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, 2012.

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, 2012, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Office of Legislative and Public Affairs, 202–502–4502. The amendments set forth in this notice also may be accessed through the Commission's Web site at *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 19, 2012 (*see* 77 FR 2778). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 14, 2012. On April 30, 2012, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2012.

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

Patti B. Saris,

Chair.

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

''(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere.*

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.'';

in Note 3(F) by adding at the end the following:

''(ix) *Fraudulent Inflation or Deflation in Value of Securities or Commodities.*—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—

(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

(II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.,* changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).'';

in Note 12(A) by adding at the end the following:

''(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a 'bailout'.'';

in Note 12(B)(ii) by adding at the end the following:

''(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a 'bailout'.'';

in Note 19(A)(iv) by inserting before the period at the end the following: '', such as a risk of a significant disruption of a national financial market'';

and in Note 19(C) by adding after the first paragraph the following new paragraph:

''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.''.

Section 2B1.4(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by adding at the end the following:

''(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14.''.

The Commentary to § 2B1.4 captioned ''Application Note'' is amended in the caption by striking ''Note'' and inserting ''Notes''; by redesignating Note 1 as Note 2 and inserting before Note 2 (as so redesignated) the following:

''1. *Application of Subsection (b)(2).*—For purposes of subsection (b)(2), an 'organized scheme to engage in insider trading' means a scheme to engage in insider trading that involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

(A) The number of transactions;

(B) The dollar value of the transactions;

(C) The number of securities involved;

(D) The duration of the offense;

(E) The number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);

(F) The efforts undertaken to obtain material, nonpublic information;

(G) The number of instances in which material, nonpublic information was obtained; and

(H) The efforts undertaken to conceal the offense.'';

in Note 2 (as so redesignated) by striking ''only''; and by adding at the end the following new paragraph:

''Furthermore, § 3B1.3 should be applied if the defendant's employment in a position that involved regular participation or

professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. *See* § 3B1.3, comment. (n. 4).''.

The Commentary to § 2B1.4 captioned ''Background'' is amended by adding at the end the following new paragraph:

''Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111B203.''.

Reason for Amendment: This amendment responds to the two directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (the ''Act''). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Securities Fraud and Similar Offenses

Section 1079A(a)(1)(A) of the Act directs the Commission to ''review and, if appropriate, amend'' the guidelines and policy statements applicable to ''persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.'' Section 1079A(a)(1)(B) provides that in promulgating any such amendment the Commission shall—

(i) Ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways. First, the amendment amends the fraud guideline, § 2B1.1 (Theft, Property Destruction, and Fraud), to provide a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. Case law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities.

The amendment amends § 2B1.1 to provide a special rule regarding how to calculate actual loss in these types of cases. Specifically, the amendment creates a new Application Note 3(F)(ix) which establishes a rebuttable presumption that ''the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and (II) multiplying the difference in average price by the number of shares outstanding.'' The special rule further provides that, ''[i]n determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.,* changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).''

The special rule is based upon what is sometimes referred to as the ''modified rescissory method'' and should ordinarily provide a ''reasonable estimate of the loss'' as required by Application Note 3(C). This special rule is intended to provide courts a workable and consistent formula for calculating loss that ''resulted from the offense.'' *See* § 2B1.1, comment. (n.3(A)(i)). By averaging the stock price during the period in which the fraud occurred and a set 90-day period after the fraud was discovered, the special rule reduces the impact on the loss calculation of factors other than the fraud, such as overall growth or decline in the price of the stock. *See, e.g., United States* v. *Bakhit,* 218 F. Supp. 2d 1232 (C.D. Cal. 2002); *United States* v. *Snyder,* 291 F.3d 1291 (11th Cir. 2002); *United States* v. *Brown,* 595 F.3d 498 (3d Cir. 2010); *see also* 15 U.S.C. 78u-4(e) (statutorily setting forth a similar method for loss calculation in the context of private securities litigation). Furthermore, applying this special rule could ''eliminate[], or at least reduce[], the complexity, uncertainty, and expense inherent in attempting to determine out-of-pocket losses on a case-by-case basis.'' *See United States* v. *Grabske,* 260 F. Supp. 2d. 866, 873–74 (N.D. Cal. 2002).

By applying a rebuttable presumption, however, the amendment also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule includes significant changes in value not resulting from the offense (*e.g.,* changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

The amendment also responds to the first directive by amending the insider trading guideline, § 2B1.4 (Insider Trading). First, it provides a new specific offense characteristic if the offense involved an ''organized scheme to engage in insider trading.'' In such a case, the new specific offense characteristic provides a minimum offense level of 14. The commentary is also amended to provide factors the court may consider in determining whether the new minimum offense level applies.

