of limitations. If so, how? For example, should conduct underlying such acquittals be excluded from the definition of ''acquitted conduct''?

4. Circuit Conflicts

Synopsis of Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A would amend § 2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase in § 2K2.1(b)(4)(B)(i) for a firearm that ''had an altered or obliterated serial number.'' Two options are presented. An issue for comment is also provided.

Part B would amend the Commentary to § 2K2.4 to address a circuit conflict concerning whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count. An issue for comment is also provided.

(A) Circuit Conflict Concerning § 2K2.1(b)(4)(B)(ii)

Synopsis of Proposed Amendment: Subsection (b)(4) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen, that had an altered or obliterated serial number, or that was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968). Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where (i) a firearm has an altered or obliterated serial number or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact. The Commentary to § 2K2.1 provides that subsection (b)(4)(A) and (B)(i) apply regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG § 2K2.1, comment. (n.8(B)).

The circuits are split regarding whether a serial number must be illegible in order to apply the 4-level increase in § 2K2.1(b)(4)(B)(i) for a firearm that ''had an altered or obliterated serial number.'' The Ninth Circuit first analyzed the meaning of ''altered or obliterated'' and determined that ''a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes

accurate information less accessible.'' *See United States* v. *Carter,* 421 F.3d 909, 916 (9th Cir. 2005). Various circuits have cited this decision, with different conclusions on the extent of legibility.

The Sixth Circuit has determined that a serial number must be illegible, adopting a ''naked eye test'', that is, ''a serial number that is defaced but remains visible to the naked eye is not 'altered or obliterated' under the guideline.'' *United States* v. *Sands,* 948 F.3d 709, 719 (6th Cir. 2020). This holding is based on the Sixth Circuit's determination that ''[a]ny person with basic vision and reading ability would be able to tell immediately whether a serial number is legible,'' and may be less inclined to purchase a firearm without a legible serial number. *Id.* at 717. The Second Circuit has followed the Sixth Circuit in holding that ''altered'' means illegible for the same reasons. *See United States* v. *St. Hilaire,* 960 F.3d 61, 66 (2d Cir. 2020) (''We follow the Sixth Circuit, which defines 'altered' to mean illegible.'' (citing Sands, 948 F.3d at 715, 719)).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is legible or ''less legible.'' *See, e.g., United States* v. *Millender,* 791 F. App'x 782 (11th Cir. 2019); *United States* v. *Harris,* 720 F.3d 499 (4th Cir. 2013); *United States* v. *Perez,* 585 F.3d 880 (5th Cir. 2009). The Fourth Circuit held that ''a serial number that is made less legible is made different and therefore is altered for purposes of the enhancement.'' Harris, 720 F.3d at 501. Similarly, the Fifth Circuit affirmed the enhancement where the damage did not render the serial number unreadable but ''the serial number of the firearm [ ] had been materially changed in a way that made its accurate information less accessible.'' Perez, 585 F.3d at 884. While the Eleventh Circuit reasoned that an interpretation where altered means illegible ''would render 'obliterated' superfluous.'' Millender, 791 App'x at 783.

Part A of the proposed amendment would amend § 2K2.1(b)(4) to include a definition for ''altered or obliterated serial number'' to address the circuit conflict. Two options are provided.

Option 1 would set forth a definition of ''altered or obliterated serial number'' that adopts an approach similar to the approach of the Second and Sixth Circuits. It would provide that such term ''[ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced such that the original information is rendered illegible or unrecognizable to the unaided eye.''

Option 2 would set forth a definition of ''altered or obliterated serial number'' that adopts an approach similar to the approach of the Fourth, Fifth, Ninth, and Eleventh Circuits. It would provide that such term ''[ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information less accessible, even if such information remains legible.''

An issue for comment is also provided.

Proposed Amendment:

[Option 1:

Section 2K2.1(b)(4) is amended by inserting after ''4 levels.'' the following: ''For purposes of subsection (b)(4)(B)(i), an 'altered or obliterated serial number' [ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced such that the original information is rendered illegible or unrecognizable to the unaided eye.''.*]*

[Option 2:

Section 2K2.1(b)(4) is amended by inserting after ''4 levels.'' the following: ''For purposes of subsection (b)(4)(B)(i), an 'altered or obliterated serial number' [ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information less accessible, even if such information remains legible.''.*]*

Issue for Comment:

1. Part A of the proposed amendment sets forth two options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?

(B) Circuit Conflict Concerning the Interaction Between § 2K2.4 and § 3D1.2(c)

Synopsis of Proposed Amendment: Section 3D1.2 (Grouping of Closely Related Counts) addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (c) states that counts are grouped together ''[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.'' The Commentary to § 3D1.2 further explains that ''[s]ubsection (c) provides that when conduct that represents a separate count, *e.g.,* bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor.'' USSG § 3D1.2, comment. (n.5).

Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is the guideline applicable to certain statutes with mandatory minimum terms of imprisonment (*e.g.,* 18 U.S.C. 924(c)). The guideline provides that if a defendant, whether or not convicted of another crime, was convicted of a violation of any of these statutes, the guideline sentence is the minimum term of imprisonment required by statute. *See* USSG § 2K2.4(a)–(b). Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) do not apply to that count of conviction. *Id.* In addition, the Commentary to § 2K2.4 provides that ''[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.'' *Id.* comment. (n.4). The examples included in the application note specifically referenced 18 U.S.C. 924(c) (which penalizes the possession or use of a firearm during, and in relation to, an underlying ''crime of violence'' or ''drug trafficking crime'' by imposing a mandatory minimum penalty consecutive to the sentence for the underlying offense).

The circuits are split regarding whether § 3D1.2(c) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count. Ordinarily, the firearms and drug trafficking counts would group under § 3D1.2(c). The circuit conflict focuses on the presence of the count under 18 U.S.C. 924(c) and its interaction with the Commentary to § 2K2.4 cited above precluding application of the relevant specific offense characteristics where the conduct covered by any such enhancement forms the basis of the conviction under 18 U.S.C.§ 924(c).

The Sixth, Eighth, and Eleventh Circuits have held that such counts can be grouped in this situation. *See, e.g., United States* v. *Gibbs,* 395 F. App'x 248, 250 (6th Cir. 2010) (''The district court properly grouped together Gibbs's drug and felon-in-possession

offenses.''); *United States* v. *Bell,* 477 F.3d 607, 615–16 (8th Cir. 2007) (''the felon in possession count and the crack cocaine count should have been grouped together for sentencing purposes''); *United States* v. *King,* 201 F. App'x 715, 718 (11th Cir. 2006) (grouping permitted; felon-in-possession count ''embodies conduct that is treated as a specific offense characteristic'' to drug trafficking counts). These circuits held that grouping was permissible as the Chapter Two guidelines for the felon-in-possession conviction and drug conviction each include ''conduct that is treated as specific offense characteristics in the other offense,'' regardless of whether the enhancements are used due to the rules in § 2K2.4 related to 18 U.S.C. 924(c)). Bell, 477 F.3d at 615–16.

By contrast, the Seventh Circuit has held that there is no basis for grouping felon-in-possession and drug trafficking counts since grouping rules are to be applied only after the offense level for each count has been determined and ''by virtue of § 2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§ 2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply.'' *United States* v. *Sinclair,* 770 F.3d 1148, 1157–58 (7th Cir. 2014); *see also United States* v. *Lamon,* 893 F.3d 369, 371 (7th Cir. 2018) (declining to overturn Sinclair to rectify the circuit split; ''the mere existence of a circuit split does not justify overturning precedent . . . especially true here, because in Sinclair we knew that we were creating the split, and in doing so weighed the impact that our contrary decision would have on uniformity among the circuits''). The Seventh Circuit further explained, ''[w]ith this particular combination of offenses, the otherwise applicable basis for grouping the drug-trafficking and felon-in-possession counts dropped out of the case.'' Sinclair, 770 F.3d at 1157–58.

Part B of the proposed amendment generally follows the Sixth, Eighth, and Eleventh Circuits' approach. It would amend the Commentary to § 2K2.4 to restate the grouping rule in § 3D1.2(c) and provide an example stating that, in accordance with § 3D1.2(c), in case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), such counts shall be grouped.

An issue for comment is also provided.

Proposed Amendment: The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 4 by striking the following:

''*Weapon Enhancement.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.,* the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).'';

and inserting the following:

''*Non-Applicability of Certain Enhancements.*—

(A) *In General.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

(B) *Impact on Grouping.*—If two or more counts would otherwise group under subsection (c) of § 3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under § 3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), the counts shall be grouped pursuant to § 3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include 'conduct that is treated as a specific offense characteristic' in the other count, but the otherwise applicable enhancements did not apply due to the rules in § 2K2.4 related to 18 U.S.C. 924(c) convictions.

(C) *Upward Departure Provision.*—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.,* the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).''.

Issue for Comment:

1. Part B of the proposed amendment would amend the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address the circuit conflict described in the synopsis above. It would amend Application Note 4 in the Commentary to § 2K2.4 to restate the grouping rule in subsection (c) of § 3D1.2 (Grouping of Closely Related Counts) and provide an example stating that, in accordance with § 3D1.2(c), in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), such counts shall be grouped. The Commission seeks comment on whether it should provide additional or different guidance to address this circuit conflict.

In the alternative, should the Commission address the circuit conflict in a manner other than the one provided in Part B of the proposed amendment? For example, should the Commission amend § 3D1.2 to provide additional or different guidance about how to apply § 3D1.2(c)?

5. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023) (identifying as priorities ''[i]mplementation of any legislation warranting Commission action'' and ''[c]onsideration of other miscellaneous issues coming to the Commission's attention''). The proposed amendment contains six parts (Parts A through F). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the Safeguard Tribal Objects of Patrimony (''STOP'') Act of 2021, Public Law 117–258 (2022), by amending Appendix A (Statutory Index) and the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). An issue for comment is also provided.

Part B responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security), by amending Appendix A and § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). Two issues for comment are also provided.

Part C responds to concerns raised by the Department of Justice relating to offenses under 31 U.S.C. 5322 and 5336 and § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts), by amending the specific offense characteristic at § 2S1.3(b)(2)(B) to reflect the enhanced penalty applicable to offenses under those statutes.

Part D responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), by amending Appendix A and the Commentary to § 2R1.1 to replace the reference to 15 U.S.C. 3(b) with a reference to 15 U.S.C. 3(a).

Part E addresses a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Two options are presented.

Part F responds to concerns raised by the Department of Justice relating to the scope of the definition of ''sex offense'' in subsection (b)(2) of § 4C1.1 (Adjustment for Certain Zero-Point Offenders). Two options are presented.

(A) Safeguard Tribal Objects of Patrimony (''STOP'') Act of 2021

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Safeguard Tribal Objects of Patrimony (''STOP'') Act of 2021, Public Law 117–258 (Dec. 21, 2022). The Act added two new criminal offenses at 25 U.S.C. 3073 (Export prohibitions; export certification system; international agreements). In addition, the Act increased the penalties for offenses under 18 U.S.C. 1170 (Illegal trafficking in Native American human remains and cultural items).

The first new offense, created by the Act and codified at 25 U.S.C. 3073(a)(1), prohibits exporting, attempting to export, or otherwise transporting from the United States any ''Item Prohibited from Exportation,'' and conspiring to engage in and concealing such activity. An ''Item Prohibited from Exportation'' means (A) a cultural item prohibited from being trafficked (including through sale, purchase, use for profit, or transport for sale or profit) by 18 U.S.C. 1170(b) or any other federal law or treaty; and (B) an archaeological resource prohibited from being trafficked (including through sale, purchase, exchange, transport, receipt, or offer to sell, purchase, or exchange, including in interstate or foreign commerce) by subsections (b) and (c) of 16 U.S.C. 470ee (Archaeological Resources Protection; Prohibited acts and criminal penalties) or any other federal law or treaty. 25 U.S.C. 3072(5). A violation of this offense, if the person knew, or should have known, that the item was taken, possessed, transported, or sold in violation of, or in a manner that is unlawful under, any federal law or treaty, is punishable by a maximum term of imprisonment of one year and one day for a first violation (and not more than ten years for a second or subsequent violation), a fine, or both. 25 U.S.C. 3073(a)(2).

The second new offense, codified at 25 U.S.C. 3073(b)(5)(A)(i), prohibits exporting, attempting to export, or otherwise transporting from the United States any ''Item Requiring Export Certification'' without first obtaining an export certification. An ''Item Requiring Export Certification'' means a cultural item and an archaeological resource but does not include any such item or resource for which an Indian Tribe or Native Hawaiian organization with a cultural affiliation with the item has provided a certificate authorizing exportation of the item. 25 U.S.C. 3072(6). A violation of this provision is subject to a civil penalty and any other applicable penalties under chapter 32B (Safeguard Tribal Objects of Patrimony) of title 25, United States Code. 25 U.S.C. 3073(b)(5)(A)(ii).

In addition, the Act increased the maximum terms of imprisonment for offenses under 18 U.S.C. 1170. Section 1170(a) prohibits knowingly selling, purchasing, using for profit, or transporting for sale or profit, the human remains of a Native American without the right of possession to those remains. The Act increased the penalty for this offense from a maximum term of imprisonment of 12 months to one year and one day, changing its classification from a misdemeanor to a felony. It further increased the maximum term of imprisonment for a second or subsequent offense under section 1170(a) from five to ten years. The Act also increased the maximum term of imprisonment for a second or subsequent offense under 18 U.S.C. 1170(b) from five to ten years. Section 1170(b) prohibits knowingly selling, purchasing, using for profit, or transporting for sale or profit, any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act. Section 1170 offenses are currently referenced in Appendix A (Statutory Index) to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). The maximum terms of imprisonment for offenses under 18 U.S.C. 1170, as revised by the Act, are still within the maximum penalty range of one year to 20 years for other offenses referenced to § 2B1.5.

Part A of the proposed amendment would amend Appendix A to reference the new offenses under 25 U.S.C. 3073 to § 2B1.5. The conduct prohibited by 25 U.S.C. 3073 is similar to the conduct prohibited by 18 U.S.C. 1170. Part A of the proposed amendment would also amend the Commentary to § 2B1.5 to reflect that 25 U.S.C. 3073 is referenced to the guideline. In addition, it would make additional technical changes to the Commentary to § 2B1.5, including specifying that 18 U.S.C. 666(a)(1)(A) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment: Appendix A (Statutory Index) is amended by inserting before the line referenced to 25 U.S.C. 5306 the following new line reference:

''25 U.S.C. 3073 2B1.5''.

The Commentary to § 2B1.5 captioned ''Statutory Provisions'' is amended by striking ''16 U.S.C. 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. 541–546, 554, 641, 661–662, 666, 668, 1163, 1168, 1170, 1361, 1369, 2232, 2314–2315'' and inserting: ''16 U.S.C. 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. 541–546, 554, 641, 661–662, 666(a)(1)(A), 668, 1163, 1168, 1170, 1361, 1369, 2232, 2314–2315; 25 U.S.C. 3073. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

Issue for Comment:

1. In response to the Safeguard Tribal Objects of Patrimony (''STOP'') Act of 2021, Public Law 117–258 (2022), Part A of the proposed amendment would reference 25 U.S.C. 3073 to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). The Commission seeks comment on whether any additional changes to the guidelines are required in response to the Act. Specifically, should the Commission amend § 2B1.5 to provide a higher or lower base offense level in response to the changes brought by the Act? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2B1.5 in response to the Act? If so, what should that specific offense characteristic provide and why?

(B) Evasion of Export Controls

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security).

The Export Control Reform Act of 2018 repealed the Export Administration Act of 1979 (previously codified at 50 U.S.C. 4601–4623) regarding export controls of dual-use items. Dual-use items have both civilian and military applications and are subject to export licensing requirements. The Export Control Reform Act of 2018 also included new provisions, codified at 50 U.S.C. 4801–4826, relating to export controls for national security and foreign policy purposes, to further the policy of the United States ''to restrict the export of items which would make a significant contribution to the military potential of any other country or

combination of countries which would prove detrimental to the national security of the United States'' and ''to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.'' *See* 50 U.S.C. 4811. These new provisions authorize the Department of Commerce to develop the Export Administration Regulations, which establish the export controls governing dual-use and other items. In addition, the Export Control Reform Act of 2018 is the first export control statute to explicitly consider the economic security of the United States as a component or element of national security.

The Export Control Reform Act of 2018 maintained much of the dual-use export controls previously established under the Export Administration Act of 1979, but in a process that is still ongoing, the agencies charged with administering and enforcing the Act are still making significant changes to what items are controlled and have increased the overall restrictions on export licensing. In addition to the items and services already controlled by the Export Administration Regulations, the Export Control Reform Act of 2018 requires the President to establish an interagency process to identify ''emerging and foundational technologies that are 'essential to the national security of the United States' '' but are not already included in the definition of ''critical technologies'' in the Foreign Investment Risk Review Modernization Act. *See* 50 U.S.C. 4817(a). Examples of ''emerging technologies'' include artificial intelligence and machine learning; quantum information and sensing technology; robotics; and biotechnology. ''Foundational technologies'' are described as technologies that may warrant stricter controls if an application or capability of that technology poses a national security threat. The Export Control Reform Act of 2018 also requires the Department of Commerce to ''establish and maintain a list'' of controlled items, foreign persons, and end uses determined to be a threat to national security and foreign policy. *Id.* § 4813.

The Export Control Reform Act of 2018 includes a criminal offense at new section 4819 (replacing repealed 50 U.S.C. 4610 (Violations)), which prohibits willfully committing, willfully attempting or conspiring to commit, or aiding and abetting a violation of the Act or of any regulation, order, license, or other authorization issued under the Act. Any such violation is punishable by a fine of not more than $1,000,000, a maximum term of imprisonment of 20 years, or both. *See* 50 U.S.C. 4819(b). Offenses under repealed section 4610 are currently referenced in Appendix A (Statutory Index) to § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), which also appears to be the most analogous guideline for the offenses under new section 4819. The maximum term of imprisonment at new section 4819(b) is greater than the maximum penalties of five and ten years provided in the repealed section 4610 but is within the maximum penalty range of ten to 20 years for other offenses referenced to § 2M5.1.

In addition, the Department of Justice and the Disruptive Technology Strike Force recommended that the Commission consider amending § 2M5.1 to ensure that all controls related to national security are covered by the guideline provisions. *See* Annual Letter from the U.S. Department of Justice to the Commission (Aug. 1, 2023), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38;* Letter from U.S. Department of Justice National Security Division & U.S. Department of Commerce Bureau of Industry and Security (Aug. 1, 2023), *at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=55.* Both the Department of Justice and the Disruptive Technology Strike Force are concerned that, given the wide-range of national security-related controls in force, some courts have applied § 2M5.1 too narrowly.

