For technical questions related to the development of pricing projects involving tolls, please also contact Ms. Angela Jacobs, or contact Mr. Patrick DeCorla-Souza, FHWA Office of Innovative Program Delivery, at (202) 366–4076, *patrick.decorla-souza@dot.gov*. For technical questions related to the development of pricing projects not involving tolls, please contact Mr. Allen Greenberg, FHWA Office of Operations, at (202) 366–2425, *allen.greenberg@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, at (202) 366–4928, michael.harkins@dot.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register's** home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

On October 19, 2010, at 75 FR 64397, the FHWA published in the **Federal Register** a notice inviting States, along with their local government partners and other public authorities, to apply to participate in the Value Pricing Pilot program and presenting guidelines for program applications for fiscal years 2010 and 2011. The original deadline for formal grant applications was January 18, 2011. This notice extends the deadline by 15 calendar days to February 2, 2011. Program application requirements and further application guidance can be found in the October 19, 2010, notice.

Authority: 23 U.S.C. 315; sec. 1216(a), Pub. L. 105–178, 112 Stat. 107; Pub. L. 109–59; 117 Stat. 1144.

Issued on: January 13, 2011.

Victor M. Mendez,

Administrator.

[FR Doc. 2011–1066 Filed 1–18–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 12, 2011.

The Department of Treasury is planning to submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 21, 2011 to be assured of consideration.

HR Connect

OMB Number: 1505–0224.

Type of Review: Renewal.

Title: New Issue Bond Program and Temporary Credit and Liquidity Program.

Description: Authorized under section 304(g) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719(g)) and Section 306(l) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1455(l), as amended by the Housing and Economic Recovery Act (HERA) of 2008 (Pub. L. 110–289; approved July 30, 2008) the Department of the Treasury (Treasury) is implementing two programs under the HFA (Housing Finance Agency) Initiative. The statute provides the Secretary authority to purchase securities and obligations of Fannie Mae and Freddie Mac (the GSEs) as he determines necessary to stabilize the financial markets, prevent disruptions in the availability of mortgage finance, and to protect the taxpayer. On December 4, 2009, the Secretary made the appropriate determination to authorize the two programs of the HFA Initiative: the New Issue Bond Program (NIBP) and the Temporary Credit and Liquidity Program (TCLP). Under the NIBP, Treasury has purchased securities from the GSEs backed by mortgage revenue bonds issued by participating state and local HFAs. Under the TCLP, Treasury has purchased a participation interest from the GSEs in temporary credit and liquidity facilities provided to participating HFAs as a liquidity backstop on their variable-rate debt. In order to properly manage the two programs of the initiative, continue to protect the taxpayer, and assure compliance with the Programs' provisions, Treasury is instituting a series of data collection requirements to be completed by participating HFAs and furnished to Treasury through the GSEs.

Respondents: Businesses or other for-profit institutions, and not-for-profit institutions.

Estimated Total Reporting Burden: 26,170 hours.

Agency Contact: Theo Polan, (202) 622–8085, Room 2054MT, 1500 Pennsylvania Avenue, Washington, DC 20220.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. 2011–992 Filed 1–18–11; 8:45 am]

BILLING CODE 4810–25–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment on drug trafficking, including (A) a proposal to repromulgate as a permanent amendment the emergency, temporary amendment in response to the Fair Sentencing Act of 2010, Public Law 111–220, regarding offenses involving crack cocaine and regarding certain aggravating and mitigating circumstances in drug trafficking cases, and (B) a proposed change to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to implement the directive in section 4 of the Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273, and related issues for comment on drug trafficking; (2) a proposed amendment on firearms, including

proposed changes to § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) regarding certain cases involving small arms and ammunition crossing the border and related issues for comment, including whether revisions to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and related guidelines may be appropriate to address concerns about firearms crossing the border and straw purchasers; (3) a proposed amendment to Appendix A (Statutory Index) in response to the Dodd-Frank Wall Street Reform and Protection Act, Public Law 111–203, and issues for comment regarding the directives in section 1079A of that Act; (4) a proposed amendment to § 2B1.1 (Theft, Property Destruction, and Fraud) to implement the directive in section 10606 of the Patient Protection and Affordable Care Act, Public Law 111–148, and a related issue for comment; (5) a proposed amendment on supervised release, including a proposed change to § 5D1.1 (Imposition of a Term of Supervised Release) on cases in which the court is required by the guidelines to impose supervised release and a proposed change to § 5D1.2 (Term of Supervised Release) on the minimum lengths required by that guideline for a term of supervised release, and related issues for comment; (6) a proposed amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) that would provide a limitation on the use of convictions under § 2L1.2(b)(1)(A) and (B) in certain circumstances; (7) a proposed amendment to § 2J1.1 (Contempt) that would address a circuit conflict on the applicability of a specific enhancement in a case involving the willful failure to pay court-ordered child support; (8) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues, including proposed changes to the policy statement at § 6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States* v. *Booker,* 543 U.S. 220 (2005), and proposed changes to Appendix A (Statutory Index) to address certain criminal provisions in the Coast Guard Authorization Act of 2010, Public Law 111–281; and (9) a proposed amendment in response to certain technical issues that have arisen in the guidelines.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 21, 2011.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its Web site at *http://www.ussc.gov.*

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for Federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

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

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(c). To the extent practicable, public comment should address each of these factors.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *http://www.ussc.gov.*

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

Patti B. Saris,

Chair.

1. Drugs

Synopsis of Proposed Amendment: In October 2010, the Commission promulgated an emergency, temporary amendment to implement the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111–220 (the "Fair Sentencing Act"). *See* Appendix C, Amendment 748 (effective November 1, 2010). The emergency amendment made a number of substantive changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), including changes to the Drug Quantity Table for offenses involving cocaine base ("crack" cocaine), new enhancements to account for certain aggravating factors, and new reductions to account for certain mitigating factors. The emergency amendment also made revisions to five other guidelines: §§ 2D1.14 (Narco-Terrorism), 2D2.1 (Unlawful Possession; Attempt or Conspiracy), 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to

Certain Crimes), 3B1.4 (Using a Minor To Commit a Crime), and 3C1.1 (Obstructing or Impeding the Administration of Justice). The proposed amendment re-promulgates these guidelines without change.

In addition to re-promulgating the emergency amendment, the proposed amendment further amends the Commentary to § 2D1.1 in response to the Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273 (the "Drug Disposal Act"). Section 3 of the Drug Disposal Act amended 21 U.S.C. 822 to authorize certain persons in possession of controlled substances (*e.g.,* ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Drug Disposal Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide "an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the Guidelines Manual if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3." The proposed amendment responds to the directive by amending Application Note 8 to § 2D1.1 to provide that an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.

The proposed amendment concludes with a series of issues for comment arising out of the Commission's continued work on the guidelines applicable to drug trafficking, including issues for comment on—

(1) Whether the Commission should make any changes to the Fair Sentencing Act emergency amendment in re-promulgating it as a permanent amendment;

(2) Whether the permanent amendment or any part thereof should be included in subsection (c) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants;

(3) What changes, if any, should be made to the guidelines applicable to drug trafficking; and

(4) What changes, if any, should be made to § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

Proposed Amendment

Sections 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, and 3C1.1, as amended by Amendment 748 (*see* Supplement to the 2010 Guidelines Manual (effective November 1, 2010); *see also* 75 FR 66188 (October 27, 2010)), are repromulgated without change.

