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Part II

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2010.

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

DATES: The Commission has specified an effective date of November 1, 2010, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4597. The amendments set forth in this notice also may be accessed through the Commission's Web site at *http://www.ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the **Federal Register** on January 21, 2010 (*see* 75 FR 3525). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 17, 2010. On April 29, 2010, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2010.

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

William K. Sessions III,
Chair.

1. *Amendment:* Chapter Five, Part A, is amended in the Sentencing Table by redesignating Zones A, B, C, and D (as designated by Amendment 462, *see* USSG Appendix C, Amendment 462 (effective November 1, 1992)) as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than nine months); Zone C (containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The Commentary to § 5B1.1 captioned "Application Notes" is amended in Note 1(b) by striking "six" and inserting "nine"; and in Note 2 by striking "eight" and inserting "ten".

The Commentary to § 5C1.1 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "six" and inserting "nine"; in Note 4 by striking "eight, nine, or ten months" and inserting "ten or twelve months"; by striking "8–14" and inserting "10–16" both places it appears; by striking "sentence of four" and inserting "sentence of five" both places it appears; by striking "four" before "months community"and inserting "five"; by striking "five" after "and a sentence of" and inserting "ten"; by striking Note 6 and inserting the following:

"6. 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."

In Note 7 by striking the last sentence; in Note 8 by striking "twelve" and inserting "15"; and by redesignating Note 8 as Note 9 and inserting after Note 7 the following:

"8. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program."

Reason for Amendment: This amendment is a two-part amendment expanding the availability of alternatives to incarceration. The amendment provides a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the Sentencing Table by one level each and addresses cases in which a departure from imprisonment to an alternative to incarceration (such as intermittent confinement, community confinement, or home confinement) may be appropriate to accomplish a specific treatment purpose.

The amendment is a result of the Commission's continued multi-year study of alternatives to incarceration. The Commission initiated this study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent first offenders. *See generally* 28 U.S.C. 994(g), (j).

As part of the study, the Commission held a two-day national symposium at which the Commission heard from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law

and the social sciences, corrections and alternative sentencing practitioners and specialists, federal and state prosecutors and defense attorneys, prison officials, and others involved in criminal justice. *See United States Sentencing Commission, Symposium on Alternatives to Incarceration* (July 2008). In considering the amendment, the Commission also reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.

First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level for each Criminal History Category (taking this area from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, under the amendment, defendants in Zone C with an applicable guideline range of 8–14 months or 9–15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12–18 months are moved to Zone C. Conforming changes also are made to §§ 5B1.1 (Imposition of a Term of Probation) and 5C1.1. In considering this one-level expansion, the Commission observed that approximately 42 percent of the Zone C offenders covered by the amendment and approximately 52 percent of the Zone D offenders covered by the amendment already receive sentences below the applicable guideline range.

The Commission estimates that of the 71,054 offenders sentenced in fiscal year 2009 for which complete sentencing guideline application information is available, 1,565 offenders in Zone C, or 2.2 percent, would have been in Zone B of the Sentencing Table under the amendment, and 2,734 offenders in Zone D, or 3.8 percent, would have been in Zone C. Not all of these offenders would have been eligible for an alternative to incarceration, however, because many were non-citizens who may have been subject to an immigration detainer and some were statutorily prohibited from being sentenced to a term of probation, *see, e.g.*, 18 U.S.C. 3561(a)(1) (prohibiting a defendant convicted of a Class A or Class B felony from being sentenced to a term of probation).

As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12–18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. *See* 18 U.S.C. 624(b). For such an offender, assuming the maximum "good time credit" is earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10–16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12–18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.

Second, the amendment clarifies and illustrates certain cases in which a departure may be appropriate to accomplish a specific treatment purpose. Specifically, it amends an existing departure provision at § 5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that a departure from the sentencing options authorized for Zone C of the Sentencing Table to accomplish a specific treatment purpose 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.

Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) to accomplish a specific treatment purpose. The application note also provides that, in determining whether such a departure is appropriate, the court should consider, among other things, two factors relating to public safety: (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. Some public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public. Accordingly, the Commission amended the application note to clarify the criteria and to provide examples of such cases.

The amendment also makes two other changes to the Commentary to § 5C1.1 regarding the factors to be considered in determining whether to impose an alternative to incarceration. The amendment adds an application note providing that, in a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the treatment program. The amendment also deletes as unnecessary the second sentence of Application Note 7.

2. *Amendment:* Chapter Five, Part H, is amended in the Introductory Commentary by striking the first paragraph and inserting the following:

"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 addressing 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 second paragraph by striking "The Commission has determined that certain circumstances" and inserting the following: "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"; by striking "or to the determination of" and inserting ", the type of sentence (*e.g.,* probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or"; by striking "incidents" and inserting "aspects"; and by striking the last paragraph and inserting the following:

"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."