The Department of Justice explained that under the Export Administration Regulations and the Commerce Control List (contained within the Export Administration Regulations) export controls related to national security can carry different designations correlating to the specific reason certain items (*i.e.,* commodities, software, technology) are subject to the nation's export licensing authority and are thus controlled. One such designation is ''NS'' (National Security), while other designations include ''MT'' (Missile Technology), ''RS,'' (Regional Stability), ''CB'' (Proliferation of Chemical and Biological Weapons), ''AT'' (Anti-Terrorism), and ''NP'' (Nuclear Nonproliferation). The Department of Justice further clarified that other export controls comprise ''the full spectrum of national security related controls,'' including export controls to certain military end-users and foreign entities when they present an unacceptable security risk to national security policy interests and export controls placed on certain goods and destinations based on sanctions and embargoes imposed by the President pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1705) or other specific acts of Congress.

According to the Department of Justice, because § 2M5.1(a)(1)(A) specifically refers to ''national security controls,'' some sentencing courts may erroneously conclude that only the goods controlled under the Commerce Control List's ''NS'' designation, and not the goods controlled under separate sections of the Export Administration Regulations or the International Emergency Economic Powers Act, qualify for the higher alternative base offense level 26 at § 2M5.1(a)(1)(A). Both the Department of Justice and the Disruptive Technology Strike Force recommend replacing the term ''national security controls'' currently used at § 2M5.1(a)(1)(A) with the term ''controls related to national security,'' to ensure that the provision includes ''the full spectrum'' of national security-controls, including anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, and military and weapons of mass destruction end-uses and end-users and entity-specific controls, and sanctions and embargoes.

Part B of the proposed amendment would amend Appendix A and the Commentary to § 2M5.1 to reflect the new United States Code section numbers relating to export controls for national security and foreign policy.

Additionally, Part B of the proposed amendment would amend § 2M5.1(a)(1)(A) in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force. It would replace the term ''national security controls'' with ''controls relating to national security [(including controls on emerging and foundational technologies)].''

Finally, Part B of the proposed amendment would make technical changes to the Commentary to § 2M5.1 by reorganizing the application notes and adding headings.

Two issues for comment are also provided.

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 50 U.S.C. 4610 by striking ''§ 4610'' and inserting ''§ 4819''.

Section 2M5.1(a)(1) is amended by striking ''national security controls'' and inserting ''controls relating to national security [(including controls on

emerging and foundational technologies)]''.

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. 1705; 50 U.S.C. 4601–4623'' and inserting ''50 U.S.C. 1705, 4819''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended—

by striking Notes 1 through 4 as follows:

''1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

3. In addition to the provisions for imprisonment, 50 U.S.C. 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is $250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or $1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. 4605).'';

and by inserting the following new Notes 1, 2, and 3:

''1. *Definition.*—For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. 4813).

2. *Additional Penalties.*—In addition to the provisions for imprisonment, 50 U.S.C. 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

3. *Departure Provisions.*—

(A) *In General.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict.*—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.''.

Issues for Comment:

1. In response to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), Part B of the proposed amendment would amend Appendix A (Statutory Index) and the Commentary to § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). The current provisions of § 2M5.1, including the term ''national security controls'' used in subsection (a)(1), are mostly based on the statutory provisions of the Export Administration Act of 1979. As explained in the synopsis above, the Export Control Reform Act of 2018 repealed and replaced the 1979 Act and expanded the meaning of national security (to explicitly include the economic security of the United States as a component or element of national security), the types of items controlled (*e.g.,* emerging and foundational technologies), and the reasons for control (*e.g.,* persons and firms involved in activities contrary to national security or foreign policy interests). In addition, the agencies charged with administering and enforcing the Export Control Reform Act of 2018 are still making significant changes to what items are controlled and have increased the overall restrictions on export licensing. Accordingly, the Commission seeks general comment on whether any different or additional changes to the guidelines are required in response to the changes brought by the Export Control Reform Act of 2018. Specifically, should the Commission revise the base offense levels at § 2M5.1(a)? If so, what revision should the Commission make and why? Should the Commission add additional specific offense characteristics to § 2M5.1? If so, what should any such specific offense characteristic provide and why? For example, should the Commission provide a definition of the term ''controls relating to national security''? Should the Commission include in the provisions of § 2M5.1 specific references to controls relating to foreign policy or economic interest of the United States or to certain end-users and entities?

2. Part B of the proposed amendment would also amend § 2M5.1 in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security). The Commission invites general comment on the Department of Justice's and Disruptive Technology Strike Force's concerns discussed in the synopsis above. Are the changes to § 2M5.1 appropriate to address those concerns? Should the Commission provide additional or different guidance for applying § 2M5.1? Is there an alternative approach that the Commission should consider in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force?

(C) Offenses Involving Records and Reports on Monetary Instruments Transactions

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to concerns raised by the Department of Justice relating to enhanced penalties under 31 U.S.C. 5322 (Criminal penalties) and covered by § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts).

Section 5322 is a penalty provision for the substantive criminal offenses in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 of title 31, United States Code. The provisions of this subchapter are the reporting requirements of the Bank Secrecy Act (BSA) and impose substantial compliance requirements on financial institutions. A simple violation of an offense in this subchapter is punishable by a five-year maximum term of imprisonment, a fine, or both under 31 U.S.C. 5322(a). However, if the offense also involved ''violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period,'' the maximum term of imprisonment increases to ten years as provided for at 31 U.S.C. 5322(b). Notably, other penalty provisions in subchapter II of chapter 53 of title 31, United States

Code, increase the maximum term of imprisonment if the offense involved ''violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period.'' *See* 31 U.S.C. 5324(d) and 5336(h).

The majority of the substantive criminal offenses in subchapter II of chapter 53 of title 31, United States Code, including 31 U.S.C. 5322, 5324 and 5336, are referenced in Appendix A (Statutory Index) to § 2S1.3. Relevant to this issue, § 2S1.3(b)(2) provides for a 2-level enhancement if ''the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period.'' USSG § 2S1.3(b)(2).

During the 2022–2023 amendment cycle, the Department of Justice, in its letter addressing a proposed crime legislation amendment, noted that when the Commission promulgated § 2S1.3(b)(2) it did not include the additional factor set forth in 31 U.S.C. 5322(b) that qualifies a defendant for the enhanced penalty, which is when an individual commits an offense under subchapter II of chapter 53 of title 31, United States Code, ''while violating another law of the United States.'' At the time, the Commission expressed interest in addressing this miscellaneous issue during the 2023–2024 amendment cycle.

Part C of the proposed amendment would amend the specific offense characteristic at § 2S1.3(b)(2)(B) to reflect the additional enhanced penalty factor under 31 U.S.C. 5322(b), 5324(d), and 5336. Specifically, it would revise the 2-level enhancement at § 2S1.3(b)(2)(B) to also apply if the defendant committed the offense ''while violating another law of the United States.''

Proposed Amendment: Section 2S1.3(b)(2)(B) is amended by striking ''committed the offense as part of a pattern of unlawful activity'' and inserting ''committed the offense while violating another law of the United States or as part of a pattern of unlawful activity''.

(D) Antitrust Offenses

Synopsis of Proposed Amendment: Part D of the proposed amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A (Statutory Index) to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Section 2R1.1 is intended to apply to antitrust offenses, particularly offenses relating to agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, ''that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se, i.e.,* without any inquiry in individual cases as to their actual competitive effect.'' USSG § 2R1.1, comment. (backg'd.).

In the original 1987 *Guidelines Manual,* the only statute referenced in Appendix A to § 2R1.1 was 15 U.S.C. 1 (Trusts, etc., in restraint of trade illegal; penalty), a provision of the Sherman Antitrust Act of 1890 that prohibits any contract or combination in the form of a trust or otherwise (or any such conspiracy) in restraint of trade or commerce among the several states or with foreign nations. In 1990, the Commission amended Appendix A to reference 18 U.S.C. 1860 (Bids at land sales) to § 2R1.1. *See* Appendix C, amendment 359 (effective Nov. 1, 1990). Section 1860 prohibits bargaining, contracting, or agreeing, or attempting to bargain, contract, or agree with another person that such person shall not bid upon or purchase any parcel of lands of the United States offered at public sale. It also prohibits using intimidation, combination, or unfair management, to hinder, prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale.

In 2002, Congress amended 15 U.S.C. 3 to create a new criminal offense. *See* Section 14102 of the Antitrust Technical Corrections Act of 2002, Public Law 107–273 (Nov. 2, 2002). Prior to the Antitrust Technical Corrections Act of 2002, 15 U.S.C. 3 contained only one provision prohibiting any contract or combination in the form of trust or otherwise (or any such conspiracy) in restraint of trade or commerce in any territory of the United States or the District of Columbia. The Act redesignated the existing provision as subsection (a) and added a new criminal offense at a new subsection (b). Section 3(b) prohibits monopolization, attempts to monopolize, and combining or conspiring with another person to monopolize any part of the trade or commerce in or involving any territory of the United States or the District of Columbia. 15 U.S.C. 3(b).

In 2003, the Commission amended Appendix A to reference 15 U.S.C. 3(b) to § 2R1.1 and the Commentary to § 2R1.1 to reflect such reference. *See* Appendix C, amendment 661 (effective Nov. 1, 2003). The Commission did not include a reference in Appendix A to the then newly redesignated 15 U.S.C. 3(a). Section 3(a) is not currently referenced in Appendix A to any guideline.

The Department of Justice has raised a concern that Appendix A and § 2R1.1 contain inaccurate references to 15 U.S.C. 3(b). According to the Department of Justice, both Appendix A and the Commentary to § 2R1.1 lists 15 U.S.C. 3(b) as a statutory provision covered by § 2R1.1 when, in fact, the guideline should instead cover 15 U.S.C. 3(a). The Department of Justice indicates that, other than 15 U.S.C. 3(b), the statutes currently referenced in Appendix A to § 2R1.1 cover offenses relating to agreements or combinations in restraint of trade or commerce. Section 3(b) offenses address conduct relating to the acquisition or maintenance of monopoly power in a relevant market, which may be committed by a single entity and does not depend on agreement among competitors. According to the Department of Justice, these types of monopolization offenses are beyond the scope of § 2R1.1, as described in the Background Commentary, thus maintaining the Appendix A reference to the guideline has the potential to sow confusion in antitrust prosecutions. The Department of Justice suggests that the Commission replace the reference to 15 U.S.C. 3(b) in Appendix A and § 2R1.1 with a reference to 15 U.S.C. 3(a), which is the provision in section 3 that addresses offenses relating to agreements in restraint of trade or commerce and is more similar to the other offenses already covered by § 2R1.1.

Part D of the proposed amendment would amendment Appendix A and the Commentary to § 2R1.1 to replace the reference to 15 U.S.C. 3(b) with a reference to 15 U.S.C. 3(a). In addition, it would make technical changes to the Commentary to § 2R1.1, including the addition of headings to some application notes.

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 3(b) by striking ''§ 3(b)'' and inserting ''§ 3(a)''.

The Commentary to § 2R1.1 captioned ''Statutory Provisions'' is amended by striking ''§§ 1, 3(b)'' and inserting ''§§ 1, 3(a)''.

The Commentary to § 2R1.1 captioned ''Application Notes'' is amended—

in Note 3 by inserting at the beginning the following new heading: ''*Fines for Organizations.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Another Consideration in Setting Fine.*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Use of Alternatives Other Than Imprisonment.*—'';

in Note 6 by inserting at the beginning the following new heading: ''*Understatement of Seriousness.*—'';

and in Note 7 by inserting at the beginning the following new heading: ''*Defendant with Previous Antitrust Convictions.*—''.

The Commentary to § 2R1.1 captioned ''Background'' is amended by striking ''These guidelines apply'' and inserting ''This guideline applies''.

(E) Enhanced Penalties for Drug Offenders

Synopsis of Proposed Amendment: Part E of the proposed amendment addresses a miscellaneous issue regarding the application of the enhanced base offense levels at subsections (a)(1)–(a)(4) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, *or* who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Section 2D1.1 provides specific base offense levels to reflect this enhanced penalty structure at § 2D1.1(a)(1)–(a)(4). Section 2D1.1(a)(1)(A) provides for a base offense level of 43 if ''the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony.'' Similarly, § 2D1.1(a)(1)(B) provides for a base offense level of 43 if ''the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense.'' Each of the six statutory provisions enumerated within § 2D1.1(a)(1)(A) and (B) require a mandatory term of life imprisonment for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(2) provides for a base offense level of 38 ''if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.'' Each of the six statutory provisions enumerated within § 2D1.1(a)(2) provides for a mandatory minimum term of imprisonment of not less than 20 years for a defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(3) provides for a base offense level of 30 if ''the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense.'' Both statutory provisions enumerated within § 2D1.1(a)(3) provide for an increased statutory maximum term of imprisonment of 30 years for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(4) provides for a base offense level of 26 if ''if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.'' Both statutory provisions enumerated within § 2D1.1(a)(4) provide for an increased statutory maximum term of imprisonment of 15 years for any defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

The Commission has heard concerns that it is not clear whether the enhanced base offense levels at § 2D1.1(a)(1)–(a)(4) apply only when the defendant was convicted under the enhanced penalty provision of 21 U.S.C. 841 or 21 U.S.C. 960 because each statutory element was established, or whether they also apply whenever a defendant meets the applicable requirements, regardless of whether the defendant was in fact convicted under the enhanced penalty provision.

Part E of the proposed amendment would amend § 2D1.1(a)(1)–(4) to address these concerns. Two options are provided.

Option 1 would amend § 2D1.1(a)(1)–(4) to provide that the base offense levels in those provisions apply only if the defendant was convicted under 21 U.S.C. 841 or 21 U.S.C. 960, and was subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because the specific statutory elements were established in accordance with the relevant provision in title 21, United States Code.

Option 2 would amend § 2D1.1(a)(1)–(4) so that the base offense levels in those provisions apply if the defendant was convicted under 21 U.S.C. 841 or 21 U.S.C. 960 and the offense involved the applicable requirements. However, § 2D1.1(a)(1) and (a)(3) would require that the fact that the offense was committed after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense be established by the information filed by the government pursuant to 21 U.S.C. 851.

Proposed Amendment:

[Option 1:

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

''(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of

conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or'';

and by inserting the following new paragraphs (1) through (4):

''(1) 43, if—

(A) the defendant (i) is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2); and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and (II) the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(B) the defendant (i) is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3); and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and (II) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(2) 38, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3); and (B) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (i) death or serious bodily injury resulted from the use of the substance; and (ii) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(4) 26, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or''.]

[Option 2:

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

''(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or'';

and by inserting the following new paragraphs (1) through (4):

''(1) 43, if—

(A) (i) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2); (ii) the offense involved death or serious bodily injury resulting from the use of the substance; and (iii) the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(B) (i) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3); (ii) the offense involved death or serious bodily injury resulting from the use of the substance; and (iii) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(2) 38, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3); and (B) the offense involved death or serious bodily injury resulting from the use of the substance; or

(3) 30, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); (B) the offense involved death or serious bodily injury resulting from the use of the substance; and (C) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(4) 26, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) the offense involved death or serious bodily injury resulting from the use of the substance; or''.]

(F) ''Sex Offense'' Definition in § 4C1.1

Synopsis of Proposed Amendment: Part F of the proposed amendment responds to concerns raised by the Department of Justice relating to the scope of the definition of ''sex offense'' in subsection (b)(2) of § 4C1.1 (Adjustment for Certain Zero-Point Offenders).

In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for ''zero-point'' offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). The 2-level adjustment for defendants with zero criminal history points at § 4C1.1 applies only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) apply. Among the exclusionary criteria is subsection (a)(5), requiring that ''the [defendant's] instant offense of conviction is not a sex offense.'' Section 4C1.1(b)(2) defines ''sex offense'' as ''(A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591;

or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.''

The Department of Justice has raised a concern that the current definition of ''sex offense'' is too restrictive because it applies only to offenses perpetrated against minors. The Department of Justice first raised this issue during the 2022–2023 amendment cycle. In its letter addressing the proposed amendment on sexual abuse offenses, the Department of Justice noted that the restrictive definition of ''sex offense'' in the then-proposed § 4C1.1 would run counter to the Commission's then-proposed amendment to increase the base offense level from level 14 to level 18 at § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody).

Part F of the proposed amendment would amend § 4C1.2(b)(2) to broaden the definition of ''sex offense.'' Two options are provided.

Option 1 would revise the current definition of ''sex offense'' at § 4C1.1(b)(2) to also cover sexual abuse offenses against wards and individuals in federal custody under 18 U.S.C. 2243(b) and (c).

Option 2 would expand the definition of ''sex offense'' at § 4C1.1(b)(2) to cover all offenses described in the listed provisions instead of only to offenses perpetrated against minors.

Proposed Amendment:

[Option 1:

Section 4C1.1(b)(2) is amended by striking '' 'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition''; and inserting: '' 'Sex offense' means (A) an offense under 18 U.S.C. 2243(b) or (c); (B) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (C) an attempt or a conspiracy to commit any offense described in subparagraphs (A) and (B) of this definition''.]

[Option 2:

Section 4C1.1(b)(2) is amended by striking '' 'Sex offense' means (A) an offense, perpetrated against a minor, under''; and inserting '' 'Sex offense' means (A) an offense under''.]

6. Technical

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual.* The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Technical and Conforming Changes Relating to § 4C1.1

In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for ''zero-point'' offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). Part A of the proposed amendment would make technical and conforming changes relating to § 4C1.1.

First, Part A of the proposed amendment would amend § 4C1.1. The 2-level adjustment for defendants with zero criminal history points at § 4C1.1 applies only if none of exclusionary criteria set forth in subsections (a)(1) through (a)(10) applies. Among the exclusionary criteria is subsection (a)(10), requiring that ''the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848.'' Several provisions in § 4C1.1 track similar language found in the safety valve criteria at 18 U.S.C. 3553(f). In particular, § 4C1.1(a)(10) mirrors 18 U.S.C. 3553(f)(4), which provides as a requirement that ''the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act.''

Historically, courts have generally interpreted 18 U.S.C. 3553(f)(4) as excluding a defendant from safety valve eligibility if such defendant had either an aggravating role or were engaged in a continuing criminal enterprise, given the otherwise exclusionary language beginning each phrase of subsection (f)(4) (*i.e.,* ''the defendant was not . . .'' and ''. . . was not engaged in''). The Sixth and the Seventh Circuits have squarely addressed this issue and held that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise, but that it is not required to demonstrate both. *See, e.g., United States* v. *Bazel,* 80 F.3d 1140, 1143 (6th Cir. 1996); *United States* v. *Draheim,* 958 F.3d 651, 660 (7th Cir. 2020).

