Federal Register

Friday,
May 9, 2008

Part V

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, 2008.

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, 2008, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4590. 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 28, 2008 (*see* 73 FR 4931). The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 13, 2008. On May 1, 2008, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2008.

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

Ricardo H. Hinojosa,
Chair.

1. Introduction to Chapter One

Amendment: Chapter One is amended in the heading by inserting ''Introduction,'' before ''Authority and General''; and by striking Part A, including the Editorial Note, in its entirety and inserting:

''PART A—INTRODUCTION AND AUTHORITY

Introductory Commentary

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

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

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

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

1. Authority

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

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

2. The Statutory Mission

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

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

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

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect

180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

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

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Real Offense vs. Charge Offense Sentencing

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

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

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

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an

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

(b) Departures

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

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

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

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

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

(c) Plea Agreements

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

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

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

(d) Probation and Split Sentences

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

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

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

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

(e) Multi-Count Convictions

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

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

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

(f) Regulatory Offenses

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

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

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

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

(g) Sentencing Ranges

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's

Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

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

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

(h) The Sentencing Table

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

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

5. A Concluding Note

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

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

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

2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

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

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta* v. *United States,* 488 U.S. 361 (1989), which upheld the

constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

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

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

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

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). See 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In Rita, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

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

Id. at 2463 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale,' id., and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' Id. at 2464.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. § 3553(a)(4), (a)(5); Booker, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must * * * take them into account when sentencing.'); Rita, 127 S. Ct. at 2465 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 128 S. Ct. 586, 596 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See Rita, 127 S. Ct. at 2465. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range * * * [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] * * * tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' Gall, 128 S. Ct. at 597.

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

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

Id. at 2464; see also Booker, 543 U.S. at 264 (['T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'); Gall, 128 S. Ct. at 594 ('[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in Rita, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.').

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

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in Kimbrough v. United States, 128 S. Ct. 558 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum.' Id. at 571; 28 U.S.C. § 994(h).

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

3. AUTHORITY

§ 1A3.1. Authority.

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

Reason for Amendment: This amendment sets forth the introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments occasionally made thereto between 1987 and 2000, in Subpart 1 of Chapter One. In 2003, the introduction was moved to an editorial note. (See USSC, Guidelines Manual, Supplement to Appendix C, Amendment 651.) This amendment removes the introduction from the editorial note to Subpart 1 of Chapter One, representing the original introduction as it first appeared in 1987, as amended by Amendments 67, 68, 307, 466, 534, 538, 602, and 603.

The amendment also supplements the original introduction with an updated discussion of the role of the guidelines, their evolution, and Supreme Court case law, and redesignates § 1A1.1 (Authority) as § 1A3.1.

2. Court Security Improvement Act of 2007

Amendment: Section 2A6.1 is amended in the heading by adding at the end ''; False Liens''.

Section 2A6.1(b) is amended by striking subdivision (2) and inserting the following:

''(2) If (A) the offense involved more than two threats; or (B) the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, increase by 2 levels.''.

The Commentary to § 2A6.1 captioned ''Statutory Provisions'' is amended by inserting ''1521,'' after ''1038,''.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively; and by inserting after Note 1 the following:

''2. Applicability of Chapter Three Adjustments.—If the defendant is convicted under 18 U.S.C. § 1521, apply § 3A1.2 (Official Victim).''.

The Commentary to § 2A6.1 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) and inserting the following:

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

Section 2H3.1(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; and by adding at the end the following:

''(2) (Apply the greater) If—

(A) The defendant is convicted under 18 U.S.C. § 119, increase by 8 levels; or

(B) The defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by 10 levels.''.

The Commentary to § 2H3.1 captioned ''Statutory Provisions'' is amended by inserting ''119,'' before ''1039,''.

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended by redesignating Note 3 as Note 5 and inserting after Note 2 the following:

''3. Inapplicability of Chapter Three (Adjustments).—If the enhancement under subsection (b)(2) applies, do not apply § 3A1.2 (Official Victim).

4. Definitions.—For purposes of subsection (b)(2)(B):

'Computer' has the meaning given that term in 18 U.S.C. § 1030(e)(1).

'Covered person' has the meaning given that term in 18 U.S.C. § 119(b).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Restricted personal information' has the meaning given that term in 18 U.S.C. § 119(b).''.