The amendment reflects the Commission's view that a defendant who engages in considered, calculated, systematic, or repeated efforts to obtain and trade on inside information (as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration. Sentencing data indicate that when a defendant engages in an organized insider trading scheme, the gain from the offense ordinarily triggers an enhancement under § 2B1.4(b)(1) of sufficient magnitude to result in a guideline range that requires a period of imprisonment. The amendment, however, ensures that the guidelines require a period of incarceration even in such a case involving relatively little gain.

The amendment also amends the commentary to § 2B1.4 to provide more guidance on the applicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases. In particular, the new commentary in Application Note 2 provides that § 3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. The commentary further provides examples of positions that may qualify for the adjustment, including a hedge fund professional who regularly participates in securities transactions or a lawyer who regularly provides professional assistance in securities transactions. Individuals who occupy such positions possess special knowledge regarding the financial markets and the rules prohibiting insider trading, and generally are viewed as more culpable. *See* § 3B1.3, comment. (backg'd). The commentary also provides as an example of a position that would not qualify for the adjustment in § 3B1.4 a clerical worker in an investment firm. Such a position ordinarily does not involve special skill and is not generally viewed as more culpable.

Mortgage Fraud and Financial Institution Fraud

Section 1079A(a)(2)(A) of the Act directs the Commission to ''review and, if appropriate, amend'' the guidelines and policy statements applicable to ''persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.'' Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

(i) Ensure that the guidelines and policy statements reflect—

(I) The serious nature of the offenses described in subparagraph (A);

(II) The need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) The effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) Consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) Ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) Make any necessary conforming changes to guidelines; and

(v) Ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways.

First, the amendment adds language to the credits against loss rule, found in Application Note 3(E) of the commentary to § 2B1.1. Application Note 3(E)(i) generally provides that the determination of loss under subsection (b)(1) shall be reduced by the money returned and the fair market value of the property returned and services rendered to the victim before the offense was detected. In the context of a case involving collateral pledged or otherwise provided by the defendant, Application Note 3(E)(ii) provides that the loss to the victim shall be reduced by either ''the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.''

The Commission received comment that, in cases involving mortgage fraud where the collateral has not been disposed of by the time of sentencing, the fair market value of the collateral may be difficult to determine and may require frequent updating, especially in cases involving multiple properties. The comments further indicate that the lack of a uniform process may result in unwarranted sentencing disparities.

The amendment responds to these concerns by establishing a new Application Note 3(E)(iii) applicable to fraud cases involving a mortgage loan where the underlying collateral has not been disposed of by the time of sentencing. In such a case, new Application Note 3(E)(iii) makes two changes to the calculation of credits against loss. First, the note changes the date on which the fair market value of the collateral is determined, from the time of sentencing to the date on which the guilt of the defendant has been established. This change is intended to avoid the need to reassess the fair market value of such collateral on multiple occasions up to the date of sentencing. Second, it establishes a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the tax assessment is a reasonable estimate of fair market value, the note further provides that the court may consider the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value, among other factors.

By structuring the special rule in this manner, the amendment addresses the need to provide a uniform practicable method for determining fair market value of undisposed collateral while providing sufficient flexibility for courts to address differences among jurisdictions regarding how closely the most recent tax assessment correlates to fair market value. The Commission heard concerns, for example, that, in some jurisdictions, the most recent tax assessment may be outdated or based upon factors, such as the age or status of the homeowner, that have no correlation to fair market value.

The amendment also responds to the second directive by amending the commentary regarding the application of § 2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (*e.g.,* jeopardizing a financial institution or organization). This commentary, contained in Application Note 12 to § 2B1.1, provides a non-exhaustive list of factors the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution or an organization that was a publicly traded company or that had more than 1,000 employees was substantially jeopardized. For example, in the context of financial institutions, the court shall consider whether the financial institution became insolvent, was forced to reduce benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment, or investment, or was so depleted of its assets as to be forced to merge with another institution. Similarly, in the context of a covered organization, the court shall consider whether the organization became insolvent or suffered a substantial reduction in the value of its assets, filed for bankruptcy, suffered a substantial reduction in the value of its equity securities or its employee retirement accounts, or substantially reduced its workforce or employee pension benefits.

The amendment amends Application Note 12 to add as a new consideration whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a ''bailout.'' This amendment reflects the Commission's intent that

§ 2B1.1(b)(15)(B) account for the risk of harm from the defendant's conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention.

