Issued in Washington, DC, on January 11, 2016, under authority delegated in 49 CFR 1.97.

John A. Gale,

Director, Office of Standards and Rulemaking.

[FR Doc. 2016–00626 Filed 1–14–16; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Debt Management Advisory Committee Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, 10(a)(2), that a meeting will be held at the Hay-Adams Hotel, 16th Street and Pennsylvania Avenue NW., Washington, DC, on February 2, 2016 at 11:30 a.m. of the following debt management advisory committee:

Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

The agenda for the meeting provides for a charge by the Secretary of the Treasury or his designate that the Committee discuss particular issues and conduct a working session. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, 10(d) and Public Law 103–202, 202(c)(1)(B) (31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Public Law 103–202, 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions and financing estimates. This briefing will give the press an opportunity to ask questions about financing projections. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Director for Office of Debt Management (202) 622–1876.

Dated: January 8, 2016.

James Clark,

Deputy Assistant Secretary for Federal Finance.

[FR Doc. 2016–00527 Filed 1–14–16; 8:45 am]

BILLING CODE 4810–25–M

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; 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, 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 multi-part proposed amendment to the *Guidelines Manual* to respond to recently enacted legislation and miscellaneous guideline issues, including (A) revisions to Appendix A (Statutory Index) to respond to new offenses established by the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Public Law 114–23 (June 2, 2015), and related issues for comment; (B) revisions to Appendix A (Statutory Index) to respond to changes made by the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015), to existing criminal statutes, and related issues for comment; (C) a revision to Appendix A (Statutory Index) to reference offenses under 18 U.S.C. 1715 (Firearms as nonmailable items) to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and a revision to § 2K2.1 to establish a base offense level for such offenses, and a related issue for comment; and (D) a technical amendment to the Background Commentary to § 2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax);

(2) a two-part proposed amendment to the policy statement pertaining to ''compassionate release,'' § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), including (A) a detailed request for comment on whether any changes should be made to the policy statement and (B) a proposed amendment illustrating one possible set of changes to the policy statement, *i.e.,* to reflect the criteria set forth in the program statement used by the Bureau of Prisons;

(3) a proposed amendment to §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to revise, clarify, and rearrange the provisions in the *Guidelines Manual* on

conditions of probation and supervised release, and related issues for comment;

(4) a proposed amendment to § 2E3.1 (Gambling; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses relating to attending an animal fighting venture that were established by section 12308 of the Agricultural Act of 2014, Public Law 113–79 (Feb. 7, 2014), and related issues for comment;

(5) a proposed amendment to the child pornography guidelines, §§ 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), and 2G2.6 (Child Exploitation Enterprises), to address circuit conflicts and application issues that have arisen when applying these guidelines, including issues in (A) application of the vulnerable victim adjustment when the offense involves minors who are unusually young and vulnerable (such as infants or toddlers) and (B) application of the tiered distribution enhancement and, in particular, determining the appropriate tier of enhancement to apply when the offense involves a peer-to-peer file-sharing program or network, and related issues for comment; and

(6) a multi-part proposed amendment to the guidelines for immigration offenses, including (A) revisions to § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide options for raising the base offense level for alien smuggling offenses and address offenses involving unaccompanied minors in alien smuggling offenses, and a related issue for comment, and (B) revisions to § 2L1.2 (Unlawfully Entering or Remaining in the United States) to (i) generally reduce the use of the ''categorical approach'' in applying the guidelines by measuring the seriousness of a defendant's prior conviction by the length of the sentence imposed on the prior conviction rather than by the type of offense (*e.g.,* ''crime of violence''); (ii) provide higher alternative base offense levels for defendants who have one or more prior convictions for illegal reentry offenses; (iii) provide a new tiered enhancement for defendants who engage in criminal conduct after reentering the United States; (iv) correspondingly reduce the existing tiered enhancement at subsection (b)(1) for defendants who had one or more prior convictions before being deported; and (v) related issues for comment.

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, 2016.

(2) Public Hearings.—The Commission plans to hold public hearings regarding the proposed amendments and issues for comment set forth in this notice on February 17, 2016, and March 16, 2016. Further information regarding the public hearings, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearings, will be provided by the Commission on its Web site at *www.ussc.gov.*

ADDRESSES: Public comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public_Comment@ussc.gov.* The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Matt Osterrieder, Legislative Specialist, (202) 502–4500, *pubaffairs@ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal 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 (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

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

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *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. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

A. USA FREEDOM Act of 2015

Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and nuclear terrorism. The Act also added these new offenses to the list of offenses specifically enumerated at 18 U.S.C. 2332b(g)(5) as federal crimes of terrorism.