In addition, the Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8 in the first paragraph by adding at the end the following:

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

Issues for Comment

1. *Re-Promulgation of the Fair Sentencing Act.* The Fair Sentencing Act of 2010 reduced statutory penalties for cocaine base ("crack" cocaine) offenses, eliminated the mandatory minimum sentence for simple possession of crack cocaine, and directed the Commission to review and amend the sentencing guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.

Section 8 of the Act required the Commission to promulgate, under emergency authority, the amendments provided for in the Act and such conforming amendments as the Commission determined necessary to achieve consistency with other guideline provisions and applicable law. The Commission was required to promulgate the amendment as soon as practicable, and in any event not later than 90 days after enactment of the Act. The Commission promulgated the temporary, emergency amendment required by the Act and established an effective date of November 1, 2010, for the amendment. *See* Appendix C, Amendment 748 (effective November 1, 2010). The temporary, emergency amendment will expire not later than November 1, 2011. *See* section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note); 28 U.S.C. 994(p).

The Commission is continuing work on the issues raised by the Act during the regular amendment cycle ending May 1, 2011, with a view to re-promulgating the temporary amendment as a permanent amendment (in its original form, or with revisions) under 28 U.S.C. 994(p). The Commission seeks comment on whether the Commission should make any changes to the emergency amendment in re-promulgating it as a permanent amendment. If so, what changes should the Commission make?

In particular, the Commission seeks comment on whether the penalty structure in the Drug Quantity Table for crack cocaine should continue to be set so that the statutory mandatory minimum penalties correspond to base offense levels 26 and 32. When the Commission re-promulgates the temporary amendment as a permanent amendment, should the Commission amend the Drug Quantity Table for crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, correspond to the Act's new mandatory minimum penalties?

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

In particular, the proposed permanent amendment would change the Drug Quantity Table in § 2D1.1 and also make additional mitigating changes (*e.g.,* a "minimal role cap" in § 2D1.1(a)(5), a downward adjustment for certain defendants with "minimal" role in § 2D1.1(b)(15), and a deletion of the cross reference in § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1) as well as certain proposed enhancements (*e.g.,* enhancements for violence in § 2D1.1(b)(2), for bribery in § 2D1.1(b)(11), for maintaining a drug premises in § 2D1.1(b)(12), and for certain defendants with an aggravating role in § 2D1.1(b)(14)). Should the Commission provide that only parts of the proposed permanent amendment may be applied retroactively? For example, should the Commission provide that only the changes to the Drug Quantity Table may be applied retroactively, or that those changes and

the other mitigating changes may be applied retroactively? Alternatively, should the Commission provide that the entire proposed permanent amendment may be applied retroactively, including the proposed enhancements (provided that the amended guideline range resulting from the proposed permanent amendment is not greater than the original term of imprisonment imposed)?

If the Commission does provide that the proposed permanent amendment or any part thereof may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced? For example, should the Commission limit retroactivity only to a particular category or categories of defendants, such as (A) Defendants who were sentenced within the guideline range, (B) defendants who were sentenced within the guideline range or who received a departure under Chapter Five, Part K, (C) defendants in a particular criminal history category or categories (*e.g.,* defendants in Criminal History Category I), (D) defendants sentenced before *United States* v. *Booker,* 543 U.S. 220 (2005), (E) defendants sentenced before *Kimbrough* v. *United States,* 552 U.S. 85, 110 (2007) ("it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"), or (F) defendants sentenced before *Spears* v. *United States,* 555 U.S. 261, 129 S.Ct. 840, 844 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines")?

If the Commission were to provide that the proposed amendment or any part thereof may be applied retroactively to previously sentenced defendants, what conforming changes, if any, should the Commission make to § 1B1.10?

3. *Whether Additional Revisions to the Drug Trafficking Guidelines May Be Appropriate.* The Commission requests comment on whether any additional revisions should be made to the guidelines applicable to drug trafficking cases. The complexity and scope of such an undertaking is such that it may not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is requesting comment regarding what revisions, if any, to § 2D1.1 and related guidelines may be appropriate this year.

Drug Quantity Table. The penalty structure of the Drug Quantity Table is based on the penalty structure of Federal drug laws, which generally establish three tiers of penalties for manufacturing and trafficking in controlled substances, each based on the amount of controlled substances involved. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). For smaller quantities, the statutory maximum term of imprisonment is 20 years, and there is no statutory minimum term of imprisonment. If the amount of the controlled substance reaches a statutorily specified quantity, however, the statutory maximum term increases to 40 years, and a statutory minimum term of 5 years applies. If the amount of the controlled substance reaches ten times that specified quantity, the statutory maximum term is life, and a statutory minimum term of 10 years applies.

The Commission has generally incorporated these statutory mandatory minimum sentences into the Drug Quantity Table and extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. *See* § 2D1.1, comment. (backg'd.) ("The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking."). The drug quantity thresholds in the Drug Quantity Table have generally been set so as to provide base offense levels corresponding to guideline ranges that are slightly above the statutory mandatory minimum penalties. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 26, and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 32. *See* § 2D1.1, comment. (backg'd.) ("The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.,* level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months."). The Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." *See* United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at 148.

The "Safety Valve". In 1994 Congress enacted the "safety valve," which applies to certain first-time, non-violent drug defendants and allows the court, without any government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan". *See* 18 U.S.C. 3553(f). This statutory provision is incorporated into the guidelines at USSG § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). In addition, § 2D1.1(b)(16) provides a 2-level reduction if the defendant meets the "safety valve" criteria, regardless of whether a mandatory minimum penalty applies in the case.

The Commission seeks comment on what changes, if any, should be made to the guidelines applicable to drug trafficking cases. In particular, the Commission seeks comment on whether the Commission should consider changing how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and, if so, how? For example, should the Commission amend the Drug Quantity Table so that base offense levels 24 and 30, rather than 26 and 32, correspond with the statutory mandatory minimum penalties? As mentioned above, such an undertaking may not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011).

The Commission is also requesting comment regarding what revisions, if any, to § 2D1.1 and related guidelines may be appropriate this year. For example, should the Commission consider—

A. A 2-level downward adjustment in drug trafficking cases if there are no aggravating circumstances involved in the case, *e.g.,* none of the alternative base offense levels for death or serious bodily injury in § 2D1.1(a)(1)–(4) apply, none of the enhancements in § 2D1.1(b) apply, and none of the upward adjustments in Chapter Three apply?

B. expanding the 2-level downward adjustment in subsection (b)(16)—which applies to defendants who meet the "safety valve" criteria—so that it applies to defendants who have more than 1 criminal history point but otherwise meet all other "safety valve" criteria, or providing a similar downward adjustment to drug trafficking defendants who truthfully provide to

the Government all information and evidence the defendant has concerning the offense?

If the Commission were to make changes to the guidelines applicable to drug trafficking cases, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

4. *Role Adjustments.* The Fair Sentencing Act of 2010 contained several directives to the Commission to amend the guidelines to provide increased emphasis on the defendant's role in the offense. *See* Fair Sentencing Act of 2010 §§ 6 ("Increased Emphasis on Defendant's Role and Certain Aggravating Factors"), 7 ("Increased Emphasis on Defendant's Role and Certain Mitigating Factors"). The proposed permanent amendment implements these directives by adding several provisions to § 2D1.1, including a new sentence in subsection (a)(5) (a maximum base offense level for certain defendants with a minimal role) and new specific offense characteristics at subsections (b)(14) (an enhancement for certain defendants with an aggravating role) and (15) (a downward adjustment for certain defendants with a minimal role).