Departure Provisions

Finally, the amendment also responds to the Act's directives by amending the departure provisions in § 2B1.1 to provide two examples of cases in which a departure may be warranted.

First, the amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). The amendment adds ''risk of a significant disruption of a national financial market'' as an example of such a risk. This part of the amendment responds to the requirement in the Act to consider whether the guidelines applicable to the offenses covered by the directives appropriately ''account for the potential and actual harm to the public and the financial markets[.]''

The amendment also amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense, by adding an example of a case in which such a departure may be appropriate. The example provides that ''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,'' and that, ''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.'' This part of the amendment responds to concerns raised in comment and case law that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases.

2. *Amendment:* The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10(D) in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)'' by inserting after the entry relating to N-N-Dimethylamphetamine the following new entry:

''1 gm of N-Benzylpiperazine = 100 gm of marihuana''.

Reason for Amendment: This amendment responds to concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving BZP (N-Benzylpiperazine), which is a Schedule I stimulant. *See United States* v. *Figueroa,* 647 F.3d 466 (2d Cir. 2011). The amendment establishes a marijuana equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The marijuana equivalency established by the amendment provides that 1 gram of BZP equals 100 grams of marijuana.

Prior to the amendment, the Drug Equivalency Table did not include a marijuana equivalency for BZP. As a result, in offenses involving BZP, the court determined the base offense level using the marijuana equivalency of ''the most closely related controlled substance'' referenced in § 2D1.1. *See* § 2D1.1, comment. (n. 5). In determining the most closely related controlled substance, the commentary directs the court to consider (1) whether the controlled substance not referenced in § 2D1.1 has a chemical structure that is substantially similar to a controlled substance that is referenced in § 2D1.1, (2) whether the controlled substance not referenced in § 2D1.1 has a stimulant, depressant, or hallucinogenic effect similar to a controlled substance referenced in the guideline, and (3) whether a lesser or greater quantity of the controlled substance not referenced in § 2D1.1 is needed to produce a substantially similar effect as a controlled substance that is referenced in § 2D1.1.

In applying these factors, courts have reached different conclusions regarding which controlled substance referenced in § 2D1.1 is most closely related to BZP and have therefore used different marijuana equivalencies in sentencing BZP offenders. The Commission's review of case law and sentencing data indicate that some district courts have found that the controlled substance most closely related to BZP is amphetamine and used the marijuana equivalency for amphetamine, *see United States* v. *Major,* 801 F. Supp. 2d 511, 514 (E.D. Va. 2011) (using the marijuana equivalency for amphetamine at full potency), while other district courts have found that the controlled substance most related to BZP is MDMA, but at varying potencies. *See United States* v. *Bennett,* 659 F.3d 711, 715–16 (8th Cir. 2011) (affirming a district court's use of the marijuana equivalency for MDMA at full potency); *United States* v. *Rose,* 722 F. Supp. 2d 1286, 1289 (M.D. Ala. 2010) (concluding that BZP is most closely related to MDMA, but imposing a variance to reflect BZP's reduced potency compared to MDMA). The different findings of which controlled substance is the most closely related to BZP, and the application of different potencies of those controlled substances, have resulted in courts imposing vastly different sentence lengths for the same conduct.

The Commission reviewed scientific literature and received expert testimony and comment relating to BZP and concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, in order to promote uniformity in sentencing BZP offenders and to reflect the best available scientific evidence, the amendment establishes a marijuana equivalency of 1 gram of BZP equals 100 grams of marijuana. This corresponds to one-twentieth of the marijuana equivalency for amphetamine, which is 1 gram of amphetamine equals 2 kilograms (or 2,000 grams) of marijuana.

3. *Amendment:* Section 2D1.11 is amended in subsection (b) by adding at the end the following:

''(6) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.''.

The Commentary to 2D1.11 captioned ''Application Notes'' is amended by adding at the end the following:

''9. *Applicability of Subsection (b)(6).*CThe applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, § 5C1.2(b) does not apply. *See* § 5C1.2(b)(2)(requiring a minimum offense level of level 17 if the 'statutorily required minimum sentence is at least five years').''.