Section 5H1.1 is amended by striking the first sentence and inserting 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."

Section 5H1.3 is amended by striking the first paragraph and inserting the following:

"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 6."

Section 5H1.4 is amended in the first paragraph by striking the first sentence and inserting the following: "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."; in the second sentence by striking "However, an" and inserting "An"; in the second paragraph by inserting "ordinarily" after "or abuse"; in the last sentence by striking "supervisory body" and inserting

"probation office"; by inserting as the third paragraph the following: "In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 6."; and in the fourth paragraph, as amended by this amendment, by striking "Similarly, where" and inserting "In a case in which".

Section 5H1.11 is amended by inserting as the first paragraph the following: "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."; and in the second paragraph, as amended by this amendment, by striking "Military, civic" and inserting "Civic".

Section 5K2.0(d)(1) is amended by striking "third and last sentences" and inserting "last sentence".

Reason for Amendment: This multi-part amendment revises the introductory commentary to Chapter Five, Part H (Specific Offender Characteristics), amends the policy statements relating to age, mental and emotional conditions, physical condition, and military service, and makes conforming changes to § 5K2.0 (Grounds for Departure). The amendment is a result of a review of the departure provisions in the *Guidelines Manual* begun by the Commission this year. *See* 74 FR 46478, 46479 (September 9, 2009). The Commission undertook this review, in part, in response to an observed decrease in reliance on departure provisions in the *Guidelines Manual* in favor of an increased use of variances.

First, the amendment revises the introductory commentary to Chapter Five, Part H. As amended, the introductory commentary explains that the purpose of Part H is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," *Gall* v. *United States,* 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," 28 U.S.C. 991(b)(1)(B), and "promote respect for the law," 18 U.S.C. 3553(a)(2)(A).

Accordingly, the amended introductory commentary outlines three categories of specific offender characteristics described in the Sentencing Reform Act and the statutory and guideline standards that apply to consideration of each category. Courts must consider "the history and characteristics of the defendant" among other factors. *See* 18 U.S.C. 3553(a). However, in order to avoid unwarranted sentencing disparities, *see* 18 U.S.C. 3553(a)(6), 28 U.S.C. 991(b)(1)(B), courts should not give specific offender characteristics excessive weight. 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, supra,* at 49.

The amended introductory commentary also states that the Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as contemplated by the Sentencing Reform Act. *See, e.g.,* 28 U.S.C. 995(a)(12)(A). The Commission expects that providing such information on an ongoing basis will promote nationwide consistency in the consideration of specific offender characteristics by courts and help avoid unwarranted sentencing disparities.

Second, the amendment amends several policy statements that cover specific offender characteristics addressed in 28 U.S.C. 994(d): §§ 5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), and 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction). As amended, these policy statements generally provide that age; mental and emotional conditions; and physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if [the offender characteristic], 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." The Commission adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges.

The amendment also amends §§ 5H1.3 and 5H1.4 to provide that in certain cases described in Application Note 6 to § 5C1.1 (Imposition of a Term of Imprisonment) a departure may be appropriate.

Third, the amendment amends § 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) to draw a distinction between military service and the other circumstances covered by that policy statement. As amended, the policy statement provides that 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." The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing. *See, e.g., Porter* v. *McCollum,* 130 S. Ct. 447, 455 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines * * *").

Finally, the amendment makes conforming changes to § 5K2.0 (Grounds for Departure).

3. *Amendment:* The Commentary to § 2L1.2 captioned "Application Notes" is amended in Note 7 by striking "*Consideration*" and inserting "*Based on Seriousness of a Prior Conviction*."

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

"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."

Reason for Amendment: This amendment addresses when a downward departure may be appropriate in an illegal reentry case sentenced under § 2L1.2 (Unlawfully

Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States.

Several circuits have upheld departures based on cultural assimilation. *See, e.g., United States* v. *Rodriguez-Montelongo,* 263 F.3d 429, 433 (5th Cir. 2001); *United States* v. *Sanchez-Valencia,* 148 F.3d 1273, 1274 (11th Cir. 1998); *United States* v. *Lipman,* 133 F.3d 726, 730 (9th Cir. 1998). Other circuits have declined to rule on whether such a departure may be warranted. *See, e.g., United States* v. *Galarza-Payan,* 441 F.3d 885, 889 (10th Cir. 2006) ("We need not address that debate in the altered post-*Booker* landscape."); *United States* v. *Melendez-Torres,* 420 F.3d 45, 51 n.3 (1st Cir. 2005); *see also United States* v. *Ticas,* 219 F. App'x 44, 45 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Some circuits, though not foreclosing the possibility of cultural assimilation departures, have stated that district courts are within their discretion to deny such departures in light of a defendant's criminal past and society's increased interest in *keeping aliens who have committed crimes out of the United States following their deportation.* *United States* v. *Roche-Martinez,* 467 F.3d 591, 595 (7th Cir. 2006); *see also Galarza-Payan, supra,* at 889–90 (stating that *in assessing the reasonableness of a sentence [] a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law*).