In light of these directives and the Commission's continued work on the guidelines applicable to drug trafficking, the Commission requests comment on what changes, if any, should be made to § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

Mitigating Role

The text of § 3B1.2 has remained unchanged from the original *Guidelines Manual* in 1987; the guideline continues to provide a downward adjustment based on the defendant's role in the offense: 4 levels if the defendant was a "minimal" participant in any criminal activity, 2 levels if the defendant was a "minor" participant in such activity, and 3 levels in cases falling in between.

The Commentary to § 3B1.2 clarifies when and to whom the guideline applies. While the Commission has amended and reorganized the Commentary several times since 1987 with regard to certain types of cases, many elements of the commentary remain the same, including the following:

To be eligible for an adjustment, the defendant must "play[] a part in committing the offense that makes him substantially less culpable than the average participant." *See* § 3B1.2, Application Note 3(A).

The 4-level "minimal" role adjustment applies if the defendant is "plainly among the least culpable of those involved in the conduct of a group." *See* § 3B1.2, Application Note 4.

The 2-level "minor" role adjustment applies if the defendant "is less culpable than most other participants" but his or her conduct "could not be described as minimal." *See* § 3B1.2, Application Note 5.

The determination whether to apply a 4-, 3-, or 2-level adjustment is "heavily dependent upon the facts of the particular case." *See* § 3B1.2, Application Note 3(C).

In 2001, the Commission amended the Commentary to clarify that a defendant who is held accountable under § 1B1.3 (Relevant Conduct) only for the amount of drugs the defendant personally handled is not automatically precluded from receiving an adjustment under § 3B1.2. *See* USSG App. C, Amendment 635 (effective November 1, 2001). The Commission also made a number of other revisions to the commentary to clarify guideline application. *Id.* In making these changes, the Commission deleted a portion of the Commentary that had stated that a "downward adjustment for a minimal participant * * * would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." *Id.*

The Commission has received public comment stating that there are differences from district to district with regard to the application of § 3B1.2 in drug trafficking cases. In addition, the Commission has observed that, in drug trafficking cases, there are differences from district to district both on the rates of application of § 3B1.2 and the relative rates of application of the 4-, 3-, and 2-level adjustments.

Aggravating Role

As with the mitigating role guideline, the text of the aggravating role guideline, § 3B1.1, has remained unchanged from the original *Guidelines Manual* in 1987. The guideline continues to provide an upward adjustment based on the defendant's role in the offense: 4 levels if the defendant was an "organizer or leader" in a criminal activity that involved five or more participants or was otherwise extensive, 3 levels if the defendant was a "manager or supervisor (but not an organizer or leader)" of such a criminal activity, and 2 levels if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described above.

The Commentary to § 3B1.1 defines the term "participant", *see* § 3B1.1, Application Note 1; provides guidance on assessing whether the criminal history is "otherwise extensive", *see* § 3B1.1, Application Note 3; and provides guidance on distinguishing a leadership role from one of mere supervision, *see* § 3B1.1, Application Note 4.

Among other things, the Commission is seeking to determine whether there are application issues regarding § 3B1.1 warranting a Commission response.

Request for Comment

What changes, if any, should the Commission make to §§ 3B1.1 and 3B1.2 as they apply to drug trafficking cases? For example, should the Commission provide more specific guidance on when a defendant in a drug trafficking case should receive an upward adjustment for aggravating role or a downward adjustment for mitigating role and on which level of adjustment should apply? If so, what should that specific guidance be?

2. Firearms

Synopsis of Proposed Amendment: This proposed amendment amends the guideline for international weapons trafficking, § 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). As described more fully below, the proposed amendment provides higher penalties for certain cases involving small arms crossing the border and more guidance on cases involving ammunition crossing the border.

In addition to proposing these revisions to cross-border offenses under § 2M5.2, the Commission is conducting a more comprehensive review of firearms offenses to determine whether changes to the primary firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), may also be appropriate to address concerns about firearms crossing the border. The complexity and scope of the review is such that it likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year. This proposed amendment concludes with issues for comment on what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year.

Cases Involving Cross-Border Trafficking in Small Arms or Ammunition

First, the proposed amendment amends § 2M5.2 to narrow the scope of the alternative base offense level of 14. This raises penalties for certain cases involving cross-border trafficking of small arms, because certain defendants who currently receive the alternative base offense level of 14 would instead receive the higher alternative base offense level of 26. The base offense level of 14 currently applies "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." *See* § 2M5.2(a)(1), (2). The proposed amendment would reduce the threshold number of small arms in subsection (a)(2) from ten to [two]–[five] and require that all such small arms be possessed solely for personal use.

The proposed amendment also amends § 2M5.2 to address cases in which the defendant possesses ammunition, either in an ammunition-only case or in a case involving ammunition and small arms. There appear to be disparities in how § 2M5.2 is being applied in these cases. Under the proposed amendment, a defendant with ammunition would receive the alternative base offense level of 14 if the ammunition consisted of not more than [200]–[500] rounds of ammunition for small arms and was possessed solely for personal use.

In addition, the proposed amendment provides factors for the court to consider in determining whether the small arms were possessed solely for personal use; these factors are similar to the factors used in § 2K2.1 in determining whether the downward adjustment at § 2K2.1(b)(2) for "lawful sporting purposes or collection" applies. *See* § 2K2.1, comment. (n.6).

References in Appendix A (Statutory Index)

Finally, the proposed amendment amends Appendix A (Statutory Index) to address certain offenses.

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

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

Proposed Amendment

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

Section 2M5.2(a)(2) is amended by inserting "(A)" before "non-fully"; and by striking "ten" and inserting "[two]–[five], (B) ammunition for such small arms, and the number of rounds did not exceed [200]–[500], or (C) both, and all such small arms and ammunition were possessed solely for personal use".

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

The Commentary to § 2M5.2 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting after Note 1 the following:

"2. For purposes of subsection (a)(2), whether small arms and ammunition were 'possessed solely for personal use' is determined by the surrounding circumstances. Relevant surrounding circumstances include the amount and type of small arms and ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.,* prior convictions for offenses involving firearms), the intended destination, and the extent to which possession was restricted by local law.".

The Commentary to § 2M5.3 captioned "Statutory Provisions" is amended by striking "§ 1701,".

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

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

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

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

Issue for Comment

1. The Commission is conducting a review of firearms offenses to determine whether changes to the primary firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) may be appropriate to address concerns about firearms crossing the border. Firearms that cross the border may be purchased away from the border by a so-called "straw purchaser", then delivered to a firearms trafficker and brought across the border. Concerns have been raised that § 2K2.1 and § 2M5.2 do not comprehensively address these activities and, in particular, that § 2K2.1 does not adequately address (1) offenses involving firearms crossing the border and (2) offenses committed by "straw purchasers". The complexity and scope of the review is such that it likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to § 2K2.1 and related guidelines may be appropriate this year.