Reason for Amendment: This amendment adds a new specific offense characteristic at subsection (b)(6) of § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) that provides a 2-level decrease if the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (commonly referred to as the ''safety valve'' criteria). The new specific offense characteristic

in § 2D1.11 parallels the existing 2-level decrease at subsection (b)(16) of § 2D1.1(Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The Commission in 1995 created the 2-level reduction in § 2D1.1 for offenders who meet the safety valve criteria in response to a directive in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103–322. Section 80001 provided an exception to otherwise applicable statutory minimum sentences for defendants convicted of specified drug offenses and who meet the criteria specified in 18 U.S.C. 3553(f)(1)–(5), and directed the Commission to promulgate guidelines to carry out these purposes. The reduction in § 2D1.1 initially was limited to defendants whose offense level was level 26 or greater, *see* USSG App. C, Amendment 515 (effective November 1, 1995), but was subsequently expanded to apply to offenders with an offense level lower than level 26 to address proportionality concerns. *See* USSG App. C, Amendment 624 (effective November 1, 2001). Specifically, the Commission determined that limiting the applicability of the reduction to defendants with an offense level of level 26 or greater ''is inconsistent with the general principles underlying the two-level reduction * * * to provide lesser punishment for first time, nonviolent offenders.'' *Id.*

For similar reasons of proportionality, this amendment expands application of the 2-level reduction to offenses involving list I and list II chemicals sentenced under § 2D1.11. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product, while list II chemicals are generally used as solvents, catalysts, and reagents. *See* USSG § 2D1.11, comment. (backg'd.). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in § 2D1.1 for offenses involving the final product. The Commission determined that adding the 2-level reduction for meeting the safety valve criteria in § 2D1.11 would promote the proportionality the Commission has intended to achieve between §§ 2D1.1 and 2D1.11.

The amendment also adds new commentary relating to the ''safety valve'' reduction in § 2D1.11 that is consistent with the commentary relating to the ''safety valve'' reduction in § 2D1.1. *See* USSG § 2D1.1, comment. (n. 21). The commentary makes clear that the new 2-level reduction in § 2D1.11 applies regardless of the offense of conviction, and that the minimum offense level of 17 in subsection (b) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) does not apply. Section § 5C1.2(b) provides for an offense level not less than level 17 for defendants who meet the criteria of subdivisions (1)–(5) of section (a) in § 5C1.2 and for whom the statutorily required minimum sentence is at least 5 years. *See* USSG App. C, Amendment 624 (effective November 1, 2001). Since none of the offenses referenced to § 2D1.11 carries a statutory mandatory minimum, the minimum offense level of 17 at § 5C1.2(b) does not affect application of the new 2-level reduction in § 2D1.11.

4. *Amendment:* The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1(B)(vii) by inserting before the period at the end the following: '', but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States''.

Reason for Amendment: This amendment responds to a circuit conflict over the application of the enhancements found at § 2L1.2(b)(1)(A) and (B) to a defendant who was sentenced on two or more occasions for the same drug trafficking conviction (*e.g.,* because of a revocation of probation, parole, or supervised release), such that there was a sentence imposed before the defendant's deportation, then an additional sentence imposed after the deportation. The amendment resolves the conflict by amending the definition of ''sentence imposed'' in Application Note 1(B)(vii) to § 2L1.2 (Unlawfully Entering or Remaining in the United States) to state that the length of the sentence imposed includes terms of imprisonment given upon revocation of probation, parole, or supervised release, but ''only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.''

Section 2L1.2(b)(1) generally reflects the Commission's determination that both the seriousness and the timing of the prior offense for which the defendant was deported are relevant to assessing the defendant's culpability for the illegal reentry offense. A defendant who was deported after a conviction for a felony drug trafficking offense receives an enhancement under either prong (A) or (B) of subsection (b)(1), depending on the length of the sentence imposed. If the sentence imposed was more than 13 months, the defendant receives a 16-level enhancement to the base offense level under prong (A). If the sentence imposed was 13 months or less, the defendant receives a 12-level enhancement under prong (B). However, for defendants whose prior convictions are remote in time and thus do not receive criminal history points, these enhancements are reduced to 12 levels and 8 levels, respectively.

The majority of circuits that have considered the meaning of ''sentence imposed'' in this context have held that the later, additional sentence imposed after deportation does not lengthen the sentence imposed for purposes of the subsection (b)(1) enhancement. *See United States* v. *Bustillos-Pena,* 612 F.3d 863 (5th Cir. 2010); *United States* v. *Lopez,* 634 F.3d 948 (7th Cir. 2011); *United States* v. *Rosales-Garcia,* 667 F.3d 1348 (10th Cir. 2012); *United States* v. *Guzman-Bera,* 216 F.3d 1019 (11th Cir. 2000). Under the majority approach, if the sentence imposed was 13 months or less before the defendant was deported, and was only increased to more than 13 months after the deportation, the defendant is not subject to the enhancement in prong (A) because the ''sentence imposed'' includes only the sentence imposed before the deportation. Under this approach, such a defendant receives the enhancement in prong (B) instead.