The Commission intended § 4C1.1(b)(10) to track the safety valve criteria at 18 U.S.C. 3553(f)(4) and be applied by courts in the same way—namely, that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision. Nevertheless, since promulgation of new § 4C1.1, several stakeholders have raised the question of whether the ''and'' in the subsection (a)(10) is conjunctive or disjunctive.

To address the confusion caused by the use of the word ''and'' in that provision, Part A of the proposed amendment would make technical changes to § 4C1.1 to divide subsection (a)(10) into two separate provisions, clarifying the Commission's intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions listed in the provision.

Finally, Part A of the proposed amendment would make conforming changes relating to § 4C1.1 by adding necessary references to new Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in subsection (a)(6) of § 1B1.1 (Application Instructions), the Introductory Commentary to Chapter Two (Offense Conduct), and the Commentary to §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 3D1.5 (Determining the Total Punishment). These guidelines and commentaries refer to the order in which the chapters of the *Guidelines Manual* should be applied.

Additional Technical and Clerical Changes

Part B of the proposed amendment would make technical and clerical changes to—

(1) the Commentary to § 1B1.1 (Application Instructions), to add headings to some application notes, provide stylistic consistency in how subdivisions are designated, and correct a typographical error;

(2) § 2B1.1 (Theft, Property Destruction, and Fraud), to provide consistency in the use of capitalization and how subdivisions are designated, and to correct a reference to the term ''equity security'';

(3) the Commentary to § 2B1.6 (Aggravated Identity Theft), to correct

some typographical errors and provide stylistic consistency in how subdivisions are designated;

(4) § 2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

(5) § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), to provide stylistic consistency in how subdivisions are designated and add headings to some application notes in the Commentary;

(6) § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property), to provide consistency in the use of capitalization;

(7) § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), to provide stylistic consistency in how subdivisions are designated, make clerical changes to some controlled substances references in the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, and correct a reference to a statute in the Background commentary;

(8) the Background Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), to correct a reference to a statute;

(9) the Commentary to § 2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), to add headings to application notes and correct a reference to a statutory provision;

(10) § 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

(11) § 2E3.1 (Gambling Offenses; Animal Fighting Offenses), to provide stylistic consistency in how subdivisions are designated and correct a reference to a statutory provision in the Commentary;

(12) § 2H2.1 (Obstructing an Election or Registration), to provide stylistic consistency in how subdivisions are designated and add a heading to the application note in the Commentary;

(13) § 2K1.4 (Arson; Property Damage by Use of Explosives), to provide stylistic consistency in how subdivisions are designated;

(14) the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct some typographical errors;

(15) the Commentary to § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), to provide consistency in the use of capitalization and how subdivisions are designated;

(16) § 3B1.1 (Aggravating Role), to provide stylistic consistency in how subdivisions are designated, add headings to the application notes in the Commentary, and correct a typographical error;

(17) the Commentary to § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;

(18) § 4A1.1 (Criminal History Category), to provide stylistic consistency in how subdivisions are designated and correct the headings of the application notes in the Commentary;

(19) § 4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;

(20) the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction), to provide stylistic consistency in how subdivisions are designated, fix typographical errors in the Commentary, and update an example that references 18 U.S.C. 924(c) (which was amended by the First Step Act of 2018, Pub. L. 115–391 (2018));

(21) the Commentary to § 5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;

(22) § 5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;

(23) § 5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;

(24) § 5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors), to provide consistency in the use of capitalization and add a heading to an application note in the Commentary;

(25) § 6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and

(26) the Commentary to § 8B2.1 (Effective Compliance and Ethics Program), to provide consistency in the use of capitalization.

(A) Technical and Conforming Changes Relating to § 4C1.1

Proposed Amendment: Section 4C1.1(a) is amended—

in paragraph (9) by striking ''and'';

by striking paragraph (10) as follows:

''(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;'';

and by inserting at the end the following new paragraphs (10) and (11):

''(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;''.

Section 1B1.1(a)(6) is amended by striking ''Part B of Chapter Four'' and inserting ''Parts B and C of Chapter Four''.

Chapter Two is amended in the Introductory Commentary by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

The Commentary to § 3D1.1 captioned ''Background'' is amended by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

The Commentary to § 3D1.5 is amended by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

(B) Additional Technical and Clerical Changes

Proposed Amendment: The Commentary to § 1B1.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Frequently Used Terms Defined.*—'';

in Note 1(F) by striking ''subdivision'' and inserting ''clause'';

in Note 2 by inserting at the beginning the following new heading: ''*Definition of Additional Terms.*—''; and by striking ''case by case basis'' and inserting ''case-by-case basis'';

in Note 3 by inserting at the beginning the following new heading: ''*List of Statutory Provisions.*—'';

in Note 4 by inserting at the beginning the following new heading:

''*Cumulative Application of Multiple Adjustments.*—'';

in Note 4(A) by striking ''subdivisions'' and inserting ''subparagraphs'';

and in Note 5 by inserting at the beginning the following new heading: ''*Two or More Guideline Provisions Equally Applicable.*—''.

Section 2B1.1(b)(7) is amended by striking ''Federal'' and inserting ''federal''; and by striking ''Government'' both places such term appears and inserting ''government''.

Section 2B1.1(b)(17) is amended by striking ''subdivision'' both places such term appears and inserting ''subparagraph''.

Section 2B1.1(b)(19)(B) is amended by striking ''subdivision'' and inserting ''subparagraph''.

Section 2B1.1(c) is amended by striking ''subdivision'' and inserting ''paragraph''.

The Commentary to 2B1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking '' 'Equity securities' '' and inserting '' 'Equity security' '';

in Note 3(A) by striking ''subdivision'' and inserting ''subparagraph'';

in Note 3(A)(v) by striking ''subdivisions'' and inserting ''subclauses'';

in Note 3(F) by striking ''subdivision (A)'' and inserting ''subparagraph (A)'';

in Note 3(F)(i) by striking ''this subdivision'' and inserting ''this clause'';

in Note 3(F)(viii) by striking ''a Federal health care offense'' and inserting ''a federal health care offense''; and by striking ''Government health care program'' both places such term appears and inserting ''government health care program'';

and in Note 4(C)(ii) by striking ''subdivision'' and inserting ''subparagraph''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''United State Code'' both places such term appears and inserting ''United States Code''; and by striking ''subdivision'' and inserting ''subparagraph''.

Section 2B3.1(b)(3) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''cumulative adjustments from (2) and (3)'' and inserting ''cumulative adjustments from application of paragraphs (2) and (3)''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definitions.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Dangerous Weapon.*—'';

in Note 3 by inserting at the beginning the following new heading: ''*Definition of 'Loss'.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Cumulative Application of Subsections (b)(2) and (b)(3).*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—'';

and in Note 6 by inserting at the beginning the following new heading: '' '*A Threat of Death*'.—''.

Section 2B3.2(b)(3)(B) is amended by striking ''subdivisions'' and inserting ''clauses''.

Section 2B3.2(b)(4) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''cumulative adjustments from (3) and (4)'' and inserting ''cumulative adjustments from application of paragraphs (3) and (4)''.

The Commentary to § 2B3.2 captioned ''Application Notes'' is amended—

in Note 2 by inserting at the beginning the following new heading: ''*Threat of Injury or Serious Damage.*—'';

in Note 3 by inserting at the beginning the following new heading: ''*Offenses Involving Public Officials and Other Extortion Offenses.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Cumulative Application of Subsections (b)(3) and (b)(4).*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Definition of 'Loss to the Victim'.*—'';

in Note 6 by inserting at the beginning the following new heading: ''*Defendant's Preparation or Ability to Carry Out a Threat.*—'';

in Note 7 by inserting at the beginning the following new heading: ''*Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims.*—'';

and in Note 8 by inserting at the beginning the following new heading: ''*Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim.*—''.

Section 2C1.8(b)(3) is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to § 2C1.8 captioned ''Application Notes'' is amended in Note 2 by striking ''Federal'' both places such term appears and inserting ''federal''; and by striking ''Presidential'' and inserting ''presidential''.

Section 2D1.1(b)(14)(C)(ii) is amended by striking ''subdivision'' and inserting ''subparagraph''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended—

in Note 8(D)—

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

''1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm

1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg

1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm

1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm'';

and inserting the following:

''1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg

1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm

1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm

1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg'';

and under the heading relating to Schedule III Substances (except ketamine), by striking ''1 unit of a Schedule III Substance'' and inserting ''1 unit of a Schedule III Substance (except Ketamine)'';

and in Note 9, under the heading relating to Hallucinogens, by striking the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg

MDA 250 mg

MDMA 250 mg

Mescaline 500 mg

PCP* 5 mg'';

and inserting the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg

3,4-Methylenedioxyamphetamine (MDA) 250 mg

3,4-Methylenedioxymethamphetamine (MDMA) 250 mg

Mescaline 500 mg

Phencyclidine (PCP)* 5 mg''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Section 6453 of the Anti-Drug Abuse Act of 1988'' and inserting ''section 6453 of Public Law 100–690''.

The Commentary to § 2D1.2 captioned ''Background'' is amended by striking ''Section 6454 of the Anti-Drug Abuse Act of 1988'' and inserting ''section 6454 of Public Law 100–690''.

The Commentary to § 2D1.5 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Inapplicability of Chapter Three Adjustment.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—'';

in Note 3 by inserting at the beginning the following new heading: '' '*Continuing Series of Violations*'.—'';

and in Note 4 by inserting at the beginning the following new heading: ''*Multiple Counts.*—''.

The Commentary to § 2D1.5 captioned ''Background'' is amended by striking ''Title 21 U.S.C. 848'' and inserting ''Section 848 of title 21, United States Code,''.

Section 2E2.1(b)(2) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''the combined increase from (1) and (2)'' and inserting ''the combined increase from application of paragraphs (1) and (2)''.

The Commentary to § 2E2.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definitions.*—'';

and in Note 2 by inserting at the beginning the following new heading: ''*Interpretation of Specific Offense Characteristics.*—''.

Section 2E3.1(a)(1) is amended by striking ''subdivision'' and inserting ''paragraph''.

The Commentary to § 2E3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 2156(g)'' and inserting ''§ 2156(f)''.

Section 2H2.1(a)(2) is amended by striking ''in (3)'' and inserting ''in paragraph (3)''.

The Commentary to § 2H2.1 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—''.

Section 2K1.4(b)(2) is amended by striking ''under (a)(4)'' and inserting ''under subsection (a)(4)''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 1 by striking ''United State Code'' both place such term appears and inserting ''United States Code''.

The Commentary to § 2S1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking ''Federal'' and inserting ''federal'';

and in Note 4(B)(vi) by striking ''subdivisions'' and inserting ''clauses''.

Section 3B1.1(c) is amended by striking ''in (a) or (b)'' and inserting ''in subsection (a) or (b)''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definition of 'Participant'.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Organizer, Leader, Manager, or Supervisor of One or More Participants.*—'';

in Note 3 by inserting at the beginning the following new heading: '' '*Otherwise Extensive*'.—'';

and in Note 4 by inserting at the beginning the following new heading: ''*Factors to Consider.*—''; and by striking ''decision making'' and inserting ''decision-making''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended in Note 2 by inserting at the beginning the following new heading: ''*Application of Subsection (b).*—''.

Section 4A1.1(b) is amended by striking ''in (a)'' and inserting ''in subsection (a)''.

Section 4A1.1(c) is amended by striking ''in (a) or (b)'' and inserting ''in subsection (a) or (b)''.

Section 4A1.1(d) is amended by striking ''under (a), (b), or (c)'' and inserting ''under subsection (a), (b), or (c)''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended—

in Note 1, in the heading, by striking ''*§ 4A1.1(a).*'' and inserting ''*§ 4A1.1(a).*—'';

in Note 2, in the heading, by striking ''*§ 4A1.1(b).*'' and inserting ''§ *4A1.1(b).*—'';

in Note 3, in the heading, by striking ''*§ 4A1.1(c).*'' and inserting ''*§ 4A1.1(c).*—'';

in Note 4, in the heading, by striking ''*§ 4A1.1(d).*'' and inserting ''*§ 4A1.1(d).*—'';

and in Note 5, in the heading, by striking ''*§ 4A1.1(e).*'' and inserting ''*§ 4A1.1(e).*—''.

Section 4A1.2(a)(2) is amended by striking ''by (A) or (B)'' and inserting ''by subparagraph (A) or (B)''.

Section 4A1.2(d)(2)(B) is amended by striking ''in (A)'' and inserting ''in subparagraph (A)''.

Section 5E1.2(c)(2) is amended by striking ''in (4)'' and inserting ''in paragraph (4)''.

Section 5F1.6 is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to 5F1.6 captioned ''Application Notes'' is amended in Note 1 by inserting at the beginning the following new heading: ''*Definition of 'Federal Benefit'.*—''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended—

in Note 1 by striking ''*See* Note 3'' and inserting ''*See* Application Note 3''.

in Note 2(A) by striking ''subdivision'' and inserting ''subparagraph'';

in Note 4(B)(i) by striking ''a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)'' and inserting ''a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)'';

in Note 4(B)(ii) by striking ''one count of 18 U.S.C. 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)'' and inserting ''one count of 18 U.S.C. 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)'';

and in Note 4(B)(iii) by striking the following:

''The defendant is convicted of two counts of 18 U.S.C. 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. 113(a)(3) (10 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.'';

and inserting the following:

''The defendant is convicted of two counts of 18 U.S.C. 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. 113(a)(3) (10-year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 120 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.''.

The Commentary to § 5K1.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Sentence Below Statutorily Required Minimum Sentence.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Interaction*

with Acceptance of Responsibility Reduction.—'';

and in Note 3 by inserting at the beginning the following new heading: ''*Government's Evaluation of Extent of Defendant's Assistance.*—''.

The Commentary to § 5K1.1 captioned ''Background'' is amended by striking ''*in camera*'' and inserting ''in camera''.

Section 5K2.0(e) is amended by striking ''*in camera*'' and inserting ''in camera''.

The Commentary to § 5K2.0 captioned ''Application Notes'' is amended in Note 3(C) by striking ''subdivision'' and inserting ''subparagraph''.

Section 6A1.5 is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to § 8B2.1 captioned ''Application Notes'' is amended in Note 4(A) by striking ''any Federal, State,'' and inserting ''any federal, state,''.

7. Simplification of Three-Step Process

Synopsis of Proposed Amendment: In September 2023, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2024, the ''exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.'' U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 88 FR 60536 (Sept. 1, 2023). Consistent with this priority, the Commission is publishing these issues for comment and proposed amendment to inform the Commission's consideration of these issues.

The Three-Step Process in the Guidelines Manual

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the ''Act'') provides for the development of guidelines that will further the basic purposes of criminal sentencing: deterrence, incapacitation, retribution, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process. The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to establish categories of offenses and categories of defendants for use in prescribing guideline ranges that specify an appropriate sentence and to consider whether, and to what extent, specific offense-based and offender-based factors are relevant to sentencing. *See* 28 U.S.C. 994(c) and (d). In relation to the establishment of categories of defendants, the Act placed several limitations upon the Commission's ability to consider certain personal and individual characteristics in establishing the guidelines and policy statements. *See* 28 U.S.C. 994(d), (e).

In *United States* v. *Booker,* 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be ''the starting point and the initial benchmark'' in sentencing proceedings. *See Gall* v. *United States,* 552 U.S. 38, 49 (2007); *see also Peugh* v. *United States,* 569 U.S. 530 (2013) (noting that ''the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing''). After determining the kinds of sentence and guideline range, however, the court must also fully consider the factors in 18 U.S.C. 3553(a), including, among other factors, ''the nature and circumstances of the offense and the history and characteristics of the defendant,'' to determine a sentence that is sufficient but not greater than necessary.

In the wake of *Booker* and other cases, § 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the *Guidelines Manual.* It sets forth a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of § 1B1.1 (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range and determines the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. 3553(a) in deciding what sentence to impose (whether within the applicable guideline range, or whether as a departure or as a variance (or as both)).

The first step in the three-step process, as set forth in § 1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), and Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

The second step in the three-step process, as set forth in § 1B1.1(b), requires the court to consider ''Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.'' Authorized grounds for departures based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case are described throughout the *Guidelines Manual:* several Chapter Two offense guidelines and Chapter Eight organizational guidelines contain departure provisions within their corresponding Commentary; grounds for departure based on criminal history are provided in Chapter Four; and Chapter Five sets forth various policy statements with additional grounds for departure. Chapter Five, Part H, addresses the relevance of certain specific personal characteristics in sentencing by allocating them into three general categories. The first category includes specific personal characteristics that Congress has prohibited from consideration or that the Commission has determined should be prohibited. *See, e.g.,* USSG § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)). The second category includes specific personal characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See, e.g.,* §§ 5H1.2 (Employment Record); 5H1.6 (Family Ties and Responsibilities (Policy Statement)). The third category includes specific personal characteristics that Congress directed the Commission to consider in the guidelines only to the extent that they have relevance to sentencing. *See, e.g.,* USSG §§ 5H1.1 (Age (Policy Statement)); 5H1.3 (Mental and Emotional Conditions (Policy Statement)).

The third step in the three-step process, as set forth in § 1B1.1(c), requires the court to ''consider the applicable factors in 18 U.S.C. 3553(a) taken as a whole.'' Specifically, section 3553(a) provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

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

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

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

18 U.S.C. 3553(a).

Post-*Booker,* courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.

Proposed Amendment

The proposed amendment contains two parts. Part A contains issues for comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in § 1B1.1 and the use of departures and policy statements relating to specific personal characteristics. Part B contains a proposed amendment that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is ''sufficient, but not greater than necessary,'' and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics. The proposed amendment set forth in Part B also seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. 3553(a).

The proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions. *See United States* v. *Booker,* 543 U.S. 220 (2005); *Irizarry* v. *United States,* 553 U.S. 708 (2008) (holding that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give ''reasonable notice'' that the court is contemplating a ''departure'' from the recommended guideline range on a ground not identified for departure in the presentence report or in a party's prehearing submission, does not apply to a ''variance'' from a recommended guideline range).

The proposed amendment would revise Chapter One in multiple ways. First, it would delete the ''Original Introduction to the Guidelines Manual'' currently contained in Chapter One, Part A. This introduction would be published as a historical background in Appendix B (Selected Sentencing Statutes) of the *Guidelines Manual.* Second, the proposed amendment would revise the application instructions provided in § 1B1.1 to reflect the simplification of the three-step process into two steps. Additionally, the definition of ''departures'' is removed from the application notes to § 1B1.1, and the Background Commentary is revised accordingly.