Firearms Crossing the Border

The crossing of an international border is not currently used as a factor in determining the offense level in § 2K2.1. Instead, the crossing of a border is accounted for in the guidelines in § 2M5.2, the guideline to which arms export offenses are referenced. Should the crossing of a border be incorporated as a factor in § 2K2.1? If so, how? Are there aggravating or mitigating factors in

cases involving firearms crossing a border that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

In particular, should the Commission amend § 2K2.1 to incorporate the crossing of a border as the basis for a new alternative base offense level, a new enhancement, a new upward departure provision, or a new cross-reference (*e.g.,* to § 2M5.2), or some combination of these? What should the amount of such a new alternative base offense level or enhancement be?

One approach would be to provide a new enhancement in § 2K2.1, such as the following:

(#) If the defendant possessed any firearm or ammunition while crossing or attempting to cross the border or otherwise departing or attempting to depart the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States, increase by [2]–[5] levels.

Should the Commission consider such an enhancement?

Another approach would be to amend one or more of the existing provisions in § 2K2.1 to provide higher penalties for cases involving the crossing of a border. In particular, § 2K2.1 has a 4-level enhancement at subsection (b)(5) that applies if the defendant engaged in the trafficking of firearms, and a 4-level enhancement (and minimum offense level of 18) at subsection (b)(6) that applies if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. Should the Commission revise subsection (b)(5) or (b)(6), or both, to account for cases in which firearms cross the border? For example, should the Commission amend the commentary to § 2K2.1 to specify that subsection (b)(5) always applies in a case involving one or more firearms crossing the border (*e.g.,* a case in which the defendant transported a firearm across the border or transferred a firearm to another individual with knowledge or reason to believe that the firearm would be transported across the border)? Should the Commission amend subsection (b)(6) to raise the minimum offense level from 18 to 20?

If the Commission were to provide a new provision in § 2K2.1 to account for firearms crossing the border, how should that provision interact with the specific offense characteristics in subsections (b)(5) and (b)(6)? In particular, should all these provisions be cumulative, or should they interact in some other way?

If the Commission were to make any such changes to § 2K2.1, what conforming changes, if any, should the Commission make elsewhere in § 2K2.1? What changes, if any, should the Commission make to related guidelines—in particular, to § 2K1.3 and § 2M5.2—to maintain proportionality?

Straw Purchasers

Defendants who operate as straw purchasers may be convicted under any of several different statutes. One such statute is 18 U.S.C. 922(d), which makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that the person meets any of nine statutory criteria. *See* 18 U.S.C. 922(d)(1)–(9). *See also* 18 U.S.C. 922(g), (n) (making it unlawful for a person meeting any of the same nine criteria to transport, possess, or receive a firearm or ammunition). Such a person is referred to in the guidelines as a "prohibited person". *See* § 2K2.1, comment. (n.3) (defining "prohibited person" as "any person described in 18 U.S.C. 922(g) or 922(n)"). The nine criteria that make a person a "prohibited person" can be summarized as whether the person is a (1) felon, (2) fugitive, (3) substance abuser, (4) mental defective, (5) illegal alien, (6) person dishonorably discharged from the Armed Forces, (7) person who has renounced U.S. citizenship, (8) person under a restraining order not to engage in domestic violence, or (9) person convicted of a misdemeanor crime of domestic violence. *See* 18 U.S.C. 922(d), (g), (n). A person convicted under section 922(d) is subject to imprisonment for not more than 10 years. *See* 18 U.S.C. 924(a)(2).

A second statute used for straw purchasers is 18 U.S.C. 922(a)(6), which makes it unlawful, in connection with the acquisition of or attempted acquisition of any firearm or ammunition from a licensed dealer, to knowingly make any false statement intended or likely to deceive the dealer with respect to the lawfulness of the transaction. A person convicted under section 922(a)(6) is subject to imprisonment for not more than 10 years. *See* 18 U.S.C. 924(a)(2).

A third statute used for straw purchasers is 18 U.S.C. 924(a)(1)(A), which makes it unlawful to knowingly make any false statement with respect to information required to be kept by a firearms licensee or information required in applying for a firearms license. A person convicted under section 924(a)(1)(A) is subject to imprisonment for not more than 5 years. *See* 18 U.S.C. 924(a)(1).

All three of these statutes used for straw purchasers are referenced to § 2K2.1. The guideline assigns a base offense level of 14 to cases involving prohibited persons, whether the defendant (A) *is* a prohibited person or (B) is convicted under section 922(d) of transferring *to* a prohibited person. *See* § 2K2.1(a)(6)(A), (B). The guideline assigns a base offense level of 12 for most offenses, including convictions under sections 922(a)(6) and 924(a)(1)(A). *See* § 2K2.1(a)(7). Higher base offense levels may apply based on the type of firearm involved or the defendant's criminal history.

Are the guidelines adequate as they apply to straw purchasers? If not, what changes would be appropriate? Are there aggravating or mitigating factors in cases involving straw purchasers that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

Should the Commission provide higher penalties for cases involving straw purchasers? In particular, should the Commission raise by 2 levels the alternative base offense levels applicable to defendants convicted of 18 U.S.C. 922(a)(6), 922(d), and 924(a)(1)(A)? Under such an approach, the alternative base offense level in § 2K2.1(a)(6) would be raised from 14 to 16 (for cases in which the defendant *is* a prohibited person as well as cases in which the defendant is convicted under section 922(d) of transferring *to* a prohibited person). Also, a new alternative base offense level of 14 would be established for defendants convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A).

As described above, a defendant convicted under section 922(d) receives a higher base offense level (14 vs. 12) than a defendant convicted under section 922(a)(6) or 924(a)(1)(A). How, if at all, should the Commission revise § 2K2.1 to address a case in which a defendant convicted under section 922(a)(6) or 924(a)(1)(A) has engaged in the same conduct as a defendant convicted under section 922(d)? One approach would be to provide a new enhancement in § 2K2.1, such as the following:

(#) If the defendant is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and the defendant sold or otherwise disposed of any firearm or ammunition

to any person knowing or having reasonable cause to believe that the person was a prohibited person, increase by 2 levels.

Should the Commission consider such an enhancement?

If the Commission were to make any such changes to § 2K2.1, what conforming changes, if any, should the Commission make elsewhere in § 2K2.1? What changes, if any, should the Commission make to related guidelines—in particular, to § 2K1.3 and § 2M5.2—to maintain proportionality?

§ 2M5.2

In addition to the changes in the proposed amendment, are there any other aggravating or mitigating factors in cases involving firearms trafficking that the Commission should take into account in § 2M5.2? If so, what are the factors, and how should the Commission amend § 2M5.2 to take them into account? In particular, should the Commission consider establishing in § 2M5.2 a specific offense characteristic similar to the specific offense characteristic in § 2K2.1(b)(6), which provides a 4-level enhancement if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense?

3. Dodd-Frank Act

Synopsis of Proposed Amendment: The Dodd-Frank Wall Street Reform and Protection Act, Public Law 111–203 (the "Act"), contains two directives to the Commission and created certain new offenses.

The proposed amendment responds to the directives in Part A and the new offenses in Part B, as follows:

(A) Directives

Issue for Comment

1. The Act contained two directives to the Commission, one on securities fraud, the other on bank fraud and other frauds relating to financial institutions. Each directive requires the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to the offenses covered by the directive and consider whether the guidelines appropriately account for the potential and actual harm to the public and the financial markets from those offenses. Each directive also requires the Commission to ensure that the guidelines reflect (i) the serious nature of the offenses, (ii) the need for deterrence, punishment, and prevention, and (iii) the effectiveness of incarceration in furthering those objectives.