The Second Circuit has reached the contrary conclusion, holding that defendants who had their sentences increased to more than 13 months upon revocation after deportation are subject to the enhancement in prong (A) because the ''sentence imposed'' includes the additional revocation sentence imposed after deportation. *See United States* v. *Compres-Paulino,* 393 F.3d 116 (2d Cir. 2004).

The amendment adopts the approach taken by the majority of circuits, with the result that the term of imprisonment imposed upon revocation counts toward the calculation of the offense level in § 2L1.2 only if it was imposed before the defendant was deported or unlawfully remained in the United States. According to public comment and testimony received by the Commission, and as courts have observed, the circumstances under which persons are found present in this country and have their probation, parole, or supervised release revoked for a prior offense vary widely. *See Bustillos-Pena,* 612 F.3d at 867–68 (describing differences among revocation proceedings). In some jurisdictions, the revocation is typically based on the offender's illegal return, while in others, the revocation is typically based on the offender's committing an additional crime.

Furthermore, in some cases revocation proceedings commonly occur before the offender is sentenced on the illegal reentry offense, while in other cases the revocation occurs after the federal sentencing. *See Rosales-Garcia,* 667 F.3d at 1354 (observing that considering post-deportation revocation sentences could result in disparities based on the ''happenstance'' of whether that revocation occurred before or after the prosecution for the illegal reentry offense). Therefore, assessing the seriousness of the prior crime based on the sentence imposed before deportation should result in more consistent application of the enhancements in § 2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing.

5. *Amendment:* Section 2L2.2 is amended in subsection (b) by adding at the end the following:

''(4) (Apply the Greater):

(A) If the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by 6 levels; or (ii) any other serious human rights offense, increase by 10 levels. If clause (ii) applies and the resulting offense level is less than level 25, increase to level 25.''.

The Commentary to 2L2.2 captioned ''Application Notes'' is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively; and by inserting after Note 3 the following:

''4. *Application of Subsection (b)(4)*—For purposes of subsection (b)(4):

'Serious human rights offense' means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, *see* 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

'The offense of incitement to genocide' means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.''.

Chapter Three, Part A is amended by adding at the end the following new guideline and accompanying commentary:

''§ 3A1.5. Serious Human Rights Offense

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

(a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by 2 levels.

(b) If the defendant was convicted of any other serious human rights offense, increase by 4 levels. If (1) death resulted, and (2) the resulting offense level is less than level 37, increase to level 37.

Commentary

Application Notes:

1. *Definition.*—For purposes of this guideline, 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).

2. *Application of Minimum Offense Level in Subsection (b).*—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. *See* generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. *See* 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. *See* 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. *See* 18 U.S.C. § 1091(c).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2425 the following:

''18 U.S.C. § 2441 2X5.1''.

Reason for Amendment: This amendment results from the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations. This amendment addresses human rights violators in two areas: defendants who are convicted of a human rights offense, and defendants who are convicted of immigration or naturalization fraud to conceal the defendant's involvement, or possible involvement, in a human rights offense.

Serious Human Rights Offenses

First, the amendment addresses defendants whose instant offense of conviction is a ''serious human rights offense.'' In the Human Rights Enforcement Act of 2009, Public Law 111–122 (Dec. 22, 2009), Congress defined ''serious human rights offenses'' as ''violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code.'' In that legislation, Congress authorized a new section within the Department of Justice ''with responsibility for the enforcement of laws against suspected participants in [such] offenses.'' That section was established the following year, when the Human Rights and Special Prosecutions Section was created in the Justice Department's Criminal Division. Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. *See* 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. *See* 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. *See* 18 U.S.C. § 1091(c).

Serious human rights offenses can be committed in a variety of ways, including, for example, assault, kidnapping, and murder. As a result, the guidelines generally have addressed these offenses by referencing them to a number of different Chapter Two offense guidelines, such as §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault) and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). In addition, certain of these Chapter Two offense guidelines use as a base offense level the offense level from another guideline applicable to the underlying conduct (*e.g.,* § 2H1.1 (Offenses Involving Individual Rights), which is the guideline to which genocide offenses are referenced). The offense of committing a war crime in violation of 18 U.S.C. § 2441, however, has not been referenced to any guideline prior to this amendment. The amendment amends Appendix A (Statutory Index) to reference these offenses to § 2X5.1 (Other Felony Offenses). Section 2X5.1 addresses the variety of ways in which a war crimes offense may be committed by generally directing the court to apply the most analogous offense guideline.