The USA FREEDOM Act created a new criminal offense at 18 U.S.C. 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction) to prohibit certain terrorism acts and threats against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The prohibited acts include (i) the use against or on a ship, or discharge from a ship, of any explosive or radioactive material, biological, chemical, or nuclear weapon or other nuclear explosive device; (ii) the discharge from a ship of oil, liquefied natural gas, or other hazardous or noxious substance; (iii) any use of a ship that causes death or serious injury or damage; and (iv) the transportation aboard a ship of any explosive or radioactive material. Section 2280a also prohibits the transportation on board a ship of any biological, chemical or nuclear weapon or other nuclear explosive device, and any components, delivery means, or materials for a nuclear weapon or other nuclear explosive device, under specified circumstances, but this conduct does not contain a mens rea requirement. Further, section 2280a prohibits the transportation onboard a ship of a person who committed an offense under section 2280 or 2280a, with the intent of assisting that person evade criminal prosecution. The penalties for violations of section 2280a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2280a also prohibits threats to commit the offenses not related to transportation on board a ship and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment addresses these new offenses at section 2280a by referencing them in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§ 2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault), 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

The USA FREEDOM Act also created a new criminal offense at 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms) to prohibit certain maritime terrorism acts that occur either on a fixed platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Section 2281a prohibits specific conduct, including (i) the use against or discharge from a fixed platform, of any explosive or radioactive material, or biological, chemical, or nuclear weapon and (ii) the discharge from a fixed platform of oil, liquefied natural gas, or another hazardous or noxious substance. The penalties for violations of section 2281a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2281a also prohibits threats to commit the offenses related to acts on or against fixed platforms and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. 2281a are referenced to §§ 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

In addition, the USA FREEDOM Act created a new criminal offense at 18 U.S.C. 2332i that prohibits (i) the possession or production of radioactive material or a device with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment; and (ii) the use of a radioactive material or a device, or the use, damage, or interference with the operation of a nuclear facility that causes the release of radioactive material, radioactive contamination, or exposure to radiation with the intent (or knowledge that such act is likely) to cause death or serious bodily injury or substantial damage to property or the environment, or with the intent to compel a person, international organization or country to do or refrain from doing an act. Section 2332i also prohibits threats to commit any such acts. The penalties for violations of section 2332i are a fine for not more than $2,000,000 and imprisonment for any term of years or life.

Part A of the proposed amendment amends Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. 2332i to §§ 2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

Finally, Part A makes clerical changes to Application Note 1 to § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

Part A of the proposed amendment also sets forth two issues for comment.

B. Bipartisan Budget Act of 2015

Part B of the proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and

disabled]) of the Social Security Act (42 U.S.C. 408, 1011, and 1383a, respectively). The three amended statutes are currently referenced in Appendix A (Statutory Index) of the *Guidelines Manual* to § 2B1.1 (Theft, Property Destruction, and Fraud). The Act added new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes. For each of the three statutes, the new subdivision provides that whoever ''conspires to commit any offense described in any of [the] paragraphs'' enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

Part B amends Appendix A (Statutory Index) so that sections 408, 1011, and 1383a of Title 42 are referenced not only to § 2B1.1 but also to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

Part B of the proposed amendment also includes issues for comment.

C. 18 U.S.C. 1715 (Firearms as Nonmailable Items)

Section 1715 of title 18, United States Code (Firearms as nonmailable items), makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person and declared nonmailable (as prescribed by Postal Service regulations). For any violation of section 1715, the statutory maximum term of imprisonment is two years. The current *Guidelines Manual* does not provide a guideline reference in Appendix A for offenses under section 1715.

The Department of Justice in its annual letter to the Commission has proposed that section 1715 offenses should be assigned a guideline reference, base offense level, and appropriate specific offense characteristics. The Department indicates that in recent years the United States Attorney's Office for the Virgin Islands has brought several cases charging section 1715, where firearms were illegally brought onto the islands by simply mailing them from mainland United States.

Part C of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 1715 to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It also adds 18 U.S.C. 1715 to subsection (a)(8) of § 2K2.1, establishing a base offense level of 6 for such offenses.