A. Directive on Securities Fraud

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) of the Act 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.

B. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

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.

C. Prior Commission Work

In conducting the reviews required by the directives, the Commission is also studying its prior work in these areas. In 2001, for example, after a multi-year review of economic crimes, the Commission promulgated its "Economic Crime Package," a six-part amendment to the guidelines applicable to economic crimes. *See* USSG App. C, Amendment 617 (effective November 1, 2001). Among other things, the Economic Crime Package consolidated the theft and fraud guidelines into a single guideline, § 2B1.1 (Theft, Property Destruction, and Fraud); provided a 2-level enhancement for offenses involving 10 to 49 victims and a 4-level enhancement for offenses involving 50 or more victims; revised the definition of "loss"; and revised and expanded the loss table to account for higher loss amounts and "provide substantial increases in penalties for moderate and higher loss amounts." *See id.* (Reason for Amendment).

In 2003, the Commission implemented directives relating to fraud offenses, obstruction of justice offenses, and other economic crimes in the Sarbanes-Oxley Act of 2002, Public Law 107–204. The directives required the Commission to promulgate, under emergency amendment authority, amendments addressing fraud offenses committed by officers and directors of publicly traded companies; fraud offenses that endanger the solvency or financial security of a substantial number of victims; fraud offenses that

involve significantly greater than 50 victims; and obstruction of justice offenses that involve destruction of evidence. The Commission first promulgated a temporary, emergency amendment and then an expanded, permanent amendment. *See* USSG App. C, Amendments 647 (effective January 25, 2003) and 653 (effective November 1, 2003). Among other things, the Commission provided a higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to § 2B1.1 and the offense carried a statutory maximum term of imprisonment of 20 years or more; expanded the loss table to add enhancements of 28 and 30 levels for losses of more than $200 million and $400 million, respectively; added the reduction in value of equity securities or other corporate assets as a factor to be considered in determining loss; expanded the victims table to include a 6-level enhancement for offenses involving 250 or more victims; expanded the specific offense characteristic on financially endangering a financial institution to also apply when the offense financially endangered either a substantial number of victims or an organization that is publicly traded or has more than 1,000 employees; and added a 4-level enhancement if the offense involved a violation of securities law or commodities law and the defendant was in certain specified positions of heightened responsibility (*e.g.,* a corporate officer or director; a registered broker or dealer; an investment adviser; an officer of director of a futures commission merchant; a commodities trading advisor; a commodity pool operator). *See id.*

In reviewing the guidelines and offenses covered by the directives, the Commission has observed that cases sentenced under § 2B1.1 involving relatively large loss amounts calculated under the loss table in subsection (b)(1) have a relatively high rate of non-government-sponsored, below-range sentences. The Commission also has received public comment and reviewed judicial opinions suggesting that a more comprehensive review of § 2B1.1 may be appropriate.

D. Possible Multi-Year Review

In light of this information, the Commission is considering conducting a more comprehensive review of § 2B1.1 and related guidelines, not only of the specific offense characteristics referred to in the directives (§ 2B1.1(b)(14) and (17)), but also of certain other aspects of the guidelines (*e.g.,* the loss table and the definition of loss; the victims table and the definition of victim; and the interactions between these tables and definitions). Given the complexity and scope of such a review, the Commission anticipates that such a review could not be completed in the amendment cycle ending May 1, 2011.

E. Response to Directives

Given that such a review likely could not be completed this year (*i.e.,* during the amendment cycle ending May 1, 2011), should the Commission respond to the directives this year? If so, what, if any, specific changes to the guidelines should be made this year to respond to the directives in the Act?

1. Directive on Securities Fraud

The Commission requests comment regarding whether the *Guidelines Manual* provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and, if not, what changes to the *Guidelines Manual* would be appropriate to respond to the directive in section 1079A(a)(1) of the Act.

Securities fraud is prosecuted under 18 U.S.C. 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to § 2B1.1.

Securities fraud is also prosecuted under 18 U.S.C. 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. *See* § 2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to § 2B1.1.

Some of the more pertinent provisions in § 2B1.1 addressing these offenses are as follows:

(1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.

(2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.

(3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.

(4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if the offense (i) substantially jeopardized the safety and soundness of a financial institution, (ii) substantially endangered the solvency or financial security of an organization that (I) was a publicly traded company or (II) had 1,000 or more employees, or (iii) substantially endangered the solvency or financial security of 100 or more victims. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

(5) Section 2B1.1(b)(17) provides an enhancement of 4 levels if the offense involved a violation of securities law and the defendant was an officer or director of a publicly traded company, a registered broker or dealer (or person associated with a broker or dealer), or an investment adviser (or person associated with an investment adviser). Similarly, this enhancement also applies if the offense involved a violation of commodities law and the defendant was an officer or director of a futures commission merchant or an introducing broker, a commodities trading advisor, or a commodity pool operator. A conviction under a securities law or commodities law is not required for subsection (b)(17) to apply. *See* § 2B1.1, comment. (n.14(B)).

Are offenses relating to securities fraud adequately addressed by these provisions? If not, how should the Commission amend the *Guidelines Manual* to account for "the potential and actual harm to the public and the financial markets" from these offenses? Should the Commission increase the amount, or the scope, of the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the *Guidelines Manual* to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would

be warranted in a case involving securities fraud or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the *Guidelines Manual* to provide additional guidance for such offenses? For example, Application Note 12 to § 2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as 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?

2. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

The Commission requests comment regarding whether the *Guidelines Manual* provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions and, if not, what changes to the *Guidelines Manual* would be appropriate to respond to section 1079A(a)(2) of the Act.

The most specific statute on bank fraud is 18 U.S.C. 1344 (Bank fraud), which makes it unlawful to knowingly execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any of the property of a financial institution by means of false or fraudulent pretenses, representations, or promises. The statutory maximum term of imprisonment for an offense under section 1344 is 30 years. Offenses under section 1344 are referenced in Appendix A (Statutory Index) to § 2B1.1. Other statutes relating to financial institution fraud or mortgage fraud include 18 U.S.C. 215, 656, 657, 1005, 1006, 1010, 1014, 1029, and 1033.

Some of the more pertinent provisions in § 2B1.1 addressing these offenses are as follows:

(1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.

(2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.

(3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.

(4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if the offense (i) substantially jeopardized the safety and soundness of a financial institution, (ii) substantially endangered the solvency or financial security of an organization that (I) was a publicly traded company or (II) had 1,000 or more employees, or (iii) substantially endangered the solvency or financial security of 100 or more victims. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

Are bank frauds, mortgage frauds, and other frauds relating to financial institutions adequately addressed by these provisions? If not, how should the Commission amend the *Guidelines Manual* to account for "the potential and actual harm to the public and the financial markets" from these offenses and "ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions"? Should the Commission increase the amount, or the scope, of the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the *Guidelines Manual* to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would be warranted in a case involving financial institution fraud, fraud related to federally related mortgage loans, or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the *Guidelines Manual* to provide additional guidance for such offenses? For example, Application Note 12 to § 2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as 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?

(B) New Offenses

Synopsis of Proposed Amendment: This part of the proposed amendment responds to certain new offenses created by the Act.