The amendment also establishes a new Chapter Three adjustment at § 3A1.5 (Serious Human Rights Offense) if the defendant was convicted of a serious human rights offense. The new guideline provides two tiers of adjustments, corresponding to the differing statutory penalties that apply to such offenses. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c) for inciting genocide, however, the adjustment provides a 2-level increase in light of the lesser statutory maximum penalty such offenses carry compared to the other offenses covered by this adjustment.

The new Chapter Three adjustment accounts for the particularly egregious nature of serious human rights offenses while generally maintaining the proportionality

provided by the various Chapter Two guidelines that cover such offenses.

Immigration Fraud

Second, the amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud and the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense. These offenders are sentenced under § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The offenders covered by this amendment fall into two categories. In the first category are defendants who concealed their connection to a military, paramilitary, or police organization that was involved in a serious human rights offense. In the second category are defendants who concealed having participated in a serious human rights offense.

The amendment adds a new specific offense characteristic to § 2L2.2 at subsection (b)(4) that contains two subparagraphs. Subparagraph (A) applies if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, and provides a 2-level increase and a minimum offense level of 13. Subparagraph (B) applies if the defendant committed any part of the instant offense to conceal the defendant's participation in a serious human rights offense, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense. The amendment also adds an application note defining the terms ''serious human rights offense'' and ''the offense of incitement to genocide.''

The new enhancement reflects the impact that such immigration fraud offenses can have on the ability of immigration and naturalization authorities to make fully informed decisions regarding the defendant's immigration petition, application or other request and is intended to ensure that the United States is not a safe haven for those who have committed serious human rights offenses.

6. *Amendment:* The Commentary to § 4A1.2 captioned ''Application Notes'' is amended in Note 5 by striking ''counted. Such offenses are not minor traffic infractions within the meaning of § 4A1.2(c).'' and inserting ''always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of § 4A1.2(c) do not apply.''.

Reason for Amendment: This amendment resolves differences among circuits regarding when prior sentences for the misdemeanor offenses of driving while intoxicated and driving under the influence (and any similar offenses by whatever name they are known) are counted toward the defendant's criminal history score.

Convictions for driving while intoxicated and similar offenses encompass a range of offense conduct. For example, convictions for driving while intoxicated and similar offenses can be classified as anything from traffic infractions to misdemeanors and felonies, and they are subject to a broad spectrum of penalties (ranging from a fine to years in custody for habitual offenders). When the prior offense is a felony, the sentence clearly counts toward the defendant's criminal history score because ''[s]entences for all felony offenses are counted.'' *See* subsection (c) of § 4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is for a misdemeanor or petty offense, circuits have taken different approaches, in part because of language added to § 4A1.2(c)(1). *See* USSG App. C, Amendment 352 (effective November 1, 1990) (adding ''careless or reckless driving'' to the offenses listed in § 4A1.2(c)(1)).

When the prior sentence is a misdemeanor or petty offense, § 4A1.2(c) specifies that the offense is counted, but with two exceptions, limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from ''careless or reckless driving'' to ''trespassing.'' In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least 30 days, or (B) the prior offense was similar to the instant offense. *See* § 4A1.2(c)(1). On the second list are offenses from ''fish and game violations'' to ''vagrancy.'' In such a case, the sentence is never counted. *See* § 4A1.2(c)(2).

Most circuits have held that driving while intoxicated convictions, including misdemeanors and petty offenses, always count toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits have relied on Application Note 5 to § 4A1.2, which has provided:

> *Sentences for Driving While Intoxicated or Under the Influence.*—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of § 4A1.2(c).

See United States v. *Pando,* 545 F.3d 682, 683–85 (8th Cir. 2008) (holding that a conviction for driving while ability impaired was properly included in defendant's criminal history, and rejecting defendant's argument that his offense was similar to careless or reckless driving); *United States* v. *Thornton,* 444 F.3d 1163, 1165–67 (9th Cir. 2006) (holding that driving with high blood alcohol level was properly included in defendant's criminal history, and rejecting defendant's argument that his conviction was ''similar'' to minor traffic infraction or public intoxication). *See also United States* v. *LeBlanc,* 45 F.3d 192, 195 (7th Cir. 1995) (''[A]pplication note [5] reflects the Sentencing Commission's conclusion 'that driving while intoxicated offenses are of sufficient gravity to merit inclusion in the defendant's criminal history, however they might be classified under state law.'''); *United States* v. *Deigert,* 916 F.2d 916, 918 (4th Cir. 1990) (holding that defendant's alcohol-related traffic offenses are counted under Application Note 5).