Consistent with the revised approach, the proposed amendment would reclassify most ''departures'' currently provided throughout the *Guidelines Manual.* Under the new approach, current departure provisions would be retained in more generalized language. Instead of being identified as departures, they would be generally reclassified as ''Additional Considerations'' that may be relevant to the court's determination under 18 U.S.C. 3553(a). Changes would be made throughout the *Guidelines Manual* by revising the departure provisions currently contained in commentary to various guidelines. Such provisions would be maintained in a new section to the commentary titled ''Additional Considerations'' and are intended to retain, to the extent possible, the guidance and considerations provided by the deleted provisions and to be neutral as to the scope and content of the conduct covered.

The proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter's purpose in the introductory commentary noting that ''a sentence is within the guidelines if it complies with each applicable section of this chapter.'' All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, most of the provisions in Chapter Five, Part K (Departures), would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

The proposed amendment would also create a new Chapter Six (renumbering existing chapters accordingly) to facilitate the court's consideration of 18 U.S.C. 3553(a). The new chapter is divided into three guidelines. The first generally reflects the court's consideration of the section 3553(a) factors and specifically references those

factors. The second and third guidelines compile factors which generally are not considered in the calculation of the guideline range in Chapters Two through Five, but which may be relevant to the court's consideration of ''the nature and circumstances of the offense and the history and characteristics of the defendant'' pursuant to 18 U.S.C. 3553(a)(1). These factors set forth reasons from former Parts H and K of Chapter Five, including factors that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to section 3553(a). While the list of factors is provided to both facilitate the court's consideration and to assist with the collection of data by the Commission, the proposed amendment includes language recognizing that the nature, extent, and significance of specific personal characteristics can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline ranges. As such, the new chapter notes that the factors identified are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.

The issues for comment set forth below are informed by the proposed amendment contained in Part B. In addition to receiving input from the issues for comment below, the Commission anticipates both general comment on Part B of the proposed amendment and welcomes line edits on the specific changes proposed.

(A) Issues for Comment

1. Part B of the proposed amendment would reconceptualize and simplify the three-step process, as set forth in § 1B1.1 (Application Instructions), to streamline the application of the *Guidelines Manual* and to better reflect the interaction between 18 U.S.C. 3553(a) and the guidelines. It would do so by removing the second step in the three-step process, as set forth in § 1B1.1(b), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics. The *Guidelines Manual* currently contains more than two hundred departure provisions in Chapter Five, Part K, and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H, contains twelve policy statements addressing the relevance of certain specific personal characteristics in sentencing. The Commission invites general comment on whether the Commission should reconceptualize and simplify the three-step process in this manner. If so, what, if any, revisions would be appropriate to further the Commission's goal to reconceptualize and simplify the three-step process? If not, are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

2. The Commission seeks comment on whether revising the three-step process either in general or as implemented in any particular provision in Part B of the proposed amendment, is consistent with 28 U.S.C. 994 and 995 and all other provisions of federal law. In particular, the Commission seeks comment regarding whether providing guidance to the courts regarding consideration of the other factors in 18 U.S.C. 3553(a), including providing examples of factors that may be relevant to the court's determination of the appropriate sentence, is consistent with the Commission's authority. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission.

3. The proposed amendment contained in Part B would continue to account for factors contained in most of the two hundred departure provisions in Chapter Five, Parts H and K, and the commentary to various guidelines in different ways. If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to account for these factors? If so, how and why? Should the Commission account for these factors in the manner set forth in Part B of the proposed amendment? If not, should the Commission consider a different approach? For example, should the Commission remove some or all of the specific factors and rely on a more general policy statement referencing the sentencing factors in 18 U.S.C.§ 3553(a)? What should such a policy statement specifically provide? What factors should be retained or removed, and why?

4. The proposed amendment would create a new Chapter Six (and renumber existing chapters accordingly) that consolidate in three policy statements many of the factors in contained in Chapter Five, Parts H and K. The new Chapter Six set forth in Part B of the proposed amendment would facilitate the court's consideration of 18 U.S.C. 3553(a). The new chapter is divided into three guidelines, § 6A1.1 through § 6A1.3. New § 6A1.1 generally reflects the court's consideration of the section 3553(a) factors and specifically references those factors. New §§ 6A1.2 and 6A1.3 compile factors which generally are not considered in the calculation of the guideline range in Chapters Two through Five, but which may be relevant to the court's consideration of ''the nature and circumstances of the offense and the history and characteristics of the defendant'' pursuant to 18 U.S.C. 3553(a)(1). New § 6A1.2 enumerates certain personal characteristics, while § 6A1.3 provides a list of offense characteristics along with some guidance for consideration of the court. The Commission does not intend to expand the list of personal and offense characteristics beyond those set forth in the proposed amendment. The Commission does, however, seek comment on whether the policy statement compiling factors relating to personal characteristics in § 6A1.2 should include more specific guidance to the court regarding when and under what types of circumstances any such characteristic may be relevant to the court's sentencing determination in a manner that is more similar to new § 6A1.3. Similarly, should the Commission provide different guidance regarding the offense characteristics in § 6A1.3? If so, what guidance should the Commission provide for both personal characteristics and offense characteristics, and why? If not, how should the Commission lay out such characteristics and why?

5. In addition to new Chapter Six, Part B of the proposed amendment would reclassify most ''departures'' currently provided throughout the *Guidelines Manual.* Instead of being identified as departures, they would be generally reclassified in the corresponding Chapter Two provisions as ''Additional Offense Specific Considerations'' that may be relevant to the court's determination under 18 U.S.C. 3553(a). Under the new approach, the current departure provisions would be retained in more generalized language but are intended to be neutral as to the scope and content of the conduct covered by the existing departures. The Commission seeks comment on whether some or all of the factors contained in the commentary to various guidelines should be consolidated in the new Chapter Six. If so, which factors should be moved into new Chapter Six, and why? Which factors should be retained in their current guideline or policy statement, and why?

The Commission further seeks comment regarding whether any revisions made in reclassifying

departures as ''Additional Considerations'' unintentionally remove guidance and considerations provided by the deleted provisions or unintentionally expand or contract the scope and content of those provisions.

6. If the Commission were to remove or limit the departure provisions in the *Guidelines Manual,* how should the Commission continue to account for sentencing considerations for substantial assistance to authorities and refusal to assist authorities, currently provided for in §§ 5K1.1 (Substantial Assistance to Authorities (Policy Statement)) and 5K1.2 (Refusal to Assist (Policy Statement))?

7. If the Commission were to remove or limit the departure provisions in the *Guidelines Manual,* how should the Commission continue to account for sentencing considerations relating to early disposition programs, currently provided for in § 5K3.1 (Early Disposition Programs (Policy Statement))?

8. The Commission seeks general comment on whether the proposed changes to the *Guidelines Manual,* as set forth in Part B of the proposed amendment, would make it easier for courts to report the reasons for their sentences and allow possible improvements in data collection on all of the factors courts consider when imposing a sentence consistent with 18 U.S.C. 3553(a). What, if any, changes to the proposed amendment would enhance such reporting and data collection efforts? What changes should the Commission consider, in conjunction with the Judicial Conference of the United States, to the Statement of Reasons form if the proposed amendment is adopted?

(B) Proposed Amendment

Chapter One is amended by striking Part A as follows:

''*Part A—Introduction and Authority*

Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ('Commission') when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. Original Introduction to the Guidelines Manual

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in

sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity—sentencing every offender to five years—destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take

such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the

Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' 18 U.S.C. 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of § 5K2.12 (Coercion and Duress), and § 5K2.19 (Post-Sentencing Rehabilitative Efforts) * list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

* *Note:* Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.,* physical injury) may infrequently occur in connection with a particular crime (*e.g.,* fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' 28 U.S.C. 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly

when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**

* *Note:* The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a 'nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.' (*See* USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to § 5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in § 5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment 821.)

** *Note:* Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)

(e) Multi-Count Convictions

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment—sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.,* separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.,* 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. Continuing Evolution and Role of the Guidelines

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first

theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta* v. *United States,* 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States* v. *Booker,* 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker,* the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. 3553(a). *See* 28 U.S.C. 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita* v. *United States,* 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita,* the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

[T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. 3553(a) . . . . The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 347–48 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[,]' *id.* at 348, and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. 3553(a)(4), (a)(5); *Booker,* 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita,* 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall* v. *United States,* 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. 3553(a). *See Rita,* 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' *Gall,* 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita:*

The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker,* by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. at 350; *see also Booker,* 543 U.S. at 264 ('[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'); *Gall,* 552 U.S. at 46 ('[E]ven though the

Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita,* the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.').

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. 994(x), the Commission publishes guideline amendment proposals in the **Federal Register** and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough* v. *United States,* 552 U.S. 85 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum.' *Id.* at 103; 28 U.S.C. 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.

3. Authority

§ 1A3.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.'';

and inserting the following:

''**Part A—Introduction and Authority**

Introductory Commentary

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. This Part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

Further information describing the historical development and evolution of the federal sentencing guidelines is set forth in Appendix D of the Guidelines Manual.

1. Authority

§ 1A1.1. Authority

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.''.

Section 1B1.1(a) is amended—

by inserting at the beginning the following new heading: ''*Step One: Calculation of Guideline Range and Determination of Sentencing Requirements and Options under the Guidelines Manual.*—'';

in paragraph 5 by striking ''Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three'' and inserting ''Apply the adjustment for the defendant's acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three'';

in paragraph 6 by striking ''Part B'' and inserting ''Parts B and C'';

and by inserting at the end the following new paragraph 9:

''(9) Apply, as appropriate, Part K of Chapter Five.''.

Section 1B1.1 is amended by striking subsections (b) and (c) as follows:

''(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. 3553(a) taken as a whole. *See* 18 U.S.C. 3553(a).'';

and inserting the following new subsection (b):

''(b) *Step Two: Consideration of Factors Set Forth in 18 U.S.C. 3553(a) and Related Guidance.*—The court shall then consider as a whole the additional factors identified in 18 U.S.C. 3553(a) and the guidance provided in Chapter Six to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a).''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1—

by striking subparagraph (F) as follows:

''(F) 'Departure' means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. 'Depart' means grant a departure.

'Downward departure' means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. 'Depart downward' means grant a downward departure.

'Upward departure' means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. 'Depart upward' means grant an upward departure.'';

and by redesignating subparagraphs (G) through (M) as subparagraphs (F) through (L), respectively.

The Commentary to § 1B1.1 captioned ''Background'' is amended by striking the following:

''The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a 'variance'. *See Irizarry* v. *United States,* 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as 'sentences imposed under the framework set out in the Guidelines').'';

and inserting the following:

''The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court's decision in *United States* v. *Booker,* 543 U.S. 220 (2005), by setting forth both essential steps of the court's inquiry in making this determination.

District courts are required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. 3553(a)(4), (a)(5); *Booker,* 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita* v. *United States,* 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall* v. *United States,* 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'); *Peugh* v. *United States,* 569 U.S. 530 (2013) (noting that 'the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing'). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution to any victims of the offense. *See Rita,* 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process and also instructs courts to consider guidance provided by the Commission in Chapter Six.''.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''the court would be forced to use an artificial guideline and then depart from it'' and inserting ''the court would be forced to use an artificial guideline and then impose a sentence that is greater than the otherwise applicable guideline range''; by striking ''the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure'' and inserting ''the probation officer might need to calculate the robbery guideline to assist the court in determining an appropriate sentence''; and by striking ''Chapter Six, Part B (Plea Agreements)'' and inserting '' Chapter Seven, Part B (Plea Agreements)''.

Section 1B1.3(b) is amended in the heading by striking ''*Five (Determining the Sentence)*'' and inserting ''*Five (Determining the Sentencing Range and Options Under the Guidelines)*''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended—

in Note 3(B) by striking ''The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.'';

and in Note 6(B) by striking ''In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure).''.

The Commentary to § 1B1.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The conduct of members of a conspiracy prior to the defendant joining the conspiracy, which is not otherwise considered as part of the defendant's relevant conduct.

(B) The applicable guideline does not adequately account the risk or danger of harm created.

See §§ 6A1.1; 6A1.3.''.

Section 1B1.4 is amended—

in the heading by striking ''*(Selecting a Point Within the Guideline Range or Departing from the Guidelines)*'';

and by striking ''In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted'' and inserting ''In determining the sentence to impose''.

The Commentary to 1B1.4 captioned ''Background'' is amended by striking the following:

''This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. 3661, which recodifies 18 U.S.C. 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy

that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.,* Chapter Five, Part H (Specific Offender Characteristics).'';

and inserting the following:

''This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing a sentence. The section is based on 18 U.S.C. 3661, which recodifies 18 U.S.C. 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines may provide a reason for sentencing at the top of, or above, the guideline range. Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) details factors which generally are not considered in the calculation of the guideline range, but which courts regularly consider pursuant to 18 U.S.C. 3553(a).''.

Section 1B1.7 is amended by striking ''the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines'' and inserting ''the commentary may suggest additional considerations for the court to take into account in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a)''; and by striking ''such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines'' and inserting ''such commentary may provide guidance in determining the appropriate sentence to impose''.

Section 1B1.8(b)(5) is amended by striking ''in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities)'' and inserting ''in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities)''.

The Commentary to § 1B1.8 captioned ''Application Notes'' is amended in Note 1 by striking ''Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities); *e.g.,* a court may refuse to depart downward on the basis of such information.'' and inserting ''Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to increase a defendant's applicable guideline range. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities). For example, a court may refuse to impose a sentence that is below the otherwise applicable guideline range on the basis of such information.''.

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended—

in Note 1(A) by striking ''(*i.e.,* the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance)'' and inserting ''(*i.e.,* the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of the remaining provisions in § 1B1.1)'';

and in Note 3 by striking ''representing a downward departure of 20 percent'' and inserting ''representing a reduction of 20 percent''; and by striking ''authorizing, upon government motion, a downward departure based on the defendant's substantial assistance'' and inserting ''authorizing the court, upon government motion, to impose a sentence that is below the otherwise applicable guideline range based on the defendant's substantial assistance''.

Section 1B.12 is amended by striking ''sufficient to warrant an upward departure from that guideline range'' and inserting ''sufficient to warrant imposing a sentence that exceeds that guideline range''.

Chapter Two is amended in the Introductory Commentary by inserting after ''adjust the offense level upward or downward.'' the following: ''Additionally, each guideline may identify certain conduct not fully accounted for in the base offense level or specific offense characteristics that the district court may choose to consider pursuant to the additional factors set forth in 18 U.S.C. 3553(a) and the guidance set forth in Chapter Six (Determining the Sentence Imposed).''; and by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures)'' and inserting: ''and Chapter Four, Part B (Career Offenders and Criminal Livelihood). Additionally, Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) sets forth other factors that a court may nevertheless consider in determining the appropriate sentence in a particular case pursuant to 18 U.S.C. 3553(a)''.

The Commentary to § 2A1.1 captioned ''Application Notes'' is amended in Note 2 by striking the following:

''*Imposition of Life Sentence.*—

(A) *Offenses Involving Premeditated Killing.*—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. 3553(e).

(B) *Felony Murder.*—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.,* recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in § 2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.'';

and inserting the following:

''*Offenses Involving Premeditated Killing.*—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. If a mandatory statutory term of life imprisonment applies, a lesser term of imprisonment is permissible only in cases in which the government files a motion pertaining to the defendant's substantial assistance, as provided in 18 U.S.C. 3553(e).''.

The Commentary to § 2A1.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Defendant's Intent in Felony Murder Case.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant did not intentionally or knowingly cause death in the course of the commission of a felony (*e.g.,* defendant passed a note to a bank teller in the course of a robbery causing the teller to have a heart attack) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A1.2 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. *Upward Departure Provision.*—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* § 5K2.8 (Extreme Conduct).'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Extreme Conduct.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A2.1 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. *Upward Departure Provision.*—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.''.

The Commentary to § 2A2.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Substantial Risk of Death or Serious Bodily Injury to Multiple Victims.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense created a substantial risk of death or serious bodily injury to more than one person may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A2.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. *Upward Departure Provision.*—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* § 5K2.7 (Disruption of Governmental Function).''.

The Commentary to § 2A2.4 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Disruption of Governmental Function.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant's conduct resulted in a significant disruption of a governmental function may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Note 6 as follows:

''6. *Upward Departure Provision.*—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See* § 5K2.8 (Extreme Conduct).''.

The Commentary to § 2A3.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Victim Sexually Abused by More Than One Participant.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a victim was sexually abused by more than one participant may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 6 as follows:

''6. *Upward Departure Consideration.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.''.

The Commentary to § 2A3.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Underrepresentation of Seriousness of the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline substantially underrepresents the seriousness of the offense (*e.g.,* the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A3.6 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Upward Departure.*—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. 2250(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.''.

The Commentary to § 2A3.6 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Characteristic:*

1. *Sex Offense Against or Serious Bodily Injury to a Minor.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a sex offense was committed against a minor, or resulted in serious bodily injury to a minor, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A5.3 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.''.

The Commentary to § 2A5.3 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Endangering the Safety of the Aircraft or Passengers.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the conduct intentionally or recklessly endangered the safety of the aircraft or passengers may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Departure Provisions.*—

(A) *In General.*—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. *See* Chapter Five, Part K (Departures).

(B) *Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm.*—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.''.

The Commentary to § 2A6.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Multiple Victims or Multiple Harms to Same Victim.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved (A) substantially more than two threatening communications to the same victim, (B) a prolonged period of making harassing communications to the same victim, (C) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (D) multiple victims, or (E) substantial pecuniary harm to a victim, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended by striking Note 5 as follows:

''5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.''.

The Commentary to § 2A6.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factor Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline does not adequately reflect the extent or seriousness of the conduct involved (*e.g.,* that the defendant stalked the victim on many occasions over a prolonged period of time) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended—

in Note 8(A) by striking ''If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.'';

in Note 14(B)(i) by striking ''§ 8A1.1 (Applicability of Chapter Eight)'' and inserting ''§ 9A1.1 (Applicability of Chapter Nine)'';

and by striking Note 21 as follows:

''21. *Departure Considerations.*—

(A) *Upward Departure Considerations.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a 'protected computer', as defined in 18 U.S.C. 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.*—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) *Downward Departure Consideration.*—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

(D) *Downward Departure for Major Disaster or Emergency Victims.*—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.''.

The Commentary to § 2B1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially understates the seriousness of the offense.

(B) A primary objective of the offense was an aggravating, non-monetary objective (*e.g.,* to inflict emotional harm).

(C) The offense caused or risked substantial non-monetary harm (*e.g.,* physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest).

(D) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss.