First, the proposed amendment responds to the new offense at 12 U.S.C. 5382. Under authority granted by the Act, the Secretary of the Treasury may make a "systemic risk determination" regarding a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. *See* sections 202–203 of the Act. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for district court approval. The Act makes it a crime, classified to 12 U.S.C. 5382, to recklessly disclose such a determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. 5382 is subject to imprisonment for not more than 5 years. The proposed amendment references this new offense to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Second, the proposed amendment responds to the new offense at 15 U.S.C. 78jjj(d). The Act makes it a crime, classified to 15 U.S.C. 78jjj(d), for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. *See* section 929V of the Act. A person who violates section 78jjj(d) is subject to imprisonment for not more than 5 years. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that are not currently referenced in Appendix A (Statutory Index). The proposed amendment references all these offenses under section 78jjj to § 2B1.1 (Theft, Property Destruction, and Fraud).

Proposed Amendment

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

"12 U.S.C. 5382 2H3.1"; and by inserting after the line referenced to 15 U.S.C. 78u(c) the following:

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

4. Patient Protection Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Patient Protection and Affordable Care Act, Public Law 111–148 (the "Act"), which contained a directive to the Commission and created a new offense.

First, the proposed amendment responds to section 10606(a)(2) of the Act, which directs the Commission to—

(A) Review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses;

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

(C) Amend the Federal Sentencing Guidelines to provide—

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

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

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

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

Section 10606(a)(3) of the Act requires the Commission, in implementing this directive, to—

(A) Ensure that the Federal Sentencing Guidelines and policy statements—

(i) Reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud; and

(ii) Provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances;

(B) Consult with individuals or groups representing health care fraud victims, law enforcement officials, the health care industry, and the Federal judiciary as part of the review described in paragraph (2);

(C) Ensure reasonable consistency with other relevant directives and with other guidelines under the Federal Sentencing Guidelines;

(D) Account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements;

(E) Make any necessary conforming changes to the Federal Sentencing Guidelines; and

(F) Ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing.

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

The first provision is a tiered enhancement that applies in such cases if the loss is more than $1,000,000. The enhancement would be inserted at subsection (b)(8) of § 2B1.1 and would provide 2 levels if the loss was more than $1,000,000, 3 levels if the loss is more than $7,000,000, and 4 levels if the loss is more than $20,000,000. This tiered enhancement implements paragraph (2)(C) of the directive. To "ensure reasonable consistency" with the guidelines, as required by section 10606(a)(3)(C) of the Act, the tiers of the enhancement apply to loss amounts "more than" than the dollar amounts specified in the directive, rather than to loss amounts "not less than" the dollar amounts specified in the directive. The consistent practice in the *Guidelines Manual* is to apply enhancements to loss amounts "more than" dollar amounts. That practice is followed in § 2B1.1, both in the loss table in subsection (b)(1) and in the enhancement in subsection (b)(14)(A). It is also followed by each of the guidelines that utilize the loss table in § 2B1.1(b)(1), as well as by other guidelines with enhancements based on dollar amounts. *See, e.g.,* §§ 2B2.1(b)(2), 2B3.1(b)(7), 2B3.2(b)(2), 2B4.1(b)(2), 2R1.1(b)(2), 2S1.3(b)(2), 2T1.1(b)(1), 2T3.1(a), 2T4.1 (Tax Table).

The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a Federal health care offense involving a Government health care program. This new special rule implements paragraph (2)(B) of the directive.

In addition, the proposed amendment specifies that "Federal health care offense" has the same meaning as in 18 U.S.C. 24 and provides two options for defining "Government health care program":

Option 1 provides a list of programs consistent with section 1501 of the Act, which lists the "Government sponsored programs" that provide health care coverage satisfying the individual mandate established by the Act. *See* 26 U.S.C. 5000A(f)(1)(A), as established by section 1501 of the Act.

Option 2 provides a definition consistent with section 1128B of the Social Security Act (42 U.S.C. 1320a–7b), which defines "Federal health care program" to mean (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (2) any State health care program, as defined in 42 U.S.C. 1320a–7(h).

An issue for comment is also included on whether a different definition of "Government health care program" should be used.

Second, the proposed amendment responds to section 6601 of the Act, which established a new offense at 29 U.S.C. 1149 for making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. A person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The proposed amendment references this new offense in Appendix A (Statutory Index) to § 2B1.1.

Proposed Amendment

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

"(8) If the defendant was convicted of a Federal health care offense involving a Government health care program and the loss under subsection (b)(1) was (A)

more than $1,000,000, increase by 2 levels; (B) more than $7,000,000, increase by 3 levels; or (C) more than $20,000,000, increase by 4 levels.";

and in subdivision (15)(C), as redesignated by this amendment, by striking "(14)" and inserting "(15)".

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

"'Federal health care offense' has the meaning given that term in 18 U.S.C. 24.";

and inserting after the paragraph that begins "'Foreign instrumentality'" the following:

[Option 1:

"'Government health care program' means (A) the Medicare program under part A of title XVIII of the Social Security Act, (B) the Medicaid program under title XIX of the Social Security Act, (C) the CHIP program under title XXI of the Social Security Act, (D) the TRICARE for Life program, (E) the veteran's health care program under chapter 17 of title 38, United States Code, or (F) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).".]

[Option 2:

"'Government health care program' means (A) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (B) any State health care program, as defined in 42 U.S.C. 1320a–7(h).".]

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

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

in Note 7 by striking "(8)" and inserting "(9)" each place it appears;

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

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

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

in Note 11 by striking "(14)" and inserting "(15)" in both places;

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

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

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

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

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

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

in the paragraph that begins "Subsection (b)(8)(D)" by striking "(8)" and inserting "(9)";

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

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

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

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

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

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

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

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

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

Appendix (Statutory Index) is amended in the line referenced to 29 U.S.C. 1131 by inserting "(a)" after "1131";

and by inserting after the line referenced to 29 U.S.C. 1141 the following:

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

Issue for Comment:

1. The proposed amendment provides two options for defining the term "Government health care program". Which, if any, of these options should the Commission use? If the Commission were to use one of these options, should the Commission add other specific programs or categories of programs to the definition and, if so, what programs or categories of programs? For example, are there other Federal or State programs that should be included? Alternatively, should private health care programs also be included?

5. Supervised Release

Synopsis of Proposed Amendment: The proposed amendment would make revisions to the supervised release guidelines, § 5D1.1 (Imposition of a Term of Supervised Release) and § 5D1.2 (Term of Supervised Release). Section 5D1.1 directs the court to order a term of supervised release when a sentence of imprisonment of more than one year is imposed, or when required by statute. For cases in which the court decides to impose a term of supervised release, § 5D1.2 provides both a minimum and a maximum length of the term. Specifically, § 5D1.2 requires a minimum of three years and a maximum of five years, if a Class A or B felony; a minimum of two years and a maximum of three years, if a Class C or D felony; and a term of precisely one year, if a Class E felony or Class A misdemeanor.