The Second Circuit took a different approach in *United States* v. *Potes-Castillo,* 638 F.3d 106 (2d Cir. 2011), holding that Application Note 5 could be read either (1) to ''mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception'' or (2) ''as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2).'' *Id.* at 110–11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired ''should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2).'' *Id.* at 113. According to the Second Circuit, such a sentence can qualify for an exception, and therefore not be counted, under the first list (*e.g.,* if it was similar to ''careless or reckless driving'' and the other criteria for a first-list exception were met).

The amendment resolves the issue by amending Application Note 5 to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified. Further, the amendment states plainly that paragraphs (1) and (2) of § 4A1.2(c) do not apply.

This amendment reflects the Commission's view that convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant's criminal history score. The amendment clarifies the Commission's intent and should result in more consistent

calculation of criminal history scores among the circuits.

7. *Amendment:* Section 5G1.2 is amended in subsection (b) by striking ''Except as otherwise required by law (*see* § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.'' and inserting ''For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended in Note 1, in the first paragraph, by inserting before the period at the end of the first sentence the following: ''and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table)''; and after the first paragraph, by inserting the following new paragraph: ''Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* § 5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Note 3, below.''; and by redesignating Note 3 as Note 4 and inserting after Note 2 the following:

''3. *Application of Subsection (b).*—

(A) *In General.*—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.,* the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) *Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.*—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* § 5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* § 5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* § 5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* § 5G1.1(a).

(C) *Examples.*—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate 'total punishment' to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. *See* subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate 'total punishment' to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) *Special Rule on Resentencing.*—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.''.

Reason for Amendment: This amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. The issue arises under § 5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case.

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. *See United States* v. *Salter,* 241 F.3d 392, 395–96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in *United States* v. *Evans-Martinez,* 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, ''a mandatory minimum sentence becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range,'' but ''[a]ll other counts * * * are sentenced based on the Guidelines sentencing range, regardless [of] the mandatory minimum sentences that apply to other counts.'' *See id.* at 637. The Ninth Circuit stated that it would be more ''logical'' to follow the Fifth Circuit's approach but ''such logic is overcome by the precise language of the Sentencing Guidelines''. *See id.*

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. *See United States* v. *Kennedy,* 133 F.3d 53, 60–61 (DC Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The amendment adopts the approach followed by the Fifth Circuit and makes three changes to § 5G1.2. First, it amends § 5G1.2(b) to clarify that the court is to determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty (*i.e.,* a mandatory minimum may increase the bottom of the otherwise applicable guideline range and a statutory maximum may decrease the top of the otherwise applicable guideline range) in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under § 5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant's guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which (1) a defendant's guideline range was affected or restricted by a mandatory minimum penalty, (2) the court is resentencing the defendant, and (3) the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

These changes resolve the application issue by clarifying the manner in which the Commission intended this guideline to operate, and by providing examples similar to those used in training probation officers and judges. When there is only one count, the guidelines provide a single guideline range, and that range may be restricted if a mandatory minimum is involved, as described in § 5G1.1 (Sentencing on a Single Count of Conviction). When there is more than one count, the guidelines also provide a single guideline range, and that range also may be restricted if a mandatory minimum is involved. These changes provide clarity and consistency for cases in which a mandatory minimum is present and are intended to ensure that sentencing courts resolve multiple-count cases in a straightforward, logical manner, with a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations.

8. *Amendment:* Chapter Five, Part K, Subpart 2 is amended by striking § 5K2.19 and its accompanying commentary as follows:

''§ 5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.''.

Reason for Amendment: The Commission's policy statement at § 5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement) prohibits the consideration of post-sentencing rehabilitative efforts as a basis for downward departure when resentencing a defendant. Section 5K2.19 was promulgated in 2000 in response to a circuit conflict regarding whether sentencing courts may consider such rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. *See* USSG App. C, Amendment 602 (effective November 1, 2000). This amendment repeals § 5K2.19. The amendment responds to the Supreme Court's decision in *Pepper* v. *United States,* 131 S. Ct. 1229 (2011), which, in part relying on 18 U.S.C. § 3661, held among other things that ''when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation.'' The amendment repeals the policy statement in light of the *Pepper* decision.

9. *Amendment:* Section 2P1.2 is amended in subsection (a)(3) by inserting after ''currency,'' the following: ''a mobile phone or similar device,''.

The Commentary to § 2P1.2 captioned ''Application Notes'' is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively, and by inserting at the beginning the following:

''1. In this guideline, the term 'mobile phone or similar device' means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).''.

The Commentary to § 2T2.1 captioned ''Statutory Provisions'' is amended by inserting ''15 U.S.C. § 377,'' before ''26 U.S.C.''.