In order to promote uniform consideration of cultural assimilation by courts, the amendment adds an application note to § 2L1.2 providing that a downward departure may be appropriate on the basis of cultural assimilation. The application note provides that such a departure may be appropriate if (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. The application note also provides a non-exhaustive list of factors the court should consider in determining whether such a departure is appropriate.

4. *Amendment:* Section 1B1.1 is amended by redesignating subdivisions (a) through (h) as (1) through (8), respectively; in subdivision (4) (as so redesignated) by striking "(a)" and inserting "(1)", and by striking "(c)" and inserting "(3)"; by striking the first paragraph and inserting the following: "(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:"; by redesignating subdivision (i) as subsection (b) and, in that subsection, by striking "Refer to" and inserting "The court shall then consider"; by striking "to" before "any"; and by adding at the end "*See* 18 U.S.C. 3553(a)(5)."; and by adding at the end the following: "(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).".

The Commentary to § 1B1.1 is amended by adding at the end the following:

"*Background:* 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,* 128 S. Ct. 2198, 2200–03 (2008) (describing within-range sentences and departures as 'sentences imposed under the framework set out in the Guidelines').".

Reason for Amendment: This amendment amends § 1B1.1 (Application Instructions) in light of *United States* v. *Booker,* 543 U.S. 220 (2005), and subsequent case law.

As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the *Guidelines Manual,* a district court is required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. 3553(a)(4); *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, 347–48 (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.").

After determining the guideline range, the district court should refer to the *Guidelines Manual* and consider whether the case warrants a departure. *See* 18 U.S.C. 3553(a)(5). "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Irizarry* v. *United States,* 128 S.Ct. 2198, 2202 (2008). A "variance"—*i.e.,* a sentence outside the guideline range other than as provided for in the *Guidelines Manual*—is considered by the court only after departures have been considered.

Most circuits agree on a three-step approach, including the consideration of departure provisions in the *Guidelines Manual,* in determining the sentence to be imposed. *See United States* v. *Dixon,* 449 F.3d 194, 203–04 (1st Cir. 2006) (court must consider "any applicable departures"); *United States* v. *Selioutsky,* 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); *United States* v. *Jackson,* 467 F.3d 834, 838 (3d Cir. 2006) (same); *United States* v. *Moreland,* 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after *Booker*"); *United States* v. *Tzep-Mejia,* 461 F.3d 522, 525 (5th Cir. 2006) ("Post-*Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) A sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." (internal footnote and citation omitted)); *United States* v. *McBride,* 434 F.3d 470, 476 (6th Cir. 2006) (district court "still required to consider * * * whether a Chapter 5 departure is appropriate"); *United States* v. *Hawk Wing,* 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance (internal quotation omitted)); *United States* v. *Robertson,* 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States* v. *Jordi,* 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). *But see United States* v. *Johnson,* 427 F.3d 423, 426 (7th Cir. 2006) (stating that departures are "obsolete").

The amendment resolves the circuit conflict and adopts the three-step approach followed by a majority of

circuits in determining the sentence to be imposed. The amendment restructures § 1B1.1 into three subsections to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in the *Guidelines Manual* to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. 3553(a) taken as a whole in determining the appropriate sentence. The amendment also adds background commentary referring to the statutory requirements of 18 U.S.C. 3553(a) and defining the term "variance" as "a sentence that is outside the guidelines framework".

5. *Amendment:* Section 4A1.1 is amended by striking "items (a) through (f)" and inserting "subsections (a) through (e)"; in subsection (c) by striking "item" and inserting "subsection"; by striking subsection (e) and redesignating subsection (f) as (e); and in subsection (e) (as so redesignated) by striking "item" and inserting "subsection".

The Commentary to § 4A1.1 captioned "Application Notes" is amended by striking "item" and inserting "subsection" each place it appears; by striking Note 5 and redesignating Note 6 as Note 5; and in Note 5 (as so redesignated) by striking "(f)" and inserting "(e)" each place it appears.