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 115(b)(4) the following:

''18 U.S.C. § 119 2H3.1''; and

By inserting after the line reference to 18 U.S.C. § 1520 the following:

''18 U.S.C. § 1521 2A6.1''.

Reason for Amendment: This amendment responds to two new offenses created by the Court Security Improvement Act of 2007 (the ''Act''), Public Law 110–177.

First, the amendment addresses section 201 of the Act, which created a new offense at 18 U.S.C. § 1521 prohibiting the filing of, attempts, or conspiracies to file any false lien or encumbrance against the real or personal property of officers or employees of the United States Government, on account of that individual's performance of official duties. The offense is punishable by a statutory maximum term of imprisonment of ten years. The amendment references the new offense to § 2A6.1 (Threatening or Harassing Communications; Hoaxes), and expands

the heading of § 2A6.1 accordingly. The Commission determined that referencing offenses under 18 U.S.C. § 1521 to § 2A6.1 is appropriate because the harassment and threatening of an official by the filing of fraudulent encumbrances is analogous to conduct covered by other statutes referenced to this guideline.

The amendment also makes a number of modifications to § 2A6.1 to address specific harms associated with violations of 18 U.S.C. § 1521. Specifically, the amendment expands the scope of the two-level enhancement at subsection (b)(2) to apply if the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, and also provides an upward departure provision that may apply if the offense involved substantially more than two false liens or encumbrances against the real or personal property of the same victim. These modifications reflect the additional time and resources required to remove multiple false liens or encumbrances and provide proportionality between such offenses and other offenses referenced to this guideline that involve more than two threats.

The amendment also provides an upward departure provision that may apply if the offense involved substantial pecuniary harm to a victim. The upward departure provision reflects the increased seriousness of those offenses that result in substantial costs.

In addition, the amendment adds a new application note specifying that if the defendant is convicted under 18 U.S.C. § 1521, the adjustment under § 3A1.2 (Official Victim) shall apply. The addition of this note clarifies that the official status of the victim is not taken into account in the base offense level.

Second, the amendment addresses section 202 of the Act, which created a new offense at 18 U.S.C. § 119 prohibiting the public disclosure of restricted personal information about a federal officer or employee, witness, juror, or immediate family member of such a person, with the intent to threaten or facilitate a crime of violence against such a person. The offense is punishable by a statutory maximum term of imprisonment of five years.

The amendment references the new offense to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission determined that referencing offenses under 18 U.S.C. § 119 to § 2H3.1 is appropriate because the prohibited conduct is analogous to conduct covered by other statutes referenced to this guideline.

The amendment also creates a two-pronged enhancement at subsection (b)(2), the greater of which applies. The first prong, at subsection (b)(2)(A), is an eight-level enhancement applicable if the defendant is convicted under 18 U.S.C. § 119. A corresponding application note provides that § 3A1.2 shall not apply in such cases. Thus, the enhancement at subsection (b)(2)(A) accounts for the official victim adjustment under § 3A1.2 that would otherwise apply in many offenses under 18 U.S.C. § 119. Incorporating the official victim adjustment into subsection (b)(2)(A) was appropriate because the adjustment in § 3A1.2 does not apply to some individuals, such as witnesses and jurors, who are covered by 18 U.S.C. § 119. The enhancement at subsection (b)(2)(A) also reflects the intent to threaten or facilitate a crime of violence, which is an element of an offense under 18 U.S.C. § 119. The cross reference at subsection (c)(1) will apply, however, if the purpose of the offense was to facilitate another offense and the guideline applicable to an attempt to commit that other offense results in a greater offense level.

The second prong, at subsection (b)(2)(B), is a ten-level enhancement applicable if the defendant is convicted under 18 U.S.C. § 119 and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available. This greater enhancement accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet.

3. Repromulgation of the Emergency and Disaster Assistance Fraud Amendment

Amendment: Section 2B1.1, effective February 6, 2008 (see USSC Guidelines Manual Supplement to the 2007 Supplement to Appendix C, Amendment 714), is repromulgated with the following changes:

Section 2B1.1(b) is amended by striking subdivision (16); by redesignating subdivisions (11) through (15) as subdivisions (12) through (16), respectively; by inserting after subdivision (10) the following:

''(11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.'';

In subdivision (12), as redesignated by this amendment, by inserting ''resulting'' before ''offense level''; and

In subdivision (14), as redesignated by this amendment, by striking ''(b)(13)(B)'' and inserting ''(b)(14)(B)''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1040,'' before ''1341–1344,''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3 by striking subdivision (A)(v)(IV).