(E) The offense created a risk of substantial loss beyond the loss determination, such as a significant disruption of a national financial market.

(F) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.

(G) The application of a particular enhancement is premised upon alternative factors and more than one of the enumerated factors applied (*e.g.,* § 2B1.1(b)(9)).

(H) The information stolen as part of the offense was stolen in furtherance of a broader criminal purpose.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially overstates the seriousness of the offense.

(B) The offense produces an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims.

(C) The defendant had little or no gain as related to the loss.

(D) The defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2B1.5 captioned ''Application Notes'' is amended by striking Note 9 as follows:

''9. *Upward Departure Provision.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources or paleontological resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.,* the Statue of Liberty or the Liberty Bell).''.

The Commentary to § 2B1.5 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Cultural Heritage Resources.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially understates the seriousness of the offense may be relevant.

(B) The offense also involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources.

(C) The offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.,* the Statue of Liberty or the Liberty Bell).

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2B2.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Characteristic:*

1. *Use of a Weapon.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the use of a weapon may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2B2.1 captioned ''Background'' is amended by striking ''Weapon use would be a ground for upward departure.''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended—

by striking Note 5 as follows:

''5. If the defendant intended to murder the victim, an upward departure may be warranted; *see* § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).'';

and by renumbering Note 6 as Note 5.

The Commentary to § 2B3.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Intent to Murder Victim.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant intended to murder the victim may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2B3.2 captioned ''Application Notes'' is amended by striking Notes 7 and 8 as follows:

''7. If the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.,* in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.''.

The Commentary to § 2B3.2 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Threat of Death or Serious Bodily Injury to Numerous Victims.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.,* in the case of a plan to derail a passenger train or poison consumer products) may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Organized Criminal Activity.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a),

evidence that the offense involved organized criminal activity may be relevant. *See* §§ 6A1.1; 6A1.3.''.

Section 2B4.1(c)(1) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''.

The Commentary to § 2B5.3 captioned ''Application Notes'' is amended by striking Note 5 as follows:

''5. *Departure Considerations.*—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.''.

The Commentary to § 2B5.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Additional Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.

See §§ 6A1.1; 6A1.3.''.

Section 2C1.1(d)(1) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended—

in Note 5 by striking ''Chapter Three, Parts A–D'' and inserting ''Chapter Three, Parts A–E'';

and by striking Note 7 as follows:

''7. *Upward Departure Provisions.*—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in § 2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* § 5K2.7 (Disruption of Governmental Function).''.

The Commentary to § 2C1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Monetary Value of the Unlawful Payment.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the monetary value of the unlawful payment is not known or evidence that the monetary value of the unlawful payment does not adequately reflect the seriousness of the offense may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Systematic or Pervasive Corruption of Governmental Function.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government may be relevant. *See* §§ 6A1.1; 6A1.3.''.

Section 2C1.2(c)(1) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''.

The Commentary to § 2C1.8 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Departure Provision.*—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.''.

The Commentary to § 2C1.8 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Systematic or Pervasive Corruption of Governmental Function.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended—

in Note 2 by striking the following:

''An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.'';

in Note 10 by striking the following:

''In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.'';

in Note 18(A) by striking ''In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.'';

in Note 22 by striking the following:

''*Application of Subsection (e)(1).*—

(A) *Definition.*—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. 2246(2) and (3), respectively.

(B) *Upward Departure Provision.*—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.'',

and inserting the following:

''*Application of Subsection (e)(1).*—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. 2246(2) and (3), respectively.'';

in Note 24 by striking ''a lower sentence imposed (including a downward departure)'' and inserting ''a lower sentence imposed'';

and by striking Note 27 as follows:

''27. *Departure Considerations.*—

(A) *Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.*—If, in a reverse sting (an

operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

(B) *Upward Departure Based on Drug Quantity.*—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Upward Departure Based on Unusually High Purity.*—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

(D) *Departure Based on Potency of Synthetic Cathinones.*—In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) *Departures for Certain Cases involving Synthetic Cannabinoids.*—

(i) *Departure Based on Concentration of Synthetic Cannabinoids.*—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) *Downward Departure Based on Potency of Synthetic Cannabinoids.*—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH–018 or AM–2201. In such a case, a downward departure may be warranted.''.

The Commentary to § 2D1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) *Sophisticated Manner.*—The mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

(B) *Drug Quantity.*—The drug quantity used to determine the base offense level substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Unusual High Purity.*—The offense involved trafficking in controlled substances, compounds, or mixtures of unusually high purity, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone, for which the guideline itself provides for the consideration of purity (*see* the Notes to Drug Quantity Table).

(D) *Environmental Harm or Other Threat to Public Health or Safety.*—The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

(E) *LSD.*—The potential harm of liquid D-Lysergic Acid Diethylamide/Lysergide (LSD) (*i.e.,* LSD that has not been placed onto a carrier medium) is understated as a result of using the weight of the LSD alone to calculate the offense level.

(F) *Potency of Synthetic Cathinone.*—The potency of a synthetic cathinone is understated because a substantially lesser quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class.

(G) *Unusually High Concentration of Synthetic Cannabinoid.*—A synthetic cannabinoid is sprayed on or soaked into a plant or other base material in an unusually high concentration or is trafficked in a pure form as opposed to being combined with another substance.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) *Reversed Sting.*—The offense involved a reverse sting (*i.e.,* an operation in which a government agent

sells or negotiates to sell a controlled substance to a defendant) in which the government agent set a price for the controlled substance that was substantially below the market value resulting in the defendant purchasing a significantly greater quantity than available resources would have otherwise allowed.

(B) *Potency of Synthetic Cathinone or Synthetic Cannabinoid.*—The potency of a synthetic cathinone or synthetic cannabinoid is overstated because a substantially greater quantity of the synthetic cathinone or synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone or synthetic cannabinoid in the class.

(C) *Synthetic Cannabinoid Diluted.*—The substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D1.5 captioned ''Application Notes'' is amended—

by striking Note 2 as follows:

''2. If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.'';

and by renumbering Notes 3 and 4 as Notes 2 and 3, respectively.

The Commentary to § 2D1.5 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant sanctioned the use of violence as part of the enterprise, or that the number of persons managed by the defendant was extremely large, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D1.7 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (*e.g.,* transportation for the defendant's personal use), a downward departure may be warranted.'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factor for Large-Scale Trafficking.*—The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved a large-scale dealer, distributor, or manufacturer may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Offense Not Committed for Pecuniary Gain.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was not committed for pecuniary gain (*e.g.,* transportation for the defendant's personal use) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended—

in Note 1 by striking subparagraph (C) as follows:

''(C) *Upward Departure.*—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.'';

and in Note 4 by striking ''In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.''.

The Commentary to § 2D1.11 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline does not adequately address the seriousness of the offense because the offense involved two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes.

(B) The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D1.12 captioned ''Application Notes'' is amended—

by striking Note 1 as follows:

''1. If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.'';

by redesignating Notes 2, 3, and 4 as Notes 1, 2, and 3, respectively;

and in Note 2 (as so redesignated) by striking ''In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.''.

The Commentary to § 2D1.12 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material.

(B) The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D2.1 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption.

Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.'';

and by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Intended Consumption by Another.*—The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence establishing intended consumption by a person other than the defendant may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D2.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Numerous Persons.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in the death or serious bodily injury of a large number of persons may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Risk to Passengers.*—This guideline assumes that the offense involved the operation of a common carrier carrying a number of passengers (*e.g.,* a bus). In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that no or only a few passengers were placed at risk may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2D2.3 captioned ''Background'' is amended by striking ''The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, *e.g.,* a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.''.

The Commentary to § 2E1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking ''Chapter Three, Parts A, B, C, and D'' and inserting ''Chapter Three, Parts A, B, C, D, and E'';

and in Note 4 by striking ''If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.''.

The Commentary to § 2E1.2 captioned ''Application Notes'' is amended in Note 1 by striking ''Chapter Three, Parts A, B, C, and D'' and inserting ''Chapter Three, Parts A, B, C, D, and E''.

The Commentary to § 2E3.1 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. *Upward Departure Provision.*—The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).''.

The Commentary to § 2E3.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Extraordinary Cruelty or Exceptional Scale.*—The base offense levels provided for animal fighting ventures in subsections (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal).

(B) The offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).

See §§ 6A1.1; 6A1.3.''.

Section 2E5.1(c)(1) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended—

in Note 2 by striking ''Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures)'' and inserting ''Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense'';

and by striking Note 6 as follows:

''6. *Upward Departure Provision.*—If the offense involved more than ten victims, an upward departure may be warranted.''.

The Commentary to § 2G1.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury or involved more than ten victims may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended by striking Note 7 as follows:

''7. *Upward Departure Provision.*—If the offense involved more than ten minors, an upward departure may be warranted.''.

The Commentary to § 2G1.3 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *More than Ten Minors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved more than ten minors may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by striking Note 8 as follows:

''8. *Upward Departure Provision.*—An upward departure may be warranted if the offense involved more than 10 minors.''.

The Commentary to § 2G2.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *More than Ten Minors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved more than ten minors may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended—

in Note 6(B)(i) by striking ''If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.'';

in Note 6(B)(ii) by striking ''If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.'';

and by striking Note 9 as follows:

''9. *Upward Departure Provision.*—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.''.

The Commentary to § 2G2.2 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The number of images involved in the offense substantially underrepresents the number of minors depicted.

(B) The length of any video, video-clip, movie, or visual depiction involved in the offense is substantially more than 5 minutes.

(C) The defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) did not apply or subsection (b)(5) did apply but the enhancement does not adequately reflect the seriousness of the abuse or exploitation.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2H2.1 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Bodily Injury or Significant Property Dama*ge.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury or significant property damage may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended by striking Note 5 as follows:

''5. *Upward Departure.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm *(e.g.,* physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.''.

The Commentary to § 2H3.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm (*e.g.,* physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended by striking Notes 3 and 4 as follows:

''3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

4. In a case in which the defendant was convicted under 18 U.S.C. 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.,* in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.''.

The Commentary to § 2H4.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a defendant convicted under 18 U.S.C. 1589(b) or 1593A benefitted from participating in a venture described in those sections without knowing that (*i.e.,* in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2J1.2 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. *Upward Departure Considerations.*—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) or a particularly serious sex offense, an upward departure would be warranted.'';

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.2 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) A weapon was used, or bodily injury or significant property damage resulted.

(B) The offense involved an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) or a particularly serious sex offense.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2J1.3 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. If a weapon was used, or bodily injury or significant property damage

resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Weapon Used or Bodily Injury or Significant Property Damage Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a weapon was used, or bodily injury or significant property damage resulted, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.,* perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.'';

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.6 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Additional Acts of Obstructive Behavior.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) in a case where the defendant is convicted of both the underlying offense and the failure to appear count, evidence that the defendant committed additional acts of obstructive behavior (*e.g.,* perjury) during the investigation, prosecution, or sentencing of the instant offense may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended—

by striking Note 10 as follows:

''10. An upward departure may be warranted in any of the following circumstances: (A) the quantity of explosive materials significantly exceeded 1000 pounds; (B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (*e.g.,* plastic explosives); (C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals.'';

by redesignating Note 11 as Note 10;

and in Note 10 (as so redesignated) by striking ''However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.,* the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.''.

The Commentary to § 2K1.3 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The quantity of explosive materials significantly exceeded 1000 pounds.

(B) The explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (*e.g.,* plastic explosives).

(C) The defendant knowingly distributed explosive materials to a person under twenty-one years of age.

(D) The offense posed a substantial risk of death or bodily injury to multiple individuals.

(E) The defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.,* the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives).

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2K1.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. *Upward Departure Provision.*—If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).''.

The Commentary to § 2K1.4 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.''.

Section 2K2.1(b)(9)(B) is amended by striking ''subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 7 by striking ''In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§ 5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).'';

by striking Note 11 as follows:

''11. *Upward Departure Provisions.*—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.,* machineguns, destructive devices), military type assault rifles, non-detectable ('plastic') firearms (defined at 18 U.S.C. 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).'';

by redesignating Notes 12, 13, and 14 as Notes 11, 12, and 13, respectively;

in Note 12 (as so redesignated)—

by striking subparagraph (B) as follows:

''(B) *Upward Departure Provision.*—If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.'';

and by redesignating subparagraph (C) as subparagraph (B);

and in Note 13 (as so redesignated)—

by striking subparagraph (D) as follows:

''(D) *Upward Departure Provision.*—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.,* the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.'';

and by redesignating subparagraph (E) as subparagraph (D).

The Commentary to § 2K2.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created.

(B) The offense posed a substantial risk of death or bodily injury to multiple individuals.

(C) The number of firearms involved in the offense substantially exceeded 200.

(D) The defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms.

(E) The offense involved multiple National Firearms Act weapons (*e.g.,* machineguns, destructive devices), military type assault rifles, or non-detectable ('plastic') firearms (defined at 18 U.S.C. 922(p)).

(F) The offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. 921(a)(17)(B)).

(G) The defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.,* the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives).

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended—

in Note 2 by striking the following:

''*Application of Subsection (b).*—

(A) *In General.*—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.,* not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) *Upward Departure Provision.*—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. 924(c) or § 929(a) offense but is not determined to be a career offender under § 4B1.1.'';

and inserting the following:

''*Application of Subsection (b).*—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.,* not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.'';

and in Note 4 by striking the following:

''In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.,* the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).''.

The Commentary to § 2K2.4 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Seriousness of the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the minimum term required by 18 U.S.C. 924(c) or § 929(a) understates the seriousness of the offense involved (*e.g.,* the underlying offense determined under this guideline results in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had otherwise applicable Chapter Two enhancements for possession, use, or discharge of a firearm been applied) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2K2.5 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.''.

The Commentary to § 2K2.5 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Firearm Brandished, Discharged, or Otherwise Used.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) in a case where the cross reference from subsection (c)(1) does not apply, evidence that the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended—

in Note 4 by striking ''Application Note 1(M) of § 1B1.1'' and inserting ''Application Note 1(L) of § 1B1.1'';

and by striking Note 7 as follows:

''7. *Upward Departure Provisions.*—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.''.

The Commentary to § 2L1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence

that the offense involved any of the following may be relevant:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended by striking Notes 6, 7, and 8 as follows:

''6. *Departure Based on Seriousness of a Prior Offense.*—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* § 4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

7. *Departure Based on Time Served in State Custody.*—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under § 5G1.3(b) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). *See* § 5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

8. *Departure Based on Cultural Assimilation.*—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.''.

The Commentary to § 2L1.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline substantially understates the seriousness of the conduct underlying the prior offense may be relevant because of any of the following reasons:

(A) The length of the sentence imposed does not reflect the seriousness of the prior offense.

(B) The prior conviction is too remote to receive criminal history points (*see* § 4A1.2(e)).

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline overstates the seriousness of the conduct underlying the prior offense because the time actually served was substantially less than the length of the sentence imposed for the prior offense.

(B) The defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense and the time served is not covered by an adjustment under § 5G1.3(b). The court may also consider, among other things: (i) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (ii) the seriousness of any such additional criminal activity, including (I) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (II) whether the criminal activity resulted in death or serious bodily injury to any person, and (III) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (iii) the seriousness of the defendant's other criminal history.

(C) The defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, and those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States. The court may also consider, among other things: (i) the age in childhood at which the defendant began residing continuously in the United States; (ii) whether and for how long the defendant attended school in the United States; (iii) the duration of the defendant's continued residence in the United States; (iv) the duration of the defendant's presence outside the United States; (v) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States; (vi) the seriousness of the defendant's criminal history; and (vii) whether the defendant engaged in

additional criminal activity after illegally reentering the United States.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2L2.1 captioned ''Application Notes'' is amended—

by striking Note 3 as follows:

''3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.'';

by redesignating Note 4 as Note 3;

and by striking Note 5 as follows:

''5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.''.

The Commentary to § 2L2.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, that was of an especially serious type.

(B) The offense involved substantially more than 100 documents.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2L2.2 captioned ''Application Notes'' is amended by striking Note 6 as follows:

''6. *Upward Departure Provision.*—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. *See* Application Note 4 of the Commentary to § 3A1.4 (Terrorism).''.

The Commentary to § 2L2.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Entering the United States with Purpose to Engage in Terrorist Activity.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2M3.1 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Notes 2 and 3 as follows:

''2. The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).

3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.''.

The Commentary to § 2M3.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the revelation is likely to cause little or no harm may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2M4.1 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *War or Armed Conflict.*—This guideline does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended—

by striking Notes 1 and 2 as follows:

''1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).'';

and by redesignating Notes 3 and 4 as Notes 1 and 2.

The Commentary to § 2M5.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Additional Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences may be relevant. *See* §§ 6A1.1; 6A1.3.''

The Commentary to § 2M5.2 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

in Note 1 by striking the following:

''The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by striking Note 2 as follows:

''2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.''.

The Commentary to § 2M5.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Nonetheless, in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that such factors are present in an extreme form may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.

3. *Mitigating Factors Relating to the Offense.*—This guideline assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense conduct posed no such risk may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2M5.3 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. *Departure Provisions.*—

(A) *In General.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict.*—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.''.

The Commentary to § 2M5.3 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. Nonetheless, in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that such factors are present in an extreme form may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2N1.1 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

by striking Note 1 as follows:

''1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.'';

and by redesignating Note 2 as Note 1.

The Commentary to § 2N1.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2N1.2 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2N1.3 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended—

by striking Note 1 as follows:

''1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

by redesignating Note 2 as Note 1;

by striking Note 3 as follows:

''3. *Upward Departure Provisions.*—The following are circumstances in which an upward departure may be warranted:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. 7734.'';

and by redesignating Note 4 as Note 2.

The Commentary to § 2N2.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense.

(B) The defendant was convicted under 7 U.S.C. 7734.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline assumes a regulatory offense that involved knowing or reckless conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligence may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2P1.1 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by redesignating Notes 5 and 6 as Notes 4 and 5, respectively.

The Commentary to § 2P1.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Death or Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2P1.3 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Death or Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2Q1.1 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If death or serious bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).'';

and by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Death or Serious Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or serious bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2Q1.2 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.'';

redesignating Notes 5 through 8 as Notes 4 through 7, respectively;

in Note 4 (as so redesignated) by striking ''Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.'';

in Note 5 (as so redesignated) by striking ''Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).'';

in Note 6 (as so redesignated) by striking ''Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.'';

in Note 7 (as so redesignated) by striking ''Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.'';

and by striking Note 9 as follows:

''9. *Other Upward Departure Provisions.*—

(A) *Civil Adjudications and Failure to Comply with Administrative Order.*—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) *Extreme Psychological Injury.*—If the offense caused extreme psychological injury, an upward departure may be warranted. *See* § 5K2.3 (Extreme Psychological Injury).