The Commentary to § 4A1.1 captioned "Background" is amended by striking "Subdivisions" and inserting "Subsections"; by striking "implements one measure of recency by adding" and inserting "adds"; and by striking the paragraph that begins "Section 4A1.1(e)".

Section 4A1.2 is amended in subsection (a)(2) by striking "(f)" and inserting "(e)"; in subsection (k)(2) by striking subparagraph (A) and by striking "(B)"; in subsection (l) by striking "(f)" and inserting "(e)", and by striking "; § 4A1.1(e) shall not apply"; in subsection (n) by striking "and (e)"; and in subsection (p) by striking "(f)" and inserting "(e)".

The Commentary to § 4A1.2 captioned "Application Notes" is amended in Note 12(A) by striking "subdivision" and inserting "subsection".

Reason for Amendment: This amendment addresses a factor included in the calculation of the criminal history score in Chapter Four of the *Guidelines Manual.* Specifically, this amendment eliminates the "recency" points provided in subsection (e) of § 4A1.1 (Criminal History Category). Under § 4A1.1(e), one or two points are added to the criminal history score if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under subsection (a) or (b) or while in imprisonment or escape status on such a sentence. In addition to recency, subsections (a), (b), (c), (d), and (f) add points to the criminal history score to account for the seriousness of the prior offense and the status of the defendant. These other factors remain included in the criminal history score after the amendment.

The amendment is a result of the Commission's continued review of criminal history issues. This multi-year review was prompted in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under § 4A1.1(e).

As part of its review, the Commission undertook analyses to determine the extent to which recency points contribute to the ability of the criminal history score to predict the defendant's risk of recidivism. *See generally* USSG Ch. 4, Pt. A, intro. comment ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered."). Recent research isolating the effect of § 4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability.

In addition, the Commission received public comment and testimony suggesting that the recency of the instant offense to the defendant's release from imprisonment does not necessarily reflect increased culpability. Public comment and testimony indicated that defendants who recidivate tend to do so relatively soon after being released from prison but suggested that, for many defendants, this may reflect the challenges to successful reentry after imprisonment rather than increased culpability.

Finally, Commission data indicated that many of the cases in which recency points apply are sentenced under Chapter Two guidelines that have provisions based on criminal history. The amendment responds to suggestions that recency points are not necessary to adequately account for criminal history in such cases.

6. *Amendment:* The Commentary to § 2H1.1 captioned "Statutory Provisions" is amended by inserting "249," after "248,".

The Commentary to § 2H1.1 captioned "Application Notes" is amended in Note 4 by inserting "gender identity," after "gender,".

Section 3A1.1(a) is amended by inserting "gender identity," after "gender,".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 3 by inserting "gender identity," after "gender,"; and by adding after Note 4 the following:

"5. For purposes of this guideline, 'gender identity' means actual or perceived gender-related characteristics. *See* 18 U.S.C. 249(c)(4).".

The Commentary to § 3A1.1 captioned "Background" is amended in the first paragraph by striking "(*i.e.*" and all that follows through "victim)"; and by adding at the end of that paragraph the following: "In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 247 the following: "18 U.S.C. 249 2H1.1"; and by inserting after the line referenced to 18 U.S.C. 1369 the following: "18 U.S.C. 1389 2A2.2, 2A2.3, 2B1.1".

Reason for Amendment: This amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111–84) (the "Act"). The Act created two new offenses and amended a 1994 directive to the Commission regarding crimes motivated by hate.

The first new offense, 18 U.S.C. 249 (Hate crime acts), makes it unlawful, whether or not acting under color of law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, to attempt to cause bodily injury to any person because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. A person who violates 18 U.S.C. 249 is subject to a term of imprisonment of up to 10 years or, if the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, or if death results from the offense, to imprisonment for any term of years or life. The amendment amends Appendix A (Statutory Index) to refer offenses under 18 U.S.C. 249 to § 2H1.1 (Offenses Involving Individual Rights) because

that guideline covers similar offenses, *e.g.,* 18 U.S.C. 241 (Conspiracy against rights) and 242 (Deprivation of rights under color of law), and contains appropriate enhancements to account for aggravating circumstances that may be involved in a section 249 offense, *e.g.,* subsection (b)(1), which provides a 6-level increase if the offense was committed under color of law.

The Act also amended section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322; 28 U.S.C. 994 note), which contains a directive to the Commission regarding hate crimes. The Commission implemented that directive by promulgating subsection (a) of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim). *See* USSG App. C, Amendment 521 (effective November 1, 1995). The Act broadened the definition of "hate crime" in section 280003(a) to include crimes motivated by actual or perceived "gender identity", which has the effect of expanding the scope of the directive in section 280003(b) so that it now requires the Commission to provide an enhancement for crimes motivated by actual or perceived "gender identity". To reflect the broadened definition, the amendment amends § 3A1.1 so that the enhancement in subsection (a) covers crimes motivated by actual or perceived "gender identity" and makes conforming changes to §§ 2H1.1. The amendment also deletes as unnecessary the parenthetical in the Background to § 3A1.1, which provided an example of *hate crime motivation*.