Part C of the proposed amendment also includes an issue for comment regarding section 1715 offenses and whether other changes to the guidelines are appropriate to address these offenses.

D. Technical Amendment to § 2T1.6

The Internal Revenue Code (Title 26, United States Code) requires employers to withhold from their employees' paychecks money representing the employees' personal income and Social Security taxes. The Code directs the employer to collect taxes as wages are paid, but only requires a periodic payment of such taxes to the IRS. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. 7202 provides both civil and criminal remedies. Section 7202 provides as criminal penalty a term of imprisonment with a statutory maximum of five years.

Section 7202 is referenced in Appendix A (Statutory Index) to § 2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax). The Background commentary to § 2T1.6 states that ''[t]he offense is a felony that is infrequently prosecuted.'' The Department of Justice in its annual letter to the Commission has proposed that the ''infrequently prosecuted'' statement should be deleted. The Department points out that while that statement may have been accurate when the relevant commentary was originally written (in 1987), the number of prosecutions under section 7202 have since increased substantially. The use of § 2T1.6 increased from three cases in 2002 to 46 cases in 2014. *See* United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2002), at *http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2002;* United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2014), at *http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf.*

Part D of the proposed amendment amends the Background Commentary to § 2T6.1 to delete the sentence that states ''The offense is a felony that is infrequently prosecuted.''

Proposed Amendment:

(A) USA FREEDOM Act of 2015

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''831(f)(2)'' and inserting ''831(g)(2)'', and by striking ''831(f)(1)'' and inserting ''831(g)(1)''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2280 the following:

''18 U.S.C. § 2280a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.3, 2K1.4, 2M5.2, 2M5.3, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1, 2X2.1, 2X3.1'';

by inserting after the line referenced to 18 U.S.C. § 2281 the following:

''18 U.S.C. 2281a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1'';

and by inserting after the line referenced to 18 U.S.C. 2332h the following:

''18 U.S.C. 2332i 2A6.1, 2K1.4, 2M2.1, 2M2.3, 2M6.1''.

Issues for Comment:

1. The USA FREEDOM Act was enacted as a reauthorization of the USA PATRIOT Act, Pub. L. 107–56 (October 26, 2001), relating to the collection of telephone metadata by various national security agencies. Title VII of the Act also amended four existing criminal statutes and created three new criminal statutes to implement certain provisions in international conventions relating to maritime and nuclear terrorism. One of the existing criminal statutes amended by the USA FREEDOM Act was 18 U.S.C. 2280. Although the Act did not amend the substantive offense conduct in section 2280, it added 19 new definitions and terms to the statute and made them applicable to other criminal statutes, including the new offenses created by the Act.

The Commission seeks comment on whether the guidelines should be amended to address the changes made by the USA FREEDOM Act. Are the existing provisions in the guidelines adequate to address the changes to existing criminal statutes and the new offenses created by the Act? If not, how should the Commission amend the guidelines to address them?

2. The proposed amendment would reference the offenses under 18 U.S.C. 2280a, 18 U.S.C. 2281a, and 18 U.S.C. 2332i to various guidelines. The Commission invites comment on offenses under these new statutes, including in particular the conduct involved in such offenses and the nature

and seriousness of the harms posed by such offenses. Do the guidelines covered by the proposed amendment adequately account for these offenses? If not, what revisions to the guidelines would be appropriate to account for these offenses? In particular, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions in one or more of these guidelines to better account for these offenses? If so, what should the Commission provide?

In addition, the Commission seeks comment on whether the Commission should reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment. Alternatively, should the Commission defer action in response to these new offenses this amendment cycle, undertake a broader review of the guidelines pertaining to offenses involving terrorism and weapons of mass destruction, and include responding to the new offenses as part of that broader review?

(B) Bipartisan Budget Act of 2015

Appendix A (Statutory Index) is amended in each of the lines referenced to 42 U.S.C. 408, 1011, and 1383a(a) by inserting ''; 2X1.1'' at the end.

Issues for Comment:

1. Part B of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. 408, 1011, and 1383a to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses?

2. In addition to the amendments to the criminal statutes described above, the Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant social security programs. The Act included a provision in all three statutes identifying such persons as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

In light of this new provision, a person who meets this criteria and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The Commission seeks comment on whether the guidelines should be amended to address cases involving defendants convicted of a fraud offense under one of the three amended statutes and who meet this new criteria set forth by the Bipartisan Budget Act of 2015. Are the existing provisions in the guidelines, such as the provisions at § 2B1.1 and the Chapter Three adjustment at § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), adequate to address these cases? If not, how should the Commission amend the guidelines to address them?