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 10 by striking ''(b)(11)'' and inserting ''(b)(12)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 11 by striking ''(b)(13)(A)'' and inserting ''(b)(14)(A)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 12 by striking ''(b)(13)(B)'' and inserting ''(b)(14)(B)''; by striking ''(b)(13)(B)(i)'' and inserting ''(b)(14)(B)(i)''; and by striking ''(b)(13)(B)(ii)'' and inserting ''(b)(14)(B)(ii)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 13 by striking ''(b)(14)'' and inserting ''(b)(15)'' each place it appears; by striking ''(b)(14)(iii)'' and inserting ''(b)(15)(iii)'' each place it appears; and by striking ''(b)(13)(B)'' and inserting ''(b)(14)(B)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 14 by striking ''(b)(15)'' and inserting ''(b)(16)'' each place it appears.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking Note 15 in its entirety; and by redesignating Notes 16 through 20 as Notes 15 through 19, respectively.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 19, as redesignated by this amendment, by striking ''(b)(14)(iii)'' and inserting ''(b)(15)(iii)''; and by adding at the end the following:

''(D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(11) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended by inserting after the paragraph that begins ''Subsection (b)(10)(C)'' the following: ''Subsection (b)(11) implements the directive in section 5 of Public Law 110–179.''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the paragraph that begins ''Subsection (b)(12)(B)'' by striking ''(b)(12)(B)'' and inserting ''(b)(13)(B)'';

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

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

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

By striking ''(b)(14)(B)'' and inserting ''(b)(15)(B)''; and

By striking the paragraph that begins ''Subsection (b)(16) implements''.

Reason for Amendment: This amendment re-promulgates as permanent the temporary, emergency amendment (effective Feb. 6, 2008) that implemented the emergency directive in section 5 of the ''Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007,'' Public Law 110–179 (the ''Act''). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, directed that the Commission forthwith shall—

promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191) . * * *

Section 5(b) of the Act further required the Commission to—

(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(2) Assure reasonable consistency with other relevant directives and with other guidelines;

(3) Account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;

(4) Make any necessary conforming changes to the sentencing guidelines; and

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

The emergency amendment addressed concerns that disaster fraud involves harms not adequately addressed by § 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) by (1) adding a two-level enhancement if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency; (2) modifying the commentary to the guideline as it relates to the calculation of loss; and (3) providing a reference to § 2B1.1 in Appendix A (Statutory Index) for the offense at 18 U.S.C. § 1040 (Fraud in connection with major disaster or emergency benefits) created by the Act.

This amendment repromulgates the temporary, emergency amendment as permanent, with the following changes. First, the amendment expands the scope of the two-level enhancement to include all conduct described in 18 U.S.C. § 1040. Thus, the amendment expands the scope of the enhancement to include fraud or theft involving procurement of property or services as a contractor, subcontractor or supplier, rather than limiting it to the conduct described in the emergency directive. The limited emergency amendment authority did not permit the Commission to include such conduct in the enhancement promulgated in the emergency amendment. However, the directive in section 5 of the Act covers all ''fraud or theft offenses in connection with a major disaster declaration'' and, therefore, expansion of the scope of the enhancement to apply to all conduct described in 18 U.S.C. § 1040 is appropriate.

Second, the amendment modifies the enhancement to include a minimum offense level of 12. The Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense. The Commission studied a sample of disaster fraud cases and compared those cases to other cases of defrauding government programs. This analysis supported claims made in testimony to the Commission that the majority of the disaster fraud cases resulted in probationary sentences because the amount of loss calculated under subsection (b)(1) of § 2B1.1 had little impact on the sentences. The Commission also received testimony and public comment identifying various harms unique to disaster fraud cases. For example, charitable institutions may have a more difficult time soliciting contributions because fraud in connection with disasters may erode public trust in these institutions. Moreover, the pool of funds available to aid legitimate disaster victims is adversely affected when fraud occurs. Further, the inherent tension between the imposition of fraud controls and the need to provide aid to disaster victims quickly makes it difficult for relief agencies and charitable institutions to prevent disaster fraud. All of these factors provide support for a minimum offense level.