The second new offense, 18 U.S.C. 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or the status of that individual as a United States serviceman. A person who violates 18 U.S.C. 1389 is subject to a term of imprisonment of not more than 2 years in the case of a simple assault, or damage of not more than $500, of not more than 5 years in the case of damage of more than $500, or of not less than 6 months nor more than 10 years in the case of a battery, or an assault resulting in bodily injury. The Commission determined that offenses under 18 U.S.C. 1389 are similar to offenses involving assault or property damage that are already referenced to §§ 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2B1.1 (Theft, Property Destruction, and Fraud) and therefore amended Appendix A (Statutory Index) to refer the new offense to those guidelines.

7. *Amendment:* Section 8B2.1(b)(4) is amended by striking "subdivision" and inserting "subparagraph" each place it appears.

The Commentary to § 8B2.1 captioned "Application Notes" is amended in Note 2(D) by striking "subdivision" and inserting "subparagraph".

The Commentary to § 8B2.1 captioned "Application Notes" is amended by redesignating Note 6 as Note 7, and by inserting after Note 5 the following: "6. *Application of Subsection (b)(7).*— Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications."; and in Note 7, as redesignated by this amendment, by striking "subdivision" and inserting "subparagraph" each place it appears.

Section 8C2.5(f)(3) is amended in subparagraph (A) by striking "subdivision (B)" and inserting "subparagraphs (B) and (C)"; and by adding at the end the following:

"(C) Subparagraphs (A) and (B) shall not apply if—

(i) The individual or individuals with operational responsibility for the compliance and ethics program (*see* § 8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (*e.g.,* an audit committee of the board of directors);

(ii) The compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) The organization promptly reported the offense to appropriate governmental authorities; and

(iv) No individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.".

The Commentary to § 8C2.5 captioned "Application Notes" is amended in Note 10 in the second sentence by inserting "or (f)(3)(C)(iii)" after "subsection (f)(2)"; by redesignating Notes 11 through 14 as Notes 12 through 15, respectively; and by inserting after Note 10 the following:

11. For purposes of subsection (f)(3)(C)(i), an individual has 'direct reporting obligations' to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.

Section 8D1.4 is amended by striking subsections (b) and (c) and inserting the following:

(b) If probation is imposed under § 8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with § 8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(5) The organization shall submit to: (A) A reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of

knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(6) The organization shall make periodic payments, as specified by the court, in the following priority: (A) Restitution; (B) fine; and (C) any other monetary sanction.".

The Commentary to § 8D1.4 captioned "Application Note" is amended in Note 1 by striking "(a)(3) through (6)"; and by striking "(c)(3)" and inserting "(b)(3)".

Reason for Amendment: This amendment makes several changes to Chapter Eight of the *Guidelines Manual* regarding the sentencing of organizations.

First, the amendment amends the Commentary to § 8B2.1 (Effective Compliance and Ethics Program) by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps (1) to respond appropriately to the criminal conduct and (2) to prevent further similar criminal conduct.

The new application note describes the two aspects of subsection (b)(7). With respect to the first aspect, the application note provides that the organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. The application note further provides that such steps may include, where appropriate, providing restitution to identifiable victims, other forms of remediation, and self-reporting and cooperation with authorities. With respect to the second aspect, the application note provides that an organization should assess the compliance and ethics program and make modifications necessary to ensure the program is effective. The application note further provides that such steps should be consistent with § 8B2.1(b)(5) and (c), which also require assessment and modification of the program, and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

This application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct. The steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.

Second, the amendment amends subsection (f) of § 8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program when an organization's high-level or substantial authority personnel are involved in the offense. Specifically, the amendment adds subsection (f)(3)(C), which allows an organization to receive the decrease if the organization meets four criteria: (1) The individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof; (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely; (3) the organization promptly reported the offense to the appropriate governmental authorities; and (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

The new subsection (f)(3)(C) responds to concerns expressed in public comment and testimony that the general prohibition in § 8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases.

The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion under § 8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program". The application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

Third, the amendment amends § 8D1.4 (Recommended Conditions of Probation—Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. The amendment removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

Finally, the amendment makes technical and conforming changes to various provisions in Chapter Eight.

8. *Amendment:* Section 2B1.1(c)(4) is amended by inserting "or a paleontological resource" after "resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" each place it appears.