(C) *Terrorism.*—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to § 3A1.4 (Terrorism).''.

The Commentary to § 2Q1.2 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense resulted in death or serious bodily injury.

(B) The defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order.

(C) The offense caused extreme psychological injury.

(D) The offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this guideline assumes knowing conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligent conduct may be relevant. *See* §§ 6A1.1; 6A1.3.

3. *Additional Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The harm resulting from the emission, release or discharge into the environment, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation.

(B) The nature of the risk created, and the number of people placed at risk.

(C) The nature and quantity of the substance or contamination involved in, and the risk associated with, the offense.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2Q1.3 captioned ''Application Notes'' is amended—

by striking Note 3 as follows:

''3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.'';

by redesignating Notes 4 through 7 as Notes 3 through 6;

in Note 3 (as so redesignated) by striking ''Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.'';

in Note 4 (as so redesignated) by striking ''Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).'';

in Note 5 (as so redesignated) by striking ''Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.'';

in Note 6 (as so redesignated) by striking ''Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.'';

and by striking Note 8 as follows:

''8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).''.

The Commentary to § 2Q1.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense resulted in death or serious bodily injury.

(B) The defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline assumes knowing conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligent conduct may be relevant. *See* §§ 6A1.1; 6A1.3.

3. *Additional Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The harm resulting from the emission, release or discharge into the environment, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation.

(B) The nature of the risk created, and the number of people placed at risk.

(C) The nature and quantity of the substance or contamination involved in, and the risk associated with, the offense.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 2Q1.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. *Departure Provisions.*—

(A) *Downward Departure Provision.*—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) *Upward Departure Provisions.*—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of § 3A1.4 (Terrorism).''.

The Commentary to § 2Q1.4 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The offense caused extreme psychological injury or caused substantial property damage or monetary loss.

(B) The offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2Q2.1 captioned ''Application Notes'' is amended—

by striking Note 5 as follows:

''5. If the offense involved the destruction of a substantial quantity of

fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.'';

and by redesignating Note 6 as Note 5.

The Commentary to § 2Q2.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, may be relevant. *See* §§ 6A1.1; 6A1.3.''.

Section 2R1.1(d)(1) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''.

Section 2R1.1(d)(2) is amended by striking ''§ 8C2.6'' and inserting ''§ 9C2.6''.

The Commentary to § 2R1.1 captioned ''Application Notes'' is amended—

in Note 3 by striking ''Chapter Eight'' and inserting ''Chapter Nine''; and by striking ''§ 8C2.4(a)(3)'' and inserting ''§ 9C2.4(a)(3)'';

and by striking Note 7 as follows:

''7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).''.

The Commentary to § 2R1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Defendant with Previous Antitrust Convictions.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant had prior antitrust convictions may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2R1.1 captioned ''Background'' is amended by striking ''Chapter Eight'' and inserting ''Chapter Nine''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 6A1.3'' both places such term appears and inserting ''§ 7A1.3''.

The Commentary to § 2T1.8 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. If the defendant was attempting to evade, rather than merely delay, payment of taxes, an upward departure may be warranted.'';

and by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Attempt to Evade Payment of Taxes.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant was attempting to evade, rather than merely delay, payment of taxes may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2T2.1 captioned ''Application Notes'' is amended—

in the caption by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. Offense conduct directed at more than tax evasion (*e.g.,* theft or fraud) may warrant an upward departure.''.

The Commentary to § 2T2.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense conduct was directed at more than tax evasion (*e.g.,* theft or fraud) may be relevant. *See* §§ 6A1.1; 6A1.3.''.

Chapter Two, Part T, Subpart 3 is amended in the Introductory Commentary by striking ''for departing upward if there is not another more specific applicable guideline'' and inserting ''for imposing a sentence that is greater than the otherwise applicable guideline range pursuant to Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a))''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended in Note 2 by striking ''Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted.''.

The Commentary to § 2T3.1 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the duties evaded on the items involved in the offense do not adequately reflect the harm to society or protected industries resulting from their importation may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2X5.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting after ''include:'' the following: ''§ 3F1.1 (Early Disposition Programs (Policy Statement));''; by striking ''Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)'' and inserting ''Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Assistance to Authorities); Chapter Seven, Part A (Sentencing Procedures); Chapter Seven, Part B (Plea Agreements)'';

and in Note 2 by striking the following:

''2. *Convictions under 18 U.S.C. 1841(a)(1).*—

(A) *In General.*—If the defendant is convicted under 18 U.S.C. 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.,* the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(B) *Upward Departure Provision.*—For offenses under 18 U.S.C. 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.'';

and inserting the following:

''*Convictions under 18 U.S.C. 1841(a)(1).*—If the defendant is convicted under 18 U.S.C. 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.,* the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of

conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).''.

The Commentary to § 2X5.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) for offenses under 18 U.S.C. 1841(a)(1), evidence that the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 2X7.2 is amended—

by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. *Upward Departure Provisions.*—An upward departure may be warranted in any of the following cases:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.'';

and by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 3A1.1 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.''; and by redesignating Note 5 as Note 4.

The Commentary to § 3A1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Consideration:*

1. *Criminal History Involving Vulnerable Victims.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), a prior offense that also involved the selection of a vulnerable victim may be relevant in a case in which an enhancement from subsection (b) applies. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended by striking Note 5 as follows:

''5. *Upward Departure Provision.*—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.''.

The Commentary to § 3A1.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Exceptionally High-Level Official.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, may be relevant due to the potential disruption of the governmental function. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3A1.3 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. If the restraint was sufficiently egregious, an upward departure may be warranted. *See* § 5K2.4 (Abduction or Unlawful Restraint).''.

The Commentary to § 3A1.3 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Sufficiently Egregious Restraint.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the restraint was sufficiently egregious may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3A1.4 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Upward Departure Provision.*—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.''.

The Commentary to § 3A1.4 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, in determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the offense was calculated to influence or affect the conduct of government by intimidation or coercion, to retaliate against government conduct or to intimidate or coerce a civilian population may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.''.

The Commentary to § 3B1.1 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Management of Property, Assets, or Activities.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the defendant exercised management

responsibility over the property, assets, or activities of a criminal organization may be relevant, regardless of whether this adjustment applied. *See* §§ 6A1.1; 6A1.2.''.

The Commentary to § 3B1.4 captioned ''Application Notes'' is amended by striking Note 3 as follows:

''3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.''.

The Commentary to § 3B1.4 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Using Multiple Minors.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the defendant used or attempted to use more than one person less than eighteen years of age may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3C1.2 captioned ''Application Notes'' is amended—

in Note 2 by striking ''However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.'';

and by striking Note 6 as follows:

''6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).''.

The Commentary to § 3C1.2 is amended by inserting at the end the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The offense involved a degree of culpability higher than recklessness.

(B) Death or bodily injury resulted from the offense, or the conduct posed a substantial risk of death or bodily injury to more than one person.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 3D1.1 captioned ''Background'' is amended by striking ''Chapter Five (Determining the Sentence)'' both places such phrase appears and inserting ''Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)''.

The Commentary to § 3D1.2 captioned ''Background'' is amended by striking ''because it probably would require departure in many cases in order to capture adequately the criminal behavior'' and inserting ''because, in many cases, it would not fully capture the scope and impact of the criminal behavior''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under § 3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§ 2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* § 5K2.5 (Property Damage or Loss).''.

The Commentary to § 3D1.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the grouping rules under this section result in an offense level that substantially understates the seriousness of the defendant's conduct may be relevant. *See* §§ 6A1.1; 6A1.3.''.

The Commentary to § 3D1.4 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Consideration:*

1. *Factors Relating to Assignment of Units.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), the following may be relevant:

(A) The total number of Units is significantly more than 5 Units.

(B) There is no increase in the offense level under this guideline, because the most serious group has an offense level that is substantially higher than all of the other groups.

(C) The case involved several ungrouped minor offenses resulting in an excessive increase in the offense level under this guideline.

See §§ 6A1.1; 6A1.3.''.

The Commentary to § 3D1.4 captioned ''Background'' is amended by striking the following:

''When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.'';

and inserting the following:

''When Groups are of roughly comparable seriousness, each Group

will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17.''.

The Commentary to § 3D1.5 is amended by striking ''Chapter Five (Determining the Sentence)'' and inserting ''Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)''.

Chapter Three is amended by inserting at the end the following new Part F:

''**Part F—Early Disposition Program**

§ 3F1.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may decrease the defendant's offense level pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The level of the decrease shall be consistent with the authorized program within the filing district and the government motion filed, but shall be not more than 4 levels.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act ', Public Law 108–21).''.

The Commentary to § 4A1.1 captioned ''Background'' is amended by striking ''§ 4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement)) provides a list of factors the court may consider in determining whether a defendant's criminal history category under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes''.

Section 4A1.2(h) is amended by striking ''§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))''.

Section 4A1.2(i) is amended by striking ''§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))''.

Section 4A1.2(j) is amended by striking ''§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))''.

The Commentary to § 4A1.2 captioned ''Applications Notes'' is amended—

in Note 3 by striking the following:

''*Application of 'Single Sentence' Rule (Subsection (a)(2)).*—

(A) *Predicate Offenses.*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) *Upward Departure Provision.*—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.'';

and inserting the following:

''*Application of 'Single Sentence' Rule (Subsection (a)(2)).*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are

treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.'';

in Note 6 by striking ''§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))'';

and in Note 8 by striking ''in determining whether an upward departure is warranted under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''pursuant to § 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))''.

The Commentary to § 4A1.2 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Consideration:*

1. *Multiple Prior Sentences.*—In cases in which multiple prior sentences are treated as a single sentence, the court may, in determining the appropriate sentence to impose under 18 U.S.C. 3553(a), consider whether such treatment results in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. *See* § 4A1.3.''.

Section 4A1.3 is amended—

in the heading by striking ''Departures'' and inserting ''Additional Considerations'';

by striking the following:

''(a) *Upward Departures.*—

(1) *Standard for Upward Departure.*—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) *Types of Information Forming the Basis for Upward Departure.*—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.,* sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) *Prohibition.*—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) *Determination of Extent of Upward Departure.*—

(A) *In General.*—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) *Upward Departures from Category VI.*—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) *Downward Departures.*—

(1) *Standard for Downward Departure.*—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) *Prohibitions.*—

(A) *Criminal History Category I.*—Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) *Armed Career Criminal and Repeat and Dangerous Sex Offender.*—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of § 4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) *Limitations.*—

(A) *Limitation on Extent of Downward Departure for Career Offender.*—The extent of a downward departure under this subsection for a career offender within the meaning of § 4B1.1 (Career Offender) may not exceed one criminal history category.

(B) *Limitation on Applicability of § 5C1.2 in Event of Downward Departure.*—A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of subsection (a)(1) of § 5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(c) *Written Specification of Basis for Departure.*—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.'';

and inserting the following:

''(a) *Aggravating and Mitigating Factors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), the court should consider whether the defendant's criminal history category under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. If established by reliable information, the following aggravating or mitigating factors may be relevant to this determination:

(1) *Aggravating Factors.*—

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.,* sentences for foreign and tribal convictions).

(B) Prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(2) *Mitigating Factors.*—

(A) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(B) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(b) *Prior Arrest Record.*—A prior arrest record itself is not a relevant consideration under this policy statement.''.

The Commentary to § 4A1.3 is amended—

by striking the Commentary captioned ''Application Notes'' and ''Background'' in its entirety as follows:

''*Application Notes:*

1. *Definitions.*—For purposes of this policy statement, the terms 'depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. *Upward Departures.*—

(A) *Examples.*—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) *Upward Departures from Criminal History Category VI.*—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) *Upward Departures Based on Tribal Court Convictions.*—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in § 4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.,* defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.'';

and inserting the following new Commentary:

''*Application Note:*

1. *Tribal Convictions.*—In considering tribal court convictions not counted in the criminal history score, the presence of the following factors may be relevant to the court's determination:

(A) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(B) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(C) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(D) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(E) The tribal court conviction is not based on the same conduct that formed

the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(F) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. This policy statement recognizes that consideration of whether additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism is appropriate in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a).''.

The Commentary to § 4B1.1 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Departure Provision for State Misdemeanors.*—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in § 4A1.3(b)(3)(A).''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended by striking Note 4 as follows:

''4. *Upward Departure for Burglary Involving Violence.*—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.''.

The Commentary to § 4B1.2 is amended by inserting at the end the following new Commentary:

''*Additional Considerations:*

1. *State Misdemeanors.*—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, evidence that application of the career offender guideline results in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense may be relevant in determining the appropriate sentence to impose under 18 U.S.C. 3553(a).

2. *Offense Involving Violence.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that a prior offense, such as burglary, involved violence but does not qualify as a 'crime of violence' as defined in § 4B1.2(a) may be relevant.''.

The Commentary to § 4B1.4 captioned ''Application Notes'' is amended in Note 2, in the paragraph that begins ''In a few cases'', by striking ''In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a)'' and inserting ''In such a case, a sentence greater than the applicable guideline range may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An increase in the total punishment under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a)''.

The Commentary to § 4B1.4 captioned ''Background'' is amended by striking ''§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))'' and inserting ''§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))''.

The Commentary to § 4C1.1 captioned ''Application Notes'' is amended—

in the heading by striking ''Notes'' and inserting ''Note'';

and by striking Note 2 as follows:

''2. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.''.

The Commentary to § 4C1.1 is amended by inserting at the end the following new Commentary:

''*Additional Consideration:*

1. *Application of Adjustment.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), information establishing that an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history may be relevant. For example, a sentence greater than the applicable guideline range may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.''.

Chapter Five is amended—

in the heading by striking ''Determining the Sentence'' and inserting ''Determining the Sentencing Range and Options Under the Guidelines'';

and in the Introductory Commentary by striking the following:

'' For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. 3553(a).'';

and inserting the following:

'' Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. A sentence is within the guidelines if it complies with each applicable section of this chapter.''.

The Commentary to § 5C1.1 captioned ''Applications Notes'' is amended—

by striking Note 6 as follows:

''6. *Departures Based on Specific Treatment Purpose.*—There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may

be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* § 5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.'';

by redesignating Notes 7 through 10 as Notes 6 through 9, respectively;

and in Note 9 (as so redesignated) by striking the following:

''*Zero-Point Offenders.*—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. 994(j).

(B) *Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.*—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. 994(j).'';

and inserting the following:

''*Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. 994(j).''.

The Commentary to § 5C1.1 is amended by inserting at the end the following new Commentary:

''*Additional Considerations:*

1. *Cases Where the Applicable Guideline Range of Zero-Point Offender Overstates the Gravity of the Offense.*—A sentence other than a sentence of imprisonment may be appropriate if the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

2. *Specific Treatment Purpose.*—A sentencing option other than those authorized by the applicable zone of the Sentencing Table may be appropriate to accomplish a specific treatment purpose addressing a problem (*e.g.,* substance abuse, alcohol abuse, or mental illness) that is related to the defendant's criminality.''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended by inserting at the end the following new Note 7:

''7. *Interaction of § 5C1.2 and § 4A1.3.*—A defendant whose criminal history category was adjusted in accordance with § 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement)) does not meet the criminal history requirement of § 5C1.2(a)(1) if the defendant did not otherwise meet such requirement before application of § 4A1.3.''.

The Commentary to § 5D1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking ''The court may depart from this guideline and not impose a term of supervised release'' and inserting ''The court may not impose a term of supervised release'';

and in Note 3(C) by striking ''§ 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)'' and inserting ''Subsection (a)(7) of § 6A1.2 (Factors Relating to Individual Circumstances (Policy Statement))''.

The Commentary to § 5E1.2 captioned ''Applications Notes'' is amended—

by striking Note 4 as follows:

''4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (*e.g.,* by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.'';

and by redesignating Notes 5, 6, and 7 as Notes 4, 5, and 6, respectively.

The Commentary to § 5E1.2 is amended by inserting at the end the following new Commentary:

''*Additional Consideration:*

1. *Additional Factors Relating to the Offense.*—In determining the appropriate amount of the fine to impose pursuant to 18 U.S.C. 3553(a), evidence that the fine range determined under this guideline understates the seriousness of the offense (*e.g.,* the applicable fine guideline range would not provide adequate punishment for the offense and ensure disgorgement of any gain from the offense) may be relevant.''.

The Commentary to § 5E1.3 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 8E1.1'' and inserting ''§ 9E1.1''.

The Commentary to § 5G1.1 is amended by striking ''; a sentence of less than 48 months would be a guideline departure''; and by striking ''; a sentence of more than 60 months would be a guideline departure''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended—

in Note 4(C) by striking ''§ 7B1.3'' and inserting ''§ 8B1.3'';

by striking Note 4(E) as follows:

''(E) *Downward Departure.*—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to § 5G1.3(d), rather than as a credit for time served.'';

and by striking Note 5 as follows:

''5. *Downward Departure Provision.*—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* § 5K2.23 (Discharged Terms of Imprisonment).''.

The Commentary to § 5G1.3 is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Considerations:*

1. *Time Served on Undischarged Terms of Imprisonment.*—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to impose a sentence below the otherwise applicable guideline range. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a sentence below the applicable guideline range may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a sentence below the applicable guideline range pursuant to this additional consideration result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any sentence below the applicable guideline range under this additional consideration be clearly stated as such on the Judgment in a Criminal Case Order, rather than as a credit for time served.

2. *Discharged Terms of Imprisonment.*—In a case where (A) the defendant has completed serving a term of imprisonment, and (B) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense, it may be appropriate for the court to impose a sentence below the otherwise applicable guideline range.''.

Chapter Five is amended by striking Part H in its entirety as follows:

''**Part H—Specific Offender Characteristics**

Introductory Commentary

This part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the 'Act') contains several provisions regarding specific offender characteristics:

First, the Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. 994(d).

Second, the Act directs the Commission to consider whether eleven specific offender characteristics, 'among others', have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics—education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. 994(e).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, 'the history and characteristics of the defendant'. *See* 18 U.S.C. 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, *see* 28 U.S.C. 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). *See* § 5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, *see* 28 U.S.C. 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). *See* § 5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. *See, e.g.,* §§ 2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *See United States* v. *Booker,* 543 U.S. 220, 264–65 (2005). Although the court must consider 'the history and characteristics of the defendant' among other factors, *see* 18 U.S.C. 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the

applicable guideline range, the type of sentence (*e.g.,* probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* 18 U.S.C. 3553(a)(6), 28 U.S.C. 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be 'the starting point and the initial benchmark.' *Gall* v. *United States,* 552 U.S. 38, 49 (2007).