Third, the amendment adds a downward departure provision that may apply in a case in which the minimum offense level applies, the defendant is a victim of a major disaster or emergency, and the benefits received illegally were only an extension or overpayment of benefits received legitimately. This provision recognizes that a defendant's legitimate status as a disaster victim may be a mitigating factor warranting a downward departure in certain cases involving relatively small amounts of loss.

Fourth, the amendment deletes certain commentary relating to the definition of loss that was promulgated in the emergency amendment. Specifically, the emergency amendment added subdivision (IV) to Application Note 3(A)(v) of § 2B1.1 providing that in disaster fraud cases, ''reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.'' The amendment deletes this provision because of concerns that administrative costs might be difficult to determine or in some instances could over-represent the harm caused by the offense.

Finally, the amendment makes conforming changes to the guideline and the commentary.

4. Honest Leadership and Open Government Act of 2007

Amendment: The Commentary to § 2C1.1 captioned ''Statutory Provisions'' is amended by inserting ''227,'' after ''226,''.

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 226 the following:

''18 U.S.C. § 227 2C1.1''.

Reason for Amendment: This amendment responds to the Honest Leadership and Open Government Act of 2007, Public Law 110–81 (''the Act''). The Act created a criminal offense at 18 U.S.C. § 227 prohibiting a member or employee of Congress from influencing or attempting to influence, on the basis of political affiliation, employment decisions or practices of a private entity. The offense is punishable by a 15-year statutory maximum term of imprisonment.

The amendment modifies Appendix A (Statutory Index) to reference offenses under 18 U.S.C. § 227 to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) because this guideline covers similar offenses.

5. Animal Fighting Prohibition Enforcement Act of 2007

Amendment: Section 2E3.1 is amended in the heading by adding at the end ''; Animal Fighting Offenses''.

Section 2E3.1(a) is amended by inserting ''(Apply the greatest)'' after ''Level:''; by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

''(2) 10, if the offense involved an animal fighting venture; or''.

The Commentary to § 2E3.1 captioned ''Statutory Provisions'' is amended by inserting ''7 U.S.C. § 2156;'' before ''15 U.S.C. §§ ''.

The Commentary to § 2E3.1 is amended by adding at the end the following:

''Application Notes:

1. Definition.—For purposes of this guideline: 'Animal fighting venture' has the meaning given that term in 7 U.S.C. § 2156(g).

2. Upward Departure Provision.—If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by striking ''7 U.S.C. § 2156;''.

Appendix A (Statutory Index) is amended in the line reference to 7 U.S.C. § 2156 by striking ''2X5.2'' and inserting ''2E3.1''.

Reason for Amendment: This amendment implements the Animal Fighting Prohibition Enforcement Act of 2007, Public Law 110–22 (the ''Act''). The Act amended the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses and to create a new offense. Specifically, the Act increased penalties for criminal violations of 7 U.S.C. § 2156 from a one-year statutory maximum term of imprisonment to a three-year statutory maximum term of imprisonment. The penalties are set forth in section 49 of title 18, United States Code. In addition, the Act created an offense at 7 U.S.C. § 2156(e) making it unlawful to ''sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture.'' This new offense also carries a three-year statutory maximum term of imprisonment.

Because 7 U.S.C. § 2156 is now a felony offense, the amendment deletes the reference of 7 U.S.C. § 2156 to § 2X5.2 (Class A Misdemeanors) in Appendix A (Statutory Index), and deletes the listing of 7 U.S.C. § 2156 from the statutory provisions listed in the commentary to § 2X5.2. The amendment references offenses under 7 U.S.C. § 2156 to § 2E3.1 (Gambling Offenses) as the legislative history and public comment indicate that such offenses often involve gambling. Accordingly, the amendment expands the title of § 2E3.1 to include animal fighting offenses.