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

"'Paleontological resource' has the meaning given that term in Application Note 1 of 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).".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 14(A) by inserting "and 18 U.S.C. 1348" after "7 U.S.C. 1 *et seq.*)".

Section 2B1.5 is amended in the heading by inserting "*or Paleontological Resources*" after "*Heritage Resources*" each place it appears.

Section 2B1.5(b) is amended in each of paragraphs (1) and (2) by inserting "or paleontological resource" after "heritage resource"; and in paragraph (5) by inserting "or paleontological resources" after "heritage resources".

The Commentary to § 2B1.5 captioned "Statutory Provisions" is amended by inserting "470aaa–5," after "16 U.S.C. §§ ".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 1 by redesignating subparagraphs (A) through (G) as (i) through (vii), respectively; by striking "'*Cultural Heritage Resource' Defined.*—For purposes of this guideline, 'cultural heritage resource' means any of the following:" and inserting: "*Definitions.*—For purposes of this guideline:

(A) 'Cultural heritage resource' means any of the following:"; by striking "(A)" before "has the meaning" and inserting "(I)"; by striking "(B)" before "includes" and inserting "(II)"; and by adding at the end the following:

"(B) 'Paleontological resource' has the meaning given such term in 16 U.S.C. 470aaa.".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 2 by striking "*Cultural Heritage*" both places it appears; by striking "cultural heritage" each place it appears; and by inserting ", *e.g.,*" after "*See*" each place it appears.

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 5(B) by striking "cultural heritage"; in Note 6(A) by inserting "or paleontological resources" after "resources", and by striking "cultural heritage" after "involving a" each place it appears; in Note 8 by striking "cultural heritage" each place it appears; and in Note 9 by inserting "or paleontological resources" after "resources" the first place it appears; and by inserting "or paleontological resources" after "resources)".

Section 2D1.11(e) is amended in subdivisions (1)–(10) by inserting the following list I chemicals in the appropriate place in alphabetical order by subdivision as follows:

(1) "1.3 KG or more of Iodine;",

(2) "At least 376.2 G but less than 1.3 KG of Iodine;",

(3) "At least 125.4 G but less than 376.2 G of Iodine;",

(4) "At least 87.8 G but less than 125.4 G of Iodine;",

(5) "At least 50.2 G but less than 87.8 G of Iodine;",

(6) "At least 12.5 G but less than 50.2 G of Iodine;",

(7) "At least 10 G but less than 12.5 G of Iodine;",

(8) "At least 7.5 G but less than 10 G of Iodine;",

(9) "At least 5 G but less than 7.5 G of Iodine;",

(10) "Less than 5 G of Iodine;"; and in subdivisions (2)–(10), in list II chemicals, by striking the lines referenced to "Iodine", including the period, and in the lines referenced to "Toluene" by striking the semicolon and inserting a period.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. 413 the following: "16 U.S.C. 470aaa–5 2B1.1, 2B1.5"; and by inserting after the line referenced to 42 U.S.C. 1396h(b)(2) the following: "42 U.S.C. 1396w–2 2H3.1".

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

First, the amendment responds to the Fraud Enforcement and Recovery Act of 2009, Public Law 111–21, which broadened 18 U.S.C. 1348, a securities fraud statute, to cover commodities fraud. Offenses under 18 U.S.C. 1348 are referenced in Appendix A (Statutory Index) to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Section 2B1.1 includes an enhancement at subsection (b)(17)(B) that applies when specified persons who have fiduciary duties violate commodities law. "Commodities law" is defined in Application Note 14 to mean the Commodities Exchange Act (7 U.S.C. 1 *et seq.*), including the rules, regulations, and orders issued by the Commodity Futures Trading Commission. The amendment adds 18 U.S.C. 1348 to the definition of "commodities law" for purposes of subsection (b)(17)(B). The Commission determined that including 18 U.S.C. 1348 within the scope of subsection (b)(17)(B) is appropriate to reflect the expanded scope of the statute.

Second, the amendment responds to the Omnibus Public Land Management Act of 2009, Public Law 111–11, which created a new offense at 16 U.S.C. 470aaa–5 making it unlawful to remove, damage, alter, traffic in, or make a false record relating to a paleontological resource on federal land. The amendment amends Appendix A (Statutory Index) to refer offenses under 16 U.S.C. 470aaa–5 to 2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) because such offenses are similar either to offenses involving cultural heritage resources or, to the extent they involve false records, to fraud offenses. The amendment also makes technical and conforming changes to §§ 2B1.1 and 2B1.5.