The Commentary to § 2T2.2 captioned ''Statutory Provisions'' is amended by inserting ''15 U.S.C. § 377,'' before ''26 U.S.C.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 158 the following:

''15 U.S.C. § 377 2T2.1, 2T2.2'';

by inserting after the line referenced to 18 U.S.C. § 43 the following:

''18 U.S.C. § 48 2G3.1'';

by inserting after the line referenced to 18 U.S.C. § 1153 the following:

''18 U.S.C. § 1158 2B1.1, 2B5.3

18 U.S.C. § 1159 2B1.1'';

by inserting after the line referenced to 18 U.S.C. § 1716D the following:

''18 U.S.C. § 1716E 2T2.2''; and

by striking the lines referenced to 41 U.S.C. § 53, 54, and 423(e) as follows:

''41 U.S.C. § 53 2B4.1

41 U.S.C. § 542B4.1

41 U.S.C. § 423(e) 2B1.1, 2C1.1''; and by inserting the following:

''41 U.S.C. § 2102 2B1.1, 2C1.1

41 U.S.C. § 2105 2B1.1, 2C1.1

41 U.S.C. § 8702 2B4.1

41 U.S.C. § 8707 2B4.1''.

Reason for Amendment: This amendment responds to miscellaneous issues arising from recently enacted legislation.

Cell Phone Contraband Act of 2010

First, the amendment responds to the Cell Phone Contraband Act of 2010, Public Law 111–225 (enacted August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device. Offenses under section 1791 are referenced in Appendix A (Statutory Index) to § 2P1.2 (Providing or Possessing Contraband in Prison). The penalty structure of section 1791 is based on the type of contraband involved, and the other class A misdemeanors in section 1791 receive a base offense level of 6 in § 2P1.2. Under the amendment, the class A misdemeanor in section 1791 that applies when the contraband is a cell phone will also receive a base offense level of 6 in § 2P1.2. This change maintains the relationship between the

penalty structures of the statute and the guideline.

Prevent All Cigarette Trafficking Act of 2009

Second, the amendment responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Public Law 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. § 375 *et seq.,* which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco.

The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The amendment amends Appendix A (Statutory Index) to reference section 377 offenses to § 2T2.1 (Non-Payment of Taxes) and § 2T2.2 (Regulatory Offenses). These two guidelines are the most analogous guidelines for a section 377 offense because the offense may involve either non-payment of taxes or regulatory offenses. Accordingly, the amendment also amends the Commentary to §§ 2T2.1 and 2T2.2 to add section 377 to their lists of statutory provisions. These lists indicate that § 2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and § 2T2.2 applies if the conduct is tantamount to a recordkeeping violation rather than an effort to evade payment of taxes.

The PACT Act also created a new class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to § 2T2.2. Section 2T2.2 is the most analogous guideline because offenses under section 1716E are regulatory offenses.

Animal Crush Video Prohibition Act of 2010

Third, the amendment responds to the Animal Crush Video Prohibition Act of 2010, Public Law 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an ''animal crush video,'' which is defined by the statute in a manner that requires, among other things, that the depiction be obscene. The maximum term of imprisonment for a section 48 offense is 7 years. The amendment amends Appendix A (Statutory Index) to reference section 48 offenses to § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). Section 2G3.1 is the most analogous guideline because obscenity is an element of section 48 offenses.

Indian Arts and Crafts Amendments Act of 2010

Fourth, the amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Public Law 111–211 (enacted July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than $1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum term of imprisonment for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than $1,000. The amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to § 2B1.1 (Theft, Property Destruction, and Fraud). Section 2B1.1 is the most analogous guideline because an offense under section 1159 has elements of fraud and deceit.

The amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trademark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. The amendment amends Appendix A (Statutory Index) to reference section 1158 offenses to both §§ 2B1.1 and 2B5.3 (Criminal Infringement of Copyright or Trademark). These two guidelines are the most analogous guidelines because an offense under section 1158 contains alternative sets of elements, one of which involves trademark infringement and one of which involves false statements.

Public Contracting Offenses

Finally, the amendment responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code—title 41, ''Public Contracts''. As part of this codification, two criminal offenses, 41 U.S.C. § 53 and 423(a)B(b), and their respective penalty provisions, 41 U.S.C. 54 and 423(e), were given new title 41 section numbers: Sections 8702 and 8707 for sections 53 and 54, respectively, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e), respectively. The substantive offenses and their related penalties did not change. The amendment makes changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A. The changes are technical.

[FR Doc. 2012–11474 Filed 5–10–12; 8:45 am]

BILLING CODE 2210–40–P