Accordingly, the purpose of this part is to provide sentencing courts with a framework for ad-dressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help 'secure nationwide consistency,' *see Gall* v. *United States,* 552 U.S. 38, 49 (2007), 'avoid unwarranted sentencing disparities,' *see* 28 U.S.C. 991(b)(1)(B), 18 U.S.C. 3553(a)(6), 'provide certainty and fairness,' *see* 28 U.S.C. 991(b)(1)(B), and 'promote respect for the law,' *see* 18 U.S.C. 3553(a)(2)(A).

This part allocates specific offender characteristics into three general categories.

In the first category are specific offender characteristics the consideration of which Congress has prohibited (*e.g.,* § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. *See* 28 U.S.C. 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (*e.g.,* age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.,* probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (*e.g.,* probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or various other aspects of an appropriate sentence (*e.g.,* the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. *See* § 5K2.0 (Grounds for Departure).

As with the other provisions in this manual, these policy statements 'are evolutionary in nature'. *See* Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. *See, e.g.,* 28 U.S.C. 995(a)(12)(A) (the Commission serves as a 'clearinghouse and information center' on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the 'forbidden factors' specified in 28 U.S.C. 994(d) and (B) the 'discouraged factors' specified in 28 U.S.C. 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

§ 5H1.1. Age (Policy Statement)

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and in-firm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§ 5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

§ 5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See* also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.,* participation in a mental health program (*see* §§ 5B1.3(d)(5) and 5D1.3(d)(5)).

§ 5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to de-part downward; *e.g.,* in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

§ 5H1.5. Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a departure is warranted.

Employment record may be relevant in determining the conditions of probation or supervised release (*e.g.,* the appropriate hours of home detention).

§ 5H1.6. Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1. *Circumstances to Consider.*—

(A) *In General.*—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) *Departures Based on Loss of Caretaking or Financial Support.*—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

§ 5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (*see* Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (*see* subsection (d) of § 5K2.0 (Grounds for Departures)).

§ 5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. *See* Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, *see* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

§ 5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. *See* Chapter Four, Part B (Career Offenders and Criminal Livelihood).

§ 5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

§ 5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Civic, charitable, or public service; employment-related contributions; and

similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

§ 5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.''.

Chapter Five, Part K is amended in the heading by striking ''DEPARTURES'' and inserting ''ASSISTANCE TO AUTHORITIES''.

Chapter Five, Part K, Subpart 1 is amended by striking the heading as follows:

''**1. Substantial Assistance To Authorities**''

Section 5K1.1 is amended by striking ''the court may depart from the guidelines'' and inserting ''the court may impose a sentence that is below the otherwise applicable guideline range''.

Chapter Five, Part K is amended by striking Subparts 2 and 3 in their entirety as follows:

''**2. Other Grounds For Departure**

§ 5K2.0. Grounds for Departure (Policy Statement)

(a) *Upward Departures in General and Downward Departures in Criminal Cases Other than Child Crimes and Sexual Offenses.*—

(1) *In General.*—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. 3553(a)(2), should result in a sentence different from that described.

(2) *Departures Based on Circumstances of a Kind Not Adequately Taken into Consideration.*—

(A) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (*e.g.,* as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. 3553(b) and the provisions of this subpart may be warranted.

(B) *Unidentified Circumstances.*—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration.*—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) *Departures Based on Not Ordinarily Relevant Offender Characteristics and Other Circumstances.*—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) *Downward Departures in Child Crimes and Sexual Offenses.*—Under 18 U.S.C. 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) *Limitation on Departures Based on Multiple Circumstances.*—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) *Prohibited Departures.*—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in §§ 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and the last sentence of 5K2.12 (Coercion and Duress).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under § 3E1.1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under § 3B1.1 (Aggravating Role) or § 3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.,* a departure may not

be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* § 6B1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.,* a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) *Requirement of Specific Reasons for Departure.*—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.

Commentary

Application Notes:

1. *Definitions.*—For purposes of this policy statement:

'Circumstance' includes, as appropriate, an offender characteristic or any other offense factor.

'Depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. *Scope of this Policy Statement.*—

(A) *Departures Covered by this Policy Statement.*—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. *See* 18 U.S.C. 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) *Departures Covered by Other Guidelines.*—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (*see* Chapter Four (Criminal History and Criminal Livelihood), particularly § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (*see* § 5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (*see* § 5K3.1 (Early Disposition Programs)).

3. *Kinds and Expected Frequency of Departures under Subsection (a).*—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) *Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.*—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) *Unidentified Circumstances.*—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.*—

(i) *In General.*—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) *Examples.*—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to § 5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) *Departures Based on Circumstances Identified as Not Ordinarily Relevant.*—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see, e.g.,* Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of

such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the statement of reasons form.

4. *Downward Departures in Child Crimes and Sexual Offenses.*—

(A) *Definition.*—For purposes of this policy statement, the term 'child crimes and sexual offenses' means offenses under any of the following: 18 U.S.C. 1201 (involving a minor victim), 18 U.S.C. 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) *Standard for Departure.*—

(i) *Requirement of Affirmative and Specific Identification of Departure Ground.*—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.,* Chapter Five, Part K).

(ii) *Application of Subsection (b)(2).*—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. *Departures Based on Plea Agreements.*—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* § 6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the statement of reasons form, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, 'it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.' (*See* Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U.S.C. 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

'(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;

(B) a policy statement authorizing a departure pursuant to an early disposition program; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0'.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the 'heartland', that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§ 5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by

which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§ 5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1.

§ 5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§ 5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

§ 5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

§ 5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

§ 5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§ 5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§ 5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§ 5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§ 5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the

interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

§ 5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

§ 5K2.13. Diminished Capacity (Policy Statement)

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement—

'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

§ 5K2.14. Public Welfare (Policy Statement)

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

§ 5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

§ 5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'semiautomatic firearm capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note:

1. 'Crime of violence' and 'controlled substance offense' are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

§ 5K2.18. Violent Street Gangs (Policy Statement)

If the defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

§ 5K2.20. Aberrant Behavior (Policy Statement)

(a) *In General.*—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) *Requirements.*—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) *Prohibitions Based on the Presence of Certain Circumstances.*—The court may not depart downward pursuant to

this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. *Definitions.*—For purposes of this policy statement:

'Dangerous weapon,' 'firearm,' 'otherwise used,' and 'serious bodily injury' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

'Serious drug trafficking offense' means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of § 5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. *Repetitious or Significant, Planned Behavior.*—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. *Other Circumstances to Consider.*—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003.

§ 5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

§ 5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by § 5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by § 5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.

§ 5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

§ 5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. 716, an upward departure may be warranted.

Commentary

Application Note:

1. *Definition.*—For purposes of this policy statement, 'official insignia or uniform' has the meaning given that term in 18 U.S.C. § 716(c)(3).

3. Early Disposition Programs

§ 5K3.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).''.

Chapter Eight is amended—

by redesignating Chapter Eight as Chapter Nine;

in the heading by striking ''Chapter Eight'' and inserting ''Chapter Nine'';

in Part A by redesignating §§ 8A1.1 and 8A1.2 as §§ 9A1.1 and 9A1.2, respectively;

in Part B, Subpart 1 by redesignating §§ 8B1.1, 8B1.2, 8B1.3, and 8B1.4 as §§ 9B1.1, 9B1.2, 9B1.3, and 9B1.4, respectively;

in Part B, Subpart 2 by redesignating § 8B2.1 as § 9B2.1;

in Part C, Subpart 1 by redesignating § 8C1.1 as § 9C1.1;

in Part C, Subpart 2 by redesignating §§ 8C2.1, 8C2.2, 8C2.3, 8C2.4, 8C2.5, 8C2.6, 8C2.7, 8C2.8, 8C2.9, and 8C2.10 as §§ 9C2.1, 9C2.2, 9C2.3, 9C2.4, 9C2.5, 9C2.6, 9C2.7, 9C2.8, 9C2.9, and 9C2.10, respectively;

in Part C, Subpart 3 by redesignating §§ 8C3.1, 8C3.2, 8C3.3, and 8C3.4 as §§ 9C3.1, 9C3.2, 9C3.3, and 9C3.4, respectively;

in Part C, Subpart 4—

by redesignating § 8C4.1 as § 9C4.1;

and striking §§ 8C4.2 through 8C4.11 as follows:

''*§ 8C4.2. Risk of Death or Bodily Injury (Policy Statement)*

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to

which such harm or risk is taken into account within the applicable guideline fine range.

§ 8C4.3. Threat to National Security (Policy Statement)

If the offense constituted a threat to national security, an upward departure may be warranted.

§ 8C4.4. Threat to the Environment (Policy Statement)

If the offense presented a threat to the environment, an upward departure may be warranted.

§ 8C4.5. Threat to a Market (Policy Statement)

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (*e.g.,* a financial market, a commodities market, or a market for consumer goods) and public markets (*e.g.,* government contracting).

§ 8C4.6. Official Corruption (Policy Statement)

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

§ 8C4.7. Public Entity (Policy Statement)

If the organization is a public entity, a downward departure may be warranted.

§ 8C4.8. Members or Beneficiaries of the Organization as Victims (Policy Statement)

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

§ 8C4.9. Remedial Costs that Greatly Exceed Gain (Policy Statement)

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

§ 8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization's culpability score is reduced under § 8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

§ 8C4.11. Exceptional Organizational Culpability (Policy Statement)

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under § 8C2.4(a)(1), § 8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under § 8C2.4(a)(2).'';

in Part D by redesignating §§ 8D1.1, 8D1.2, 8D1.3, and 8D1.4 as §§ 9D1.1, 9D1.2, 9D1.3, and 9D1.4, respectively;

in Part E by redesignating §§ 8E1.1, 8E1.2, and 8E1.3 as §§ 9E1.1, 9E1.2, and 9E1.3, respectively;

and in Part F by redesignating § 8F1.1 as § 9F1.1.

Chapter Seven is amended—

by redesignating Chapter Seven as Chapter Eight;

in the heading by striking ''Chapter Seven'' and inserting ''Chapter Eight'';

and in Part B by redesignating §§ 7B1.1, 7B1.2, 7B1.3, 7B1.4, and 7B1.5 as §§ 8B1.1, 8B1.2, 8B1.3, 8B1.4, and 8B1.5.

Chapter Six is amended—

by redesignating Chapter Six as Chapter Seven;

in the heading by striking ''Chapter Six'' and inserting ''Chapter Seven'';

in Part A—

by redesignating §§ 6A1.1, 6A1.2, 6A1.3, and 6A1.5 as §§ 7A1.1, 7A1.2, 7A1.3, and 7A1.4, respectively;

and by striking § 6A1.4 as follows:

''*§ 6A1.4. Notice of Possible Departure (Policy Statement)*

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns* v. *United States,* 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.'';

and in Part B by redesignating §§ 6B1.1, 6B1.2, 6B1.3, and 6B1.4 as §§ 7B1.1, 7B1.2, 7B1.3, and 7B1.4, respectively.

The *Guidelines Manual* is amended by inserting before Chapter Seven (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) (as so redesignated) the following new Chapter Six:

''**Chapter Six**

Determining the Sentence

Introductory Commentary

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the 'Act') provides that courts must consider a variety of factors when imposing a sentence 'sufficient but not greater than necessary' to comply with the purposes

of sentencing as set forth in the Act. 18 U.S.C. 3553(a). The Act provides for the development of guidelines that will further the basic purposes of criminal punishment. 28 U.S.C. 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. *See* 18 U.S.C. 3553(b). Later, in *United States* v. *Booker,* 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker,* the guideline ranges established by application of the Guidelines Manual remain 'the starting point and the initial benchmark' of sentencing, though the guidelines are advisory in nature. *See Gall* v. *United States,* 552 U.S. 38, 49 (2007); *Peugh* v. *United States,* 569 U.S. 530 (2013) (noting that 'the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing'). Consistent with 18 U.S.C. 3553(a), which remains binding on courts following *Booker,* courts must also consider a variety of additional factors when determining the sentence to be imposed.

As background, Congress provided specific directives to the Commission when setting a guideline range for 'each category of offense involving each category of defendant.' 28 U.S.C. 994(b)(1).

First, to effectuate Congress's intent that sentences not 'afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training,' Rep. 225, 98th Cong., 1st Sess. 171 (1983), the Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. 994(d).

Second, the Act directs the Commission to consider (a) whether seven matters, 'among others,' have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence for purposes of establishing categories of offenses, and (b) whether eleven matters, 'among others', have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence for purposes of establishing categories of defendants, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. 994(d).

Third, to effectuate Congress's intent to 'guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.' S. Rep. 225, 98th Cong., 1st Sess. 174 (1983), the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics—education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. 994(e).

The statutory requirements placed by Congress upon courts in 18 U.S.C. 3553(a), however, do not include the same limitations placed upon the Commission. Accordingly, the purpose of this chapter is to assist courts in complying with their obligation under 18 U.S.C. 3553(a) to consider a variety of factors, including the 'nature and circumstances of the offense and the history and characteristics of the defendant,' in addition to the guideline range when determining the sentence to be imposed. This chapter provides examples of factors that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to section 3553(a). The Commission recognizes that the nature, extent, and significance of various considerations may be difficult or impossible to quantify for purposes of establishing the guideline ranges. As such, the factors identified in this chapter are neither weighted in any manner nor intended to be comprehensive so as to otherwise infringe upon the court's unique position to determine the most appropriate sentence.

Part A—Consideration of Factors in 18 U.S.C. 3553(a)

§ 6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)

(a) After determining the kinds of sentence and guidelines range pursuant to subsection (a) of § 1B1.1 (Application Instructions) and 18 U.S.C. 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. 3553(a) to determine a sentence that is sufficient but not greater than necessary. Specifically, as set forth in 18 U.S.C. 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

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

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. 3553(a)(2);

(3) the kinds of sentences available;

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

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

Commentary

Section 3553(a) of title 18, United States Code, requires courts to impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). After determining the kinds of sentence and guidelines range, the court must also fully consider the factors in 18 U.S.C. 3553(a), including, among other factors, 'the nature and circumstances of the offense and the history and characteristics of the defendant,' to determine an appropriate sentence. To the extent that any of the above-noted statutory provisions conflict with the provisions of this policy statement, the applicable statutory provision shall control.

§ 6A1.2. Factors Relating to Individual Circumstances (Policy Statement)

(a) In considering the history and characteristics of the defendant pursuant to 18 U.S.C. 3553(a)(1), the following factors may be relevant:

(1) Age.
(2) Education.
(3) Vocational Skills.
(4) Mental and Emotional Conditions.
(5) Diminished Mental Capacity.
(6) Physical Condition.
(7) Drug or Alcohol Dependence.
(8) Gambling Addiction.
(9) Previous Employment Record.
(10) Family Ties and Responsibilities.
(11) Lack of Guidance as a Youth and Similar Circumstances.
(12) Community Ties.
(13) Role in the Offense.
(14) Personal Financial Difficulties and Economic Pressures.
(15) Degree of Dependence Upon Criminal Activity for a Livelihood.
(16) Military Service.
(17) Civic, Charitable, or Public Service.
(18) Employment-Related Contributions.
(19) Record of Prior Good Works.
(20) Aberrant Behavior.
(21) Other Individual Circumstances Relating to the Culpability of or the Need to Incapacitate the Defendant.

Commentary

This policy statement recognizes that the nature, extent, and significance of individual circumstances can involve a range of considerations that are difficult or impossible to quantify for purposes of

establishing the guideline range. This policy statement provides examples of factors relating to the history and characteristics of the defendant that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.

§ 6A1.3. Factors Relating to the Nature and Circumstances of the Offense (Policy Statement)

(a) In considering the nature and circumstances of the offense pursuant to 18 U.S.C. 3553(a)(1), the following factors, if not accounted for in the applicable Chapter Two guideline, may be relevant:

(1) *Other Offense Specific Conduct Over- or Under-Representing Serious of Offense.*—Additional factors the court determines support a finding that the offense level determined under the applicable guideline over- or under-represents the seriousness of the offense. Such factors may be identified in specific Chapter Two guidelines as 'Additional Considerations.'

(2) *Death.*—In cases in which death resulted, the court may consider, for example, whether multiple deaths resulted, the means by which life was taken, the defendant's state of mind, and the degree of planning or preparation.

(3) *Extreme Physical Injury.*—In cases in which extreme physical injury resulted, the court may consider, for example, whether multiple victims suffered such injury, the nature of the injury, and the extent to which the defendant intended the injury or knowingly created risk.

(4) *Extreme Psychological Injury.*—The defendant caused extended or continuous substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of the victim that is more serious than that normally resulting from the commission of the offense.

(5) *Abduction or Unlawful Restraint.*—The defendant abducted, took hostage, or unlawfully restrained a person to facilitate the commission of the offense or escape.

(6) *Extreme Conduct.*—The defendant engaged in unusually heinous, cruel, brutal, or degrading conduct such as the torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

(7) *Weapons and Dangerous Instrumentalities.*—In cases in which the defendant possessed a weapon or dangerous instrumentality, the court may consider, for example, the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others.

(8) *Semiautomatic Firearms Capable of Accepting Large Capacity Magazine.*—The defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.

(9) *Property Damage or Loss.*—In cases in which the offense caused property damage or loss not taken into account within the guidelines, the court may consider, for example, the extent to which the defendant knowingly intended or risked harm, and the extent to which the harm to property is more serious than other harm caused or risked by the defendant's conduct.

(10) *Disruption of a Governmental Function.*—The defendant's conduct resulted in a significant disruption of a governmental function.

(11) *Public Welfare.*—The defendant's conduct significantly endangered national security, public health, or safety.

(12) *Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform.*—The defendant wore or displayed an official, or counterfeit official, insignia or uniform during the commission of the offense.

(13) *Criminal Purpose.*—The defendant committed the offense in order to facilitate or conceal the commission of another offense.

(14) *Victim's Conduct.*—The victim's wrongful conduct contributed significantly to provoking the offense behavior.

(15) *Lesser Harms.*—The defendant committed the offense in order to avoid a perceived greater harm.

(16) *Coercion or Duress.*—The defendant committed the offense under coercion, blackmail, duress, or circumstances not amounting to a complete defense.

(17) *Dismissed and Uncharged Conduct.*—The offense level determined under the applicable guideline under-represents the seriousness of the offense because conduct underlying a charge dismissed as part of a plea agreement in the case or conduct underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason did not enter into the determination of the applicable guideline range.

(18) *Voluntary Disclosure of Offense.*—The defendant voluntarily disclosed to authorities the existence of, and accepted responsibility for, an offense that was unlikely to have been discovered otherwise.