Third, the amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009, Public Law 111–3, which created a new Class A misdemeanor offense at 42 U.S.C. 1396w–2 regarding the unlawful disclosure of certain protected information related to social security eligibility. The amendment amends Appendix A (Statutory Index) to refer offenses under 42 U.S.C. 1396w–2 to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) because such offenses involve invasions of privacy.

Fourth, the amendment responds to a regulatory change in which iodine was upgraded from a List II chemical to a List I chemical. Offenses involving listed chemicals are sentenced under § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). Because the maximum base offense level for List I chemicals (level 30) is higher than that for List II chemicals (level 28), the amendment increases the maximum base offense level for offenses involving iodine to level 30 and specifies the amount of iodine needed (1.3 kilograms) for base offense level 30 to apply.

9. *Amendment:* The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)"; in Note 6, in the first paragraph by striking "'is" and inserting "'was"; and by striking "was committed by the means set forth in" and inserting "involved conduct described in".

The Commentary to § 1B1.8 captioned "Application Notes" is amended in Note 2 by striking "Probation Service" and inserting "probation office".

The Commentary to § 1B1.9 captioned "Application Notes" is amended in Note 1 by inserting "or for which no imprisonment is authorized. *See* 18 U.S.C. 3559" after "not more than five days".

The Commentary to § 1B1.11 captioned "Application Notes" is amended in Note 2 by striking "Guideline" and inserting "Guidelines".

The Commentary to § 1B1.13 captioned "Application Notes" is amended in Note 1 by striking "*Subsection*" and inserting "*Subdivision*".

The Commentary to § 2A1.1 captioned "Application Notes" is amended in Note 1 by inserting ", *see* § 2A4.1(c)(1)" after "occurs"; and by inserting ", *see* § 2E1.3(a)(2)" after "racketeering".

The Commentary to § 2A3.2 captioned "Application Notes" is amended in Note 5 by striking "kidnaping" and inserting "kidnapping" each place it appears.

The Commentary to § 2A3.3 captioned "Application Notes" is amended in Note 1 by inserting "years" before "; (B)".

The Commentary to § 2A3.5 captioned "Application Notes" is amended in Note 1 by striking "those terms in 42 U.S.C. 16911(2), (3) and (4), respectively" and inserting "the terms 'tier I sex offender', 'tier II sex offender', and 'tier III sex offender', respectively, in 42 U.S.C. 16911".

The Commentary to § 2B1.4 captioned "Application Notes" is amended in Note 1 by striking "*Subsection of*".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 1 by striking "299" and inserting "229"; and by striking "section 2(c) of Public Law 99–652 (40 U.S.C. 1002(c))" and inserting "40 U.S.C. 8902(a)(1)".

The Commentary to § 2B3.1 captioned "Application Notes" is amended in Note 2 by striking "(d)" and inserting "(D)".

The Commentary to § 2B4.1 captioned "Background" is amended in the fourth paragraph by striking "was recently increased from two to" and inserting "is"; and by striking "Violations" and all that follows through "to the Medicaid program." and inserting "Violations of 42 U.S.C. 1320a–7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (*e.g.,* the Medicare and Medicaid programs).".

The Commentary to § 2B6.1 captioned "Background" is amended by striking "§§ 511 and 553(a)(2)" and inserting "§ 511"; and by inserting "§ 553(a)(2) and" before "2321".

The Commentary to § 2C1.1 captioned "Application Notes" is amended in Note 3 by striking "(A)" after "(b)(2)".

The Commentary to § 2C1.2 captioned "Application Notes" is amended in Note 4 by striking "or" before "Trust" and inserting "of".

Section 2D1.1(c) is amended in each of Notes (H) and (I) to the Drug Quantity Table by striking "(25)" and inserting "(30)".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 6 by striking "or" after "1319(c),"; by striking "§ 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

The Commentary to § 2D1.12 captioned "Application Notes" is amended in Note 3 by striking "or" after "1319(c),"; by striking "§ 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

Section 2D1.14(a)(1) is amended by striking "(3)" and inserting "(5)" both places it appears.

The Commentary to § 2D2.1 captioned "Background" is amended in the last paragraph by striking "Section 6371 of the Anti-Drug Abuse Act of 1988" and inserting "21 U.S.C. 844(a)" both places it appears.

The Commentary to § 2G3.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins " 'Distribution' means" by inserting "transmission," after "production,".

Section 2H4.2(b)(1) is amended by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

The Commentary to § 2K1.3 captioned "Application Notes" is amended in Note 10 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 2 by inserting "*That Is*" after "*Firearm*"; and by inserting "that is" after "semiautomatic firearm".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by striking "; § 4A1.2, comment. (n.3)"; in Note 11 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to § 2K2.5 captioned "Application Notes" is amended in Note 2 by striking "(f)" and inserting "(g)"; and in Note 3 by inserting "*See* 18 U.S.C. 924(a)(4)." after "other offense.".