The Commission is considering whether revisions to the supervised release guidelines would help courts and probation offices focus limited supervision resources on offenders who need supervision. *See, e.g., Johnson* v. *United States,* 529 U.S. 694, 709 (2000) ("Prisoners may, of course, vary in the degree of help needed for successful reintegration. Supervised release [has given] district courts the freedom to provide postrelease supervision for those, and only those, who needed it. * * * Congress aimed * * * to use the district court's discretionary judgment to allocate supervision to those releasees who needed it most."); S. Rep. No. 98–225, p. 125 ("[P]robation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it."). The Commission's recent report, *Federal Offenders Sentenced to Supervised Release* (July 2010), found that supervised release is imposed in almost every case, including in more than 99 percent of cases where the guidelines require imposition of a term of supervised release but there is no statutory requirement to do so. When supervised release is imposed, the length of the term is within the ranges provided by § 5D1.2 in over 94 percent of cases. *Id.* at 52, 57.

The Commission is also reviewing the imposition of supervised release on non-citizens, who represent a significant

percentage of the overall population of Federal offenders. *See 2009 Sourcebook of Federal Sentencing Statistics* 19 (Table 9, showing 44.7% of Federal offenders in fiscal year 2009 were non-citizens). Supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen. *See Federal Offenders Sentenced to Supervised Release* at 60. However, a "vast number of non-citizens convicted of crimes" are "now virtually inevitable" to be deported, *Padilla* v. *Kentucky,* 130 S. Ct. 1473, 1478 (2010), and likely would face prosecution for a new offense if they were to return illegally to the United States.

Section 5D1.1

The proposed amendment provides two options for revising § 5D1.1 that would reduce the number of cases in which the court is required by the guidelines to impose supervised release:

Under Option 1A, the court would be required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. An issue for comment is also included on whether the Commission should instead set this threshold at a higher number of months of imprisonment.

Under Option 1B, the court would be required to order a term of supervised release only when required by statute.

The proposed amendment would also add a provision to § 5D1.1 indicating that for certain deportable aliens, the court ordinarily should not impose a term of supervised release unless required by statute.

Section 5D1.2

The proposed amendment provides two options for revising § 5D1.2 that would lower or eliminate the minimum lengths required by that guideline for a term of supervised release:

Under Option 2A, the minimum term for a Class A, B, C, or D felony would be one year, and the guidelines would impose no minimum term for a Class E felony or a Class A misdemeanor.

Under Option 2B, the guidelines would impose no minimum term for any felony or misdemeanor.

Both Options 2A and 2B would preserve § 5D1.2(b) and (c), which apply to cases in which the length of the term of supervised release is governed by specific statutory provisions. While the proposed amendment would affect only the minimum terms, an issue for comment is included on whether the maximum terms should also be lowered.

In addition, the proposed amendment inserts commentary into §§ 5D1.1 and 5D1.2 to provide guidance on what a court should consider in deciding whether to order a term of supervised release and, if so, how long such a term should be. Finally, the proposed amendment makes technical and conforming changes to §§ 5D1.1 and 5D1.2 to reflect requirements imposed by the supervised release statute, 18 U.S.C. 3583.

Proposed Amendment

[Option 1A:

Section 5D1.1(a) is amended by inserting "when required by statute (*see* 18 U.S.C. 3583(a)) or, except as provided in subsection (c)," after "follow imprisonment"; by striking "more than one year is imposed, or when required by statute" and inserting "15 months or more is imposed".

Section 5D1.1(b) is amended by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

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

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

The Commentary to § 5D1.1 captioned "Application Notes" is amended in Note 1 by inserting "*Application of Subsection (a).*—" before "Under subsection (a)"; by striking "more than one year" and inserting "15 months or more"; by striking "it determines" and all that follows through "by statute." and inserting the following:

"supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.";

in Note 2 by inserting "*Application of Subsection (b).*—" before "Under subsection (b)"; by striking "of one year or less for any of the reasons set forth in Application Note 1" and inserting "in any other case, after considering the factors set forth in Note 3".

The Commentary to § 5D1.1 captioned "Application Notes" is amended by adding at the end the following:

"3. *Factors to Be Considered.*—

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

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

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

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

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

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

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.

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

4. *Guideline Ranges in Zones B and C.*—In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term of imprisonment. *See* § 5C1.1(c)(2), (d)(2).

5. *Application of Subsection (c).*—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.]".

[Option 1B:

Section 5D1.1(a) is amended by striking "when a sentence of imprisonment of more than one year is imposed, or"; and by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

Section 5D1.1(b) is amended by adding at the end the following: "*See* 18 U.S.C. 3583(a).".

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

"1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a term of supervised release is required by a specific statute.

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

and by adding at the end the following:

"3. *Factors to Be Considered.*—

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

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

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

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

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

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

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.

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

(D) *Certain Deportable Aliens.*—The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.

4. *Guideline Ranges in Zones B and C.*—In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term of imprisonment. *See* § 5C1.1(c)(2), (d)(2).]".

[Option 2A:

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

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

[Option 2B:

Section 5D1.2(a) is amended in subdivision (1) by striking "At least three years but not" and inserting "Not"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(1).".

Section 5D1.2(a) is amended in subdivision (2) by striking "At least two years but not" and inserting "Not"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(2).".]

Section 5D1.2(a) is amended in subdivision (3) by striking "One" and inserting "Not more than one"; and by adding at the end the following: "*See* 18 U.S.C. 3583(b)(3).".

Section 5D1.2(b) is amended by striking "subdivisions" and inserting "subsections"; by striking "not less than" and all that follows through "offense is"; and by striking subdivisions (1) and (2) and inserting the following:

"(1) Any term of years or life, if the offense is any offense listed in 18 U.S.C. 2332b(g)(5)(B), *see* 18 U.S.C. 3583(j); or

(2) any term of years not less than 5 or life, if the offense is any offense under section 1201 involving a minor victim, or any offense under 18 U.S.C. 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, *see* 18 U.S.C. 3583(k).".

The Commentary to § 5D1.2 captioned "Application Notes" is amended in Note 3 by striking "or the guidelines".

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

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

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

Issues for Comment

1. The proposed amendment to § 5D1.1 contains an Option 1A under which the court would be required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. A possible basis for setting this threshold at 15 months (rather than 12 months, as the guideline currently provides) is to reflect the Commission's recent amendment to the Sentencing Table in Chapter Five, Part A. *See* Appendix C, Amendment 738 (effective November 1, 2010). Before that amendment, a defendant in Zone D of the Sentencing Table was required to be sentenced to at least 12 months imprisonment; the amendment changed that threshold to 15 months imprisonment.

Should the Commission instead set this threshold at a number of months of imprisonment higher than 15 months, such as 24 months or 36 months? If so, what would be the basis for doing so?

2. The proposed amendment to § 5D1.2 would either reduce or eliminate the minimum terms of supervised release required by the guidelines, but would not affect the maximum terms of supervised release required by the guidelines or by statute. If the defendant was convicted of a Class A or B felony, the maximum term of supervised release is five years; for a Class C or D felony, three years; and for a Class E felony or a Class A misdemeanor, one year. *See* § 5D1.2(a)(1), (2), (3).

Should the Commission lower the maximum terms of supervised release required by these provisions? If so, what lower maximum terms of supervised release should the Commission provide? What would be the basis for doing so?

6. Illegal Reentry

Synopsis of Proposed Amendment: Section 2L1.2 (Unlawfully Entering or Remaining in the United States) contains a specific offense characteristic at subsection (b)(1) under which a defendant receives an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction. The amount of the enhancement may be 16 levels, 12 levels, 8 levels, or 4 levels, depending on the nature of the underlying offense. This proposed amendment would amend § 2L1.2 to provide a limitation on the use of convictions under subsections (b)(1)(A) and (B). Specifically, such a conviction would receive the 16- or 12-level enhancement, as applicable, if the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), and 8 levels if it does not. Conforming changes to the Commentary are also made.