(19) *Discharged Terms of Imprisonment.*—In the case of a discharged term of imprisonment, (A) the defendant has completed serving a term of imprisonment; and (B) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense.

(20) *Violent Street Gangs.*—The defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs) and the offense involved violence.

Commentary

This policy statement recognizes that the nature, extent, and significance of individual circumstances can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline range. This policy statement provides examples of factors relating to the nature and circumstances of the offense that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.''.

Chapter Seven, Part B (as so redesignated) is amended in the Introductory Commentary by striking ''The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.''.

The Commentary to § 7B1.1 (as so redesignated) is amended in the second paragraph by striking ''Section 6B1.1(c)'' and inserting ''Section 7B1.1(c)''.

The Commentary to § 7B1.2 (as so redesignated) is amended—

in the paragraph that begins ''Similarly, the court'' by striking ''As set forth in subsection (d) of § 5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.'';

and in the paragraph that begins ''The second paragraph of subsection (a)'' by striking ''Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.''.

The Commentary to § 7B1.4 (as so redesignated) is amended—

in the paragraph that begins ''Because of the importance'' by striking ''§ 6A1.2'' and inserting ''§ 7A1.2'';

and in the final paragraph by striking ''Section 6B1.4(d)'' and inserting ''Section 7B1.4(d)''.

Chapter Eight, Part A (as so redesignated) is amended in the heading by striking ''CHAPTER SEVEN'' and inserting ''CHAPTER EIGHT''.

Section 8B1.3(b) (as so redesignated) is amended by striking ''§ 7B1.4'' and inserting ''§ 8B1.4''.

Section 8B1.3(c)(1) (as so redesignated) is amended by striking ''§ 7B1.4'' and inserting ''§ 8B1.4''.

Section 8B1.3(c)(2) (as so redesignated) is amended by striking ''§ 7B1.4'' and inserting ''§ 8B1.4''.

Section 8B1.3(d) (as so redesignated) is amended by striking ''§ 7B1.4'' and inserting ''§ 8B1.4''.

The Commentary to § 8B1.4 (as so redesignated) captioned ''Application Notes'' is amended—

by striking Notes 2, 3, and 4 as follows:

''2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.,* a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.,* as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.'';

and by redesignating Notes 5 and 6 as Notes 2 and 3, respectively.

The Commentary to § 8B1.4 (as so redesignated) is amended by inserting at the end the following new Commentary:

''*Additional Consideration:*

1. *Aggravating Factors.*—In determining the appropriate term of imprisonment upon revocation pursuant to 18 U.S.C. 3553(a), the following factors may be relevant:

(A) The court previously departed or varied on the basis that the defendant's criminal history category at the original sentencing substantially over- or under-represented the seriousness of the defendant's criminal history.

(B) The defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

(C) The revocation is the result of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.,* a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard).

(D) The defendant was originally sentenced below the applicable guideline range as the result of a departure or variance (*e.g.,* as a reward for substantial assistance) or charge reduction.''.

Section 9A1.1 (as so redesignated) is amended in the heading by striking ''Chapter Eight'' and inserting ''Chapter Nine''.

The Commentary to § 9A1.1 (as so redesignated) captioned ''Application Notes'' is amended in Note 2 by striking ''§§ 8C2.2 through 8C2.9'' both places such phrase appears and inserting ''§§ 9C2.2 through 9C2.9''.

Section 9A1.2(b) (as so redesignated) is amended—

in paragraph (1) by striking ''§ 8C1.1'' and inserting ''§ 9C1.1''.

in paragraph (2) by striking ''§ 8C2.1'' and inserting ''§ 9C2.1''; and by striking ''§§ 8C2.2 through 8C2.9'' and inserting ''§§ 9C2.2 through 9C2.9'';

in paragraph (2)(A) by striking ''§ 8C2.2'' and inserting ''§ 9C2.2'';

in paragraph (2)(B) by striking ''§ 8C2.3'' and inserting ''§ 9C2.3'';

in paragraph (2)(C) by striking ''§ 8C2.4'' and inserting ''§ 9C2.4'';

in paragraph (2)(D) by striking ''§ 8C2.5 (Culpability Score)'' and inserting ''§ 9C2.5 (Culpability Score)''; by striking ''§ 8C2.5(f)'' and inserting ''§ 9C2.5(f)''; and by striking ''§ 8B2.1'' and inserting ''§ 9B2.1'';

in paragraph (2)(E) by striking ''§ 8C2.6'' and inserting ''§ 9C2.6'';

in paragraph (2)(F) by striking ''§ 8C2.7'' and inserting ''§ 9C2.7'';

in paragraph (2)(G) by striking ''§ 8C2.8'' and inserting ''§ 9C2.8'';

in paragraph (2)(H) by striking ''§ 8C2.9'' and inserting ''§ 9C2.9'';

in the paragraph that begins ''For any count'' by striking ''§ 8C2.1'' and inserting ''§ 9C2.1''; and by striking ''§ 8C2.10'' and inserting ''§ 9C2.10'';

in paragraph (4) by striking ''For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range)'' and inserting ''Determine whether a sentence below the otherwise applicable guideline range is appropriate upon motion of the government pursuant to § 9C4.1 (Substantial Assistance to Authorities—Organizations (Policy Statement))'';

and by inserting at the end the following new paragraph (5):

''(5) Consider as a whole the additional factors identified in 18 U.S.C. 3553(a) and the guidance provided in Part C, Subpart 5 (Consideration of Factors in Determining the Guideline Fine Range) of this chapter to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a).''.

The Commentary to § 9A1.2 (as so redesignated) captioned ''Application Notes'' is amended—

in Note 2 by striking ''and E (Acceptance of Responsibility)'' and inserting ''E (Acceptance of Responsibility), and F (Early Disposition Program)''; by striking ''Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights)'' and inserting ''Chapter Seven (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights)''; and by striking ''Chapter Seven (Violations of Probation and Supervised Release)'' and inserting ''Chapter Eight (Violations of Probation and Supervised Release)'';

and in Note 3(B) by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''.

Section 9B1.2(a) (as so redesignated) is amended by striking ''§ 8B1.1'' and inserting ''§ 9B1.1''.

Section 9B2.1(a) (as so redesignated) is amended by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''; and by striking ''§ 8D1.4'' and inserting ''§ 9D1.4''.

The Commentary to § 9B2.1 (as so redesignated) captioned ''Application Notes'' is amended—

in Note 1 by striking ''§ 8A1.2'' and inserting ''§ 9A1.2'';

and in Note 2(D) by striking ''§ 8A1.2'' and inserting ''§ 9A1.2''.

Section 9C1.1 (as so redesignated) is amended by striking ''§ 8C3.4'' and inserting ''§ 9C3.4''.

Section 9C2.1 (as so redesignated) is amended by striking ''§§ 8C2.2 through 8C2.9'' and inserting ''§§ 9C2.2 through 9C2.9''.

The Commentary to § 9C2.1 (as so redesignated) captioned ''Applications Notes'' is amended—

in Note 1 by striking ''§§ 8C2.2 through 8C2.9'' in both places such phrase appears and inserting ''§§ 9C2.2 through 9C2.9'';

and in Note 2 by striking ''§§ 8C2.2 through 8C2.9'' in both places such phrase appears and inserting ''§§ 9C2.2 through 9C2.9''.

The Commentary to § 9C2.1 (as so redesignated) captioned ''Background'' is amended by striking ''§§ 8C2.2 through 8C2.9'' and inserting ''§§ 9C2.2 through 9C2.9''; and by striking ''§ 8C2.10'' and inserting ''§ 9C2.10''.

Section 9C2.2(a) (as so redesignated) is amended by striking ''§ 8B1.1'' and inserting ''§ 9B1.1''; and by striking ''§ 8C3.3(a)'' and inserting ''§ 9C3.3(a)''.

Section 9C2.2(b) (as so redesignated) is amended by striking ''§§ 8C2.3 through 8C2.7'' and inserting ''§§ 9C2.3 through 9C2.7''; and by striking ''§ 8C3.3'' and inserting ''§ 9C3.3''.

The Commentary to § 9C2.2 (as so redesignated) captioned ''Background'' is amended by striking ''§ 8C2.7(a)'' and inserting ''§ 9C2.7(a)''; by striking ''§ 8C2.7 (Guideline Fine Range—Organizations)'' and inserting ''§ 9C2.7 (Guideline Fine Range—Organizations)''; and by striking ''§ 8C3.3'' and inserting ''§ 9C3.3''.

Section 9C2.3(a) (as so redesignated) is amended by striking ''§ 8C2.1'' and inserting ''§ 9C2.1''.

The Commentary to § 9C2.3 (as so redesignated) captioned ''Application Notes'' is amended in Note 2 by striking ''and E (Acceptance of Responsibility)'' and inserting ''E (Acceptance of Responsibility), and F (Early Disposition Program)''.

Section 9C2.4(a)(1) (as so redesignated) is amended by striking ''§ 8C2.3'' and inserting ''§ 9C2.3''.

The Commentary to § 9C2.4 (as so redesignated) captioned ''Application Notes'' is amended—

in Note 1 by striking ''§ 8A1.2'' and inserting ''§ 9A1.2'';

and in Note 4 by striking ''§ 8C2.4(a)(3)'' and inserting ''§ 9C2.4(a)(3)''.

The Commentary to § 9C2.4 (as so redesignated) captioned ''Background'' is amended by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''.

Section 9C2.5(f) (as so redesignated) is amended—

in paragraph (1) by striking ''§ 8B2.1'' and inserting ''§ 9B2.1'';

in paragraph (3)(A) by striking ''§ 8B2.1(b)(2)(B) or (C)'' and inserting ''§ 9B2.1(b)(2)(B) or (C)'';

and in paragraph (3)(C)(i) by striking ''§ 8B2.1(b)(2)(C)'' and inserting ''§ 9B2.1(b)(2)(C)''.

The Commentary to § 9C2.5 (as so redesignated) captioned ''Application Notes'' is amended—

in Note 1 by striking ''§ 8A1.2'' and inserting ''§ 9A1.2'';

and in Note 3 by striking ''§ 8A1.2'' and inserting ''§ 9A1.2''.

Section 9C2.6 (as so redesignated) is amended by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''.

Section 9C2.7(a) (as so redesignated) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''; and by striking ''§ 8C2.6'' and inserting ''§ 9C2.6''.

Section 9C2.7(b) (as so redesignated) is amended by striking ''§ 8C2.4'' and inserting ''§ 9C2.4''; and by striking ''§ 8C2.6'' and inserting ''§ 9C2.6''.

Section 9C2.8(a)(7) (as so redesignated) is amended by striking ''§ 8C2.5(c)'' and inserting ''§ 9C2.5(c)''.

Section 9C2.8(a)(8) (as so redesignated) is amended by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''.

Section 9C2.8(a)(9) (as so redesignated) is amended by striking ''§ 8C2.5'' and inserting ''§ 9C2.5''.

Section 9C2.8(a)(11) (as so redesignated) is amended by striking ''§ 8B2.1'' and inserting ''§ 9B2.1''.

The Commentary to § 9C2.8 (as so redesignated) captioned ''Application Notes'' is amended—

in Note 5 by striking ''§ 8C2.5(c)'' each place such term appears and inserting ''§ 9C2.5(c)''; and by striking ''In a case involving a pattern of illegality, an upward departure may be warranted.'';

and in Note 7 by striking ''§ 8C2.5(c)(2)'' and inserting ''§ 9C2.5(c)(2)''.

The Commentary to § 9C2.8 (as so redesignated) is amended by inserting before the Commentary captioned ''Background'' the following new Commentary:

''*Additional Consideration:*

1. *Pattern of Illegality.*—In determining the appropriate fine pursuant to 18 U.S.C. 3553(a) and 3572(a), evidence of a pattern of illegality may be relevant.''.

The Commentary to § 9C2.8 (as so redesignated) captioned ''Background'' is amended by striking ''a basis for departure'' and inserting ''a basis for setting the fine either above or below the otherwise applicable guideline fine range''.

Section 9C2.9 (as so redesignated) is amended by striking ''§ 8C2.8'' and inserting ''§ 9C2.8''.

Section 9C2.10 (as so redesignated) is amended by striking ''§ 8C2.1'' and inserting ''§ 9C2.1''; by striking ''§ 8C2.8'' and inserting ''§ 9C2.8''; and by striking ''§ 8C2.9'' and inserting ''§ 9C2.9''.

The Commentary to § 9C2.10 (as so redesignated) captioned ''Background'' is amended by striking ''§ 8C2.1'' and inserting ''§ 9C2.1''.

Section 9C3.1(a) (as so redesignated) is amended by striking ''§ 8C1.1'' and inserting ''§ 9C1.1''; by striking ''§ 8C2.7'' and inserting ''§ 9C2.7''; by striking ''§ 8C2.9'' and inserting ''§ 9C2.9''; and by striking ''§ 8C2.10'' and inserting ''§ 9C2.10''.

Section 9C3.3(a) (as so redesignated) is amended by striking ''§ 8C1.1'' and inserting ''§ 9C1.1''; by striking ''§ 8C2.7'' and inserting ''§ 9C2.7''; and by striking ''§ 8C2.9'' and inserting ''§ 9C2.9''.

Section 9C3.3(b) (as so redesignated) is amended by striking ''§ 8C2.7'' both places such term appears and inserting ''§ 9C2.7''; and by striking ''§ 8C2.9'' both places such term appears and inserting ''§ 9C2.9''.

The Commentary to § 9C3.3 (as so redesignated) captioned ''Application Notes'' is amended in Note 1 by striking ''§ 8C3.2'' and inserting ''§ 9C3.2''.

Chapter Nine, Part C, Subpart 4 (as so redesignated) is amended—

in the heading by striking ''DEPARTURES FROM THE GUIDELINE FINE RANGE'' and inserting ''SUBSTANTIAL ASSISTANCE TO AUTHORITIES'';

and by striking the Introductory Commentary as follows:

''*Introductory Commentary*

The statutory provisions governing departures are set forth in 18 U.S.C. 3553(b). Departure may be warranted if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the

applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.''.

Section 9C4.1(a) (as so redesignated) is amended by striking ''the court may depart from the guidelines'' and inserting ''the court may set a fine that is below the otherwise applicable guideline fine range''.

The Commentary to § 9C4.1 (as so redesignated) captioned ''Application Note'' is amended in Note 1 by striking ''Departure'' and inserting ''Fine reduction''.

Chapter Nine, Part C (as so redesignated) is amended by inserting at the end the following new Subpart 5:

''**5. Consideration of Factors in Determining the Guideline Fine Range**

Introductory Commentary

Following *United States* v. *Booker,* 543 U.S. 220 (2005), the fine range established in this chapter remains 'the starting point and the initial benchmark,'but the ranges established by application of the Guidelines Manual are advisory. *See Gall* v. *United States,* 552 U.S. 38, 49 (2007); *Peugh* v. *United States,* 569 U.S. 530 (2013). Consistent with 18 U.S.C. 3553(a), which remains binding on courts, courts must also consider a variety of additional factors when determining the sentence to be im-posed. This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. These factors are provided to assist courts in complying with their obligation under 18 U.S.C. 3553(a).

To the extent that any policy statement from Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) is relevant to the organization, the court may consider such policy statement when determining the applicable guideline fine range. Some factors listed in Chapter Six, Part A that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Six, Part A may be applicable in particular cases. While this subpart lists factors that the Commission believes may be relevant, the list is not exhaustive.

§ 9C5.1. Factors Relating to the Nature and Circumstances of the Organization's Offense (Policy Statement)

(a) In considering the nature and circumstances of the offense pursuant to 18 U.S.C. 3553(a)(1), the following factors, if not accounted for in the applicable Chapter Two guideline, may be relevant:

(1) *Risk of Death or Bodily Injury*—The court may consider whether the offense resulted in death or bodily injury or involved a foreseeable risk of death or bodily injury, the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

(2) *Threat to National Security.*—The offense constituted a threat to national security.

(3) *Threat to the Environment.*—The offense presented a threat to the environment.

(4) *Threat to a Market.*—The offense presented a risk to the integrity or continued existence of a market, including either private markets (*e.g.,* a financial market, a commodities market, or a market for consumer goods) or public markets (*e.g.,* government contracting).

(5) *Official Corruption.*—The organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official.

(6) *Public Entity.*—The organization is a public entity.

(7) *Members or Beneficiaries of the Organization as Victims.*—In cases in which the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, the court may consider whether imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect.

(8) *Remedial Costs that Greatly Exceed Gain.*—In cases in which the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, the court may consider whether a substantial fine is necessary in order to achieve adequate punishment and deterrence, the level and extent of substantial authority personnel involvement in the offense, and the degree to which the loss exceeds the gain.

(9) *Mandatory Programs to Prevent and Detect Violations of Law.*—The organization's culpability score is reduced under § 9C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, or the organization was required by law to have an effective compliance and ethics pro-gram but did not have such a program.

(10) *Exceptionally High Organizational Culpability.*—The organization's culpability score is greater than 10.

(11) *Exceptionally Low Organizational Culpability.*—No individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under § 9C2.4(a)(1), § 9C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct).

Commentary

This policy statement recognizes that the nature, extent, and significance of offense specific characteristics can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline fine range. This policy statement provides examples of factors relating to the nature and circumstances of the offense that are generally not considered in the calculation of the guideline fine range, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.''.

Chapter Nine, Part D is amended in the Introductory Commentary by striking ''Section 8D1.1'' and inserting ''Section 9D1.1''; and by striking ''Sections 8D1.2 through 8D1.4, and 8F1.1'' and inserting ''Sections 9D1.2 through 9D1.4, and 9F1.1''.

Section 9D1.1(a)(1) (as so redesignated) is amended by striking ''§ 8B1.1'' and inserting ''§ 9B1.1''; by striking ''§ 8B1.2'' and inserting ''§ 9B1.2''; and by striking ''§ 8B1.3'' and inserting ''§ 9B1.3''.

Section 9D1.4(b) (as so redesignated) is amended by striking ''§ 8D1.1'' and inserting ''§ 9D1.1''.

Section 9D1.4(b)(1) (as so redesignated) is amended by striking ''§ 8B2.1'' and inserting ''§ 9B2.1''.

The Commentary to § 9D1.4 captioned ''Application Notes'' is amended in

Note 1 by striking ''§ 8D1.1'' and inserting ''§ 9D1.1''; and by striking ''§ 8B2.1'' and inserting ''§ 9B2.1''.

The Commentary to § 9F1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§§ 8D1.3 (Conditions of Probation—Organizations) and 8D1.4 (Recommended Conditions of Probation—Organizations)'' and inserting ''§§ 9D1.3 (Conditions of Probation—Organizations) and 9D1.4 (Recommended Conditions of Probation—Organizations)''.

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