The Commentary to § 2L2.1 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to § 2L2.2 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to § 2M3.1 captioned "Application Notes" is amended in Note 1 by striking "12356" and inserting "12958 (50 U.S.C. 435 note)".

The Commentary to § 2M3.3 captioned "Statutory Provisions" is amended by striking "(b), (c)".

The Commentary to § 2M3.9 captioned "Application Notes" is amended in Note 3 by inserting "*See* 50 U.S.C. 421(d)." after "imprisonment.".

The Commentary to § 2M6.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins " 'Foreign terrorist" by striking "1219" and inserting "1189"; and in the paragraph that begins " 'Restricted person" by striking "(b)" and inserting "(d)".

The Commentary to § 2Q1.2 captioned "Background" is amended by striking "last two" and inserting "fifth and sixth".

Section 2Q1.6(a)(1) is amended by striking "Substance" and inserting "Substances".

The Commentary to § 2Q2.1 captioned "Application Notes" is amended in Note 3 by inserting ", Subtitle B," after "7 CFR".

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking "section" and inserting "subpart"; and by inserting "of Chapter 51 of Subtitle E" after "Subchapter J".

The Commentary to § 2X5.2 captioned "Statutory Provisions" is amended by striking "§ 1129(a),".

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 4 by redesignating subdivisions (a) through (k) as (A) through (K); and in Note 5 by redesignating subdivisions (a) through (e) as (A) through (E).

The Commentary to § 3E1.1 captioned "Application Notes" is amended in Note 1 by redesignating subdivisions (a) through (h) as (A) through (H).

Section 5K2.17 is amended by striking "(A)" and inserting "(1)"; and by striking "(B)" and inserting "(2)".

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(f) by striking "(f)" and inserting "(e)"; in the line referenced to 8 U.S.C. 1325(b) by striking "(b)" and inserting "(c)"; in the line referenced to 8 U.S.C. 1325(c) by striking "(c)" and inserting "(d)"; by inserting after the line referenced to 18 U.S.C. 247 the following: "18 U.S.C. 248 2H1.1"; by striking the line referenced to 18 U.S.C. 1129(a); by inserting after the line referenced to 42 U.S.C. 1320a–7b the following: "42 U.S.C. 1320a–8b 2X5.1, 2X5.2"; in the line referenced to 50 U.S.C. 783(b) by striking "(b)"; and by striking the line referenced to 50 U.S.C. 783(c).

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

First, the amendment makes changes to the *Guidelines Manual* to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the *Guidelines Manual* provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:

(1) § 1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;

(2) § 1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";

(3) § 1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;

(4) § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing),

Application Note 2, to correct a typographical error;

(5) § 2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;

(6) § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;

(7) § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;

(8) § 2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;

(9) § 2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;

(10) § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;

(11) § 2B3.1 (Robbery), Application Note 2, to correct a typographical error;

(12) § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;

(13) § 2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. 553(a)(2);

(14) § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;

(15) § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;

(16) § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;

(17) both § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and § 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material), Application Note 3, to provide a more accurate statutory citation and description;

(18) § 2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;

(19) § 2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;

(20) § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of "distribution" in that guideline consistent with the definition of "distribution" in the child pornography guidelines;

(21) § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Notes 2 and 10, to ensure that a quotation contained in Note 2 is accurate and that a citation in Note 10 is accurate;

(22) § 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;

(23) both § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;

(24) § 2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;

(25) § 2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;

(26) § 2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;

(27) § 2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction), Application Note 1, to provide updated statutory references;

(28) § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to provide updated guideline references;

(29) § 2Q1.6 (Hazardous or Injurious Devices on Federal Lands), subsection (a)(1), to correct a typographical error;

(30) § 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), Application Note 3, to provide a more complete reference to regulations;

(31) Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), Introductory Commentary, to provide a more complete statutory reference;

(32) § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), to strike an erroneous statutory reference;

(33) Appendix A (Statutory Index), to provide updated statutory references and strike an erroneous statutory reference.

Second, the amendment makes a series of changes to the *Guidelines Manual* to promote stylistic consistency in how subdivisions are designated. When dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with "(a)"), which are broken into paragraphs (starting with "(1)"), which are broken into subparagraphs (starting with "(A)"), which are broken into clauses (starting with "(i)"), which are broken into subclauses (starting with "(I)"). For a generic term, "subdivision" is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with "(A)"). The amendment identifies places in the *Guidelines Manual* where these principles are not followed and brings them into conformity.

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