The amendment also creates a new alternative base offense level at § 2E3.1(a)(2) that provides a base offense level of level 10 if the offense involved an ''animal fighting venture,'' which is defined in Application Note 1 as having the meaning given that term in 7 U.S.C. § 2156(g), i.e., ''any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment.'' The alternative base offense level reflects the increased harm, i.e., cruelty to animals, resulting from offenses under 7 U.S.C. § 2156(g) that is not associated with offenses that typically receive a base offense level of level 6 under the guideline. Additionally, the amendment adds an instruction to apply the greatest applicable base offense level at § 2E3.1(a) because an offense involving an animal fighting venture may also involve conduct covered by subsection (a)(1) and, therefore, should receive the higher base offense level provided by that subsection.

The amendment also provides an upward departure provision that may apply if an offense involves extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal.

6. Immigration

Amendment: The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (B)(iii) and inserting the following:

''(iii) 'Crime of violence' means any of the following offenses under federal, state, or local law: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.'';

And in subdivision (B)(iv) by inserting '', or offer to sell'' after ''dispensing of''.

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

''7. Departure Consideration.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.''.

Reason for Amendment: This amendment addresses certain discrete issues that have arisen in the application of § 2L1.2 (Unlawfully Entering or Remaining in the United States). The amendment reflects input the Commission has received from federal judges, prosecutors, defense attorneys, and probation officers at several roundtable discussions and public hearings on the operation of § 2L1.2.

First, the amendment clarifies the scope of the term ''forcible sex offense'' as that term is used in the definition of ''crime of violence'' in § 2L1.2, Application Note 1(B)(iii). The amendment provides that the term

''forcible sex offense'' includes crimes ''where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.'' The amendment makes clear that forcible sex offenses, like all offenses enumerated in Application Note 1(B)(iii), ''are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another,'' USSC, Guideline Manual, Supplement to Appendix C, Amendment 658. Application of the amendment, therefore, would result in an outcome that is contrary to cases excluding crimes in which ''there may be assent in fact but no legally valid consent'' from the scope of ''forcible sex offenses.'' See, e.g., *United States* v. *Gomez-Gomez*, 493 F.3d 562, 567 (5th Cir. 2007) (holding that a rape conviction was not a forcible sex offense because it could have been based on assent given in response to a threat ''to reveal embarrassing secrets'' or after ''an employer threatened to fire a subordinate''); *United States* v. *Luciano-Rodriguez*, 442 F.3d 320, 322–23 (5th Cir. 2006) (holding that a conviction for a sexual assault was not a forcible sex offense because it could have been based on assent when ''the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it,'' when ''the actor is a public servant who coerces the other person to submit or participate,'' or when ''the actor is a member of the clergy or is a mental health service provider who exploits the emotional dependency engendered by their position''); *United States* v. *Sarmiento-Funes*, 374 F.3d 336, 341 (5th Cir. 2004) (holding that a conviction for sexual assault was not a forcible sex offense because it could have been based on assent that is ''the product of deception or a judgment impaired by intoxication'').

Second, the amendment clarifies that an ''offer to sell'' a controlled substance is a ''drug trafficking offense'' for purposes of subsection (b)(1) of § 2L1.2 by adding ''offer to sell'' to the conduct listed in Application Note 1(B)(iv).

Finally, the amendment addresses the concern that in some cases the categorical enhancements in subsection (b) may not adequately reflect the seriousness of a prior offense. The amendment adds a departure provision that may apply in a case ''in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction.'' The amendment provides two examples of cases that may warrant such a departure. The first example suggests that an upward departure may be warranted in a case in which ''subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use.'' The second example suggests that a downward departure may be warranted in a case in which ''subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43).''

7. Miscellaneous Food and Drug Offenses

Amendment: Section 2N2.1 is amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following:

''(b) Specific Offense Characteristic

(1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by 4 levels.''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''(b)(1)'' and inserting ''(c)(1)''; and by striking ''(b)(2)'' and inserting ''(c)(2)''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 3 by striking ''Death'' and inserting ''The offense created a substantial risk of bodily injury or death;''; by inserting ''death,'' before ''extreme''; and by inserting ''from the offense'' after ''resulted''.