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

The guidelines account for the age of a prior conviction in Chapter Four, which specifies when a conviction is too old to receive criminal history points. *See* § 4A1.2(e). The guidelines contain several conviction-based enhancements that depend on whether the conviction receives criminal history points. *See, e.g.,* § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); § 4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3). The proposed amendment would reduce the 16- and 12-level enhancement when the prior conviction is too old to qualify for criminal history points, but would not entirely eliminate the enhancement. *See, e.g., Amezcua-Vasquez,* 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). *See also id.* at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same magnitude"); *Chavez-Suarez,* 597 F.3d at 1139 (same).

Proposed Amendment

Section 2L1.2(b)(1)(A) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points" after "16 levels".

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

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

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

A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points under Chapter Four.".

The Commentary to 2L1.2 captioned "Application Notes" is amended striking Note 6 and redesignating Notes 7 and 8 as Notes 6 and 7.

7. Child Support

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict on whether a defendant convicted of an offense involving the willful failure to pay court-ordered child support (*e.g.,* a violation of 18 U.S.C. 228) and sentenced under § 2B1.1 (Theft, Property Destruction, and Fraud) receives the specific offense characteristic in § 2B1.1(b)(8)(C).

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

The specific offense characteristic in § 2B1.1(b)(8)(C) applies if the offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines". It provides an enhancement of 2 levels and a minimum offense level of level 10.

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

The proposed amendment resolves the conflict by amending the commentary to § 2J1.1. Two bracketed options are provided. The first option

specifies that, in a case involving a violation of section 228, apply § 2B1.1(b)(8)(C); the second option specifies that, in such a case, do not apply § 2B1.1(b)(8)(C).

Proposed Amendment

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

8. Miscellaneous

Synopsis of Proposed Amendment: This proposed multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment updates the policy statement at § 6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States* v. *Booker,* 543 U.S. 220 (2005), and the Federal Judiciary Administrative Improvements Act of 2010, Public Law 111–174 (enacted May 27, 2010). The proposed amendment amends § 6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range. The proposed amendment also responds to the Federal Judiciary Administrative Improvements Act of 2010, which amended 18 U.S.C. 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). The proposed amendment amends both § 6B1.2 and § 5K2.0(e) to reflect this statutory change.

Part B of the proposed amendment responds to the Coast Guard Authorization Act of 2010, Public Law 111–281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. 3851.

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

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

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

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

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

Finally, the proposed amendment addresses the new criminal offense at 33 U.S.C. 3851, which makes it a felony, punishable by not more than six years imprisonment, to sell or distribute an organotin or to sell, distribute, make, use, or apply an anti-fouling system (*e.g.,* paint) containing an organotin. The proposed amendment references this new offense to §§ 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) and 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification).

Proposed Amendment

(A) Plea Agreements and Statement of Reasons

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

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

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

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

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

(B) Coast Guard Authorization Act

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

"18 U.S.C. 2237(b)(2)(B)(i) [2A1.1], [2A1.2], 2A1.3, 2A1.4
18 U.S.C. 2237(b)(2)(B)(ii)(I) 2A2.1, 2A2.2
18 U.S.C. 2237(b)(2)(B)(ii)(II) 2A4.1
18 U.S.C. 2237(b)(2)(B)(ii)(III) 2A3.1
18 U.S.C. 2237(b)(3) 2A2.2
18 U.S.C. 2237(b)(4) 2A2.1, 2A2.2, [2G1.1], 2G1.3, 2G2.1, 2H4.1, 2L1.1";

and by inserting after the line referenced to "33 U.S.C. 1908" the following: "33 U.S.C. 3851 2Q1.2, 2Q1.3".

9. Technical

Synopsis of Proposed Amendment: This proposed amendment makes various technical and conforming changes to the guidelines.

First, the proposed amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. *See* 75 FR 27388 (May 14, 2010); USSG App. C, Amendments 738–746. Those changes are as follows:

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

(2) Amendment 745 expanded the scope of § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover

not only cultural heritage resources, but also paleontological resources. To reflect this expanded scope, a conforming change is made to § 2Q2.1(c)(1).

Second, the proposed amendment makes technical changes to § 3C1.1 (Obstructing or Impeding the Administration of Justice), § 4A1.2(k)(2), and § 4B1.1(b) to promote stylistic consistency in how subdivisions are designated.

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

Proposed Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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DEPARTMENT OF VETERANS AFFAIRS

West Los Angeles VA Medical Center Veterans Programs Enhancement Act of 1998; Draft Master Plan

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: This **Federal Register** Notice announces an opportunity for public comment on the West Los Angeles (WLA) Department of Veterans Affairs (VA) Medical Center Veterans Programs Enhancement Act of 1998 (VPEA) Draft Master Plan (hereinafter referred to as the "Draft Master Plan." The purpose of this plan is to satisfy the legislative mandate of the Veterans Programs Enhancement Act of 1998 regarding "a master plan for the use of the lands * * * over the next 25 and over the next 50 years."

DATES: Written comments on the Draft Master Plan must be received on or before February 19, 2011.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* or by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "Notice: Draft Master Plan." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461–4902 for an appointment.

SUPPLEMENTARY INFORMATION: The mission of the VA's Veterans Health Administration (VHA) is to honor America's veterans by providing exceptional health care that improves their health and well-being. VHA implements VA's medical care, research, and education programs. The WLA campus is part of the larger VA Greater Los Angeles (GLA) Healthcare System, serving Veterans in Los Angeles, Ventura, Santa Barbara, San Luis Obispo and Kern Counties, California. The WLA campus provides a variety of medical services including inpatient and outpatient care, rehabilitation, residential care, and long-term care services. In addition, it serves as a center for medical research and education.

The WLA campus is 387 acres in the heart of Los Angeles. There are 104 buildings across the campus of which 39 are designated as historic, 12 are considered to be exceptionally high risk for a seismic event, and a number are vacant or closed. Currently, the WLA campus has 21 land use agreements, varying in length and contractual authority, with partners to deliver a variety of services to veterans and the community. This does not include several non-recurring filming and single-day event agreements.

The purpose of the Draft Master Plan is to satisfy the legislative mandate of the Veterans Programs Enhancement Act of 1998 regarding "a master plan for the use of the lands * * * over the next 25 years and over the next 50 years." This Draft Master Plan is a land use plan that guides the physical development of the campus to support its mission of patient care, teaching, and research. The plan reflects legislative restrictions on the property and discusses developmental goals and design objectives for the campus.

The Draft Master Plan summarizes the work of previous planning studies to address future development for the portions of the land for which there is no current plan and is based on the Capital Asset Realignment for Enhanced Services (CARES) process. CARES delivered a comprehensive assessment of the campus; however, it did not deliver recommendations on land for which there is no current plan or produce a Master Plan, as needed to satisfy the legislative mandate.

The VPEA Master Plan considers on-campus services that may evolve in the future with the changing demographics of the Veteran population. It discusses current land uses, facilities, and programs in the context of the CARES approved capital plan. In addition, it outlines recommended actions for how to plan for the limited, unallocated land, and facilities in support of VA's mission.

In keeping with VA's goals to reach as many veterans as possible and to ensure that those veterans receive the services