(C) 18 U.S.C. 1715 (Firearms as Non-mailable Items)

Section 2K2.1 is amended in subsection (a)(8) by inserting '', or § 1715'' before the period at the end.

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by inserting after ''(k)–(o),'' the following: ''1715,''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1712 the following:

''18 U.S.C. 1715 2K2.1''.

Issue for Comment:

1. Part C of the proposed amendment would reference offenses under 18 U.S.C. 1715 to § 2K2.1. The Commission invites comment on offenses under section 1715, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. What guideline or guidelines are appropriate for these offenses? Does § 2K2.1 adequately account for these offenses? To the extent the Commission does provide a reference to one or more guidelines, what revisions, if any, to those guidelines would be appropriate to account for offenses under section 1715?

(D) Technical Amendment to § 2T1.6

The Commentary to § 2T1.6 captioned ''Background'' is amended by striking ''The offense is a felony that is infrequently prosecuted.''.

2. Compassionate Release

Synopsis of Proposed Amendment: In August 2015, the Commission indicated that one of its policy priorities would be ''possible consideration of amending the policy statement pertaining to 'compassionate release,' § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).'' *See* United States Sentencing Commission, ''Notice of Final Priorities,'' 80 FR 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission's consideration of the issues related to this policy priority.

The proposed amendment contains two parts. Part A sets forth a detailed request for comment on whether any changes should be made to the Commission's policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Part B illustrates one possible set of changes to the policy statement at § 1B1.13.

(A) Request for Public Comment on Whether Any Changes Should Be Made to the Commission's Policy Statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons)

Issue for Comment:

1. *Statutory Provisions Related to Compassionate Release.* Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant in certain circumstances, *i.e.,* if ''extraordinary and compelling reasons'' warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. 3582(c)(1); *see also* 28 U.S.C. 994(t) (stating that the Commission, in promulgating any such policy statements, ''shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples'').

Policy Statement at § 1B1.13. The Commission's policy statement, § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), provides that ''extraordinary and compelling reasons'' exist if (1) the defendant is suffering from a terminal illness; (2) the defendant is suffering from certain permanent physical or medical conditions, or experiencing

deteriorating physical or mental health because of the aging process; or (3) the defendant has a minor child and the defendant's only family member capable of caring for the child has died or is incapacitated. *See* § 1B1.13, comment. (n.1(A)(i)–(iii)). In addition, the policy statement provides that extraordinary and compelling reasons exist if, as determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described above. *See* § 1B1.13, comment. (n.1(A)(iv)). The policy statement was last amended in 2007 to provide the current criteria to be applied and a list of the specific circumstances which constitute ''extraordinary and compelling reasons'' for compassionate release consideration.

Bureau of Prisons Program Statement on Compassionate Release. On August 12, 2013, the Bureau of Prisons issued a new program statement, 5050.49, that changes how the Bureau implements section 3582(c)(1)(A). Among other things, the new program statement expands and details the range of circumstances that the Bureau may consider ''extraordinary and compelling reasons'' warranting such a reduction. Under the program statement, a sentence reduction may be based on the defendant's medical circumstances (*e.g.,* a terminal or debilitating medical condition; *see* 5050.49(3)(a)–(b)) or on certain non-medical circumstances (*e.g.,* an elderly defendant, the death or incapacitation of the family member caregiver, or the incapacitation of the defendant's spouse or registered partner; *see* 5050.49(4),(5),(6)).

Report of the Department of Justice's Office of the Inspector General. In May 2015, the Department of Justice's Office of the Inspector General (OIG) released a report on the Bureau of Prisons' implementation of the compassionate release program provisions related to elderly inmates. *See* U.S. Department of Justice, Office of the Inspector General, The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E–15–05 (May 2015), available at *https://oig.justice.gov/reports/2015/e1505.pdf.* The report found that while aging inmates (age 50 years or older) make up a disproportionate share of the inmate population, are more costly to incarcerate (primarily due to medical needs), engage in less misconduct while in prison, and have a lower rate of re-arrest once released than their younger counterparts, ''BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early.'' In addition, the report found that the eligibility requirements for both medical and non-medical provisions as applied