Reason for Amendment: This amendment makes two changes to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to address offenses under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (the ''FDCA'') and the Prescription Drug Marketing Act of 1987, Public Law 100–293 (the ''PDMA''). First, the amendment adds a specific offense characteristic at subsection (b)(1) of § 2N2.1 that provides a four-level enhancement for repeat violations of the FDCA. First time violations of the FDCA, absent fraud, carry a maximum term of imprisonment of one year. 21 U.S.C. § 333(a)(1). In contrast, second or subsequent violations of the FDCA carry a maximum term of imprisonment of three years. 21 U.S.C. § 333(a)(2). The Commission determined based on public comment and testimony that an enhancement is appropriate to account for the increased statutory maximum penalties provided for second or subsequent FDCA violations.

Second, the amendment expands the upward departure provision at Application Note 3(A) of § 2N2.1 to include an offense that created a substantial risk of bodily injury or death. Public comment and testimony indicated that § 2N2.1 may not adequately account for the substantial risk of bodily injury or death created by certain offenses. The PDMA, for example, includes certain offenses that may create such risks, such as the re-importation into the United States of any previously exported prescription drug, except by the drug's manufacturer; the sale or purchase of any prescription drug sample or coupon; and the wholesale distribution of prescription drugs without the necessary state or federal licenses. 21 U.S.C. § 353(c), (d), (e). Thus, the amendment expanded the scope of the upward departure provision to address such risks.

8. Technical Amendment

Amendment: The Commentary to § 2E4.1 captioned ''Application Note'' is amended in Note 1 by inserting ''and local'' before ''excise''; and by striking ''tax'' and inserting ''taxes''.

The Commentary to § 2E4.1 captioned ''Background'' is amended by inserting ''and local'' before ''excise''.

Section 2X7.1 is amended in subsection (a) by striking ''554'' and inserting ''555'' each place it appears.

The Commentary to § 2X7.1 captioned ''Statutory Provision'' is amended by striking ''554'' and inserting ''555''.

Section 3C1.4 is amended by striking ''3559(f)(1)'' and inserting ''3559(g)(1)''.

Appendix A (Statutory Index) is amended by striking both line references to 18 U.S.C. § 554 and inserting the following:

''18 U.S.C. § 554 2B1.5, 2M5.2, 2Q2.1

18 U.S.C. § 555 2X7.1'';

In the line reference to 18 U.S.C. § 1091 by striking ''2H1.3'' and inserting ''2H1.1'';

In the line reference to 18 U.S.C. § 1512(a) by inserting '', 2A2.2, 2A2.3, 2J1.2'' after ''2A2.1''; and

In the line reference to 18 U.S.C. § 1512(b) by striking ''2A1.2, 2A2.2,''.

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

First, the amendment addresses section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109–177, which expanded the definition of ''contraband cigarette'' in subsection (2) of 18 U.S.C. § 2341 to include the failure to pay local

cigarette taxes. The amendment reflects this statutory change by expanding the scope of Application Note 1 of § 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) to include local excise taxes within the meaning of ''taxes evaded.'' The amendment also amends the background commentary to § 2E4.1 to include local excise taxes.

Second, the amendment implements technical corrections made by section 553 of Public Law 110–161 by changing the statutory references in § 2X7.1 (Border Tunnels and Subterranean Passages) from ''18 U.S.C. § 554'' to ''18 U.S.C. § 555,'' and by amending Appendix A (Statutory Index) to refer violations of 18 U.S.C. § 555 to § 2X7.1.

Third, the amendment addresses a statutory redesignation made by section 202 of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, by changing statutory references in § 3C1.4 (False Registration of Domain Name) from ''18 U.S.C. § 3559(f)(1)'' to ''18 U.S.C. § 3559(g)(1).''

Fourth, the amendment addresses statutory changes to 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant) made by the 21st Century Department of Justice Appropriations Act, Public Law 107–273, by deleting in Appendix A the references to §§ 2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for violations of 18 U.S.C. § 1512(b), and adding those guidelines as references for violations of 18 U.S.C. § 1512(a). The amendment also adds a reference to § 2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by that subsection.

Fifth, the amendment changes the reference in Appendix A for offenses under 18 U.S.C. § 1091 (Genocide) from §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), which no longer exists as a result of a guideline consolidation (see USSC, Guidelines Manual, Appendix C, Amendment 521), to § 2H1.1 (Offenses Involving Individual Rights).

[FR Doc. E8–10370 Filed 5–8–08; 8:45 am]

BILLING CODE 2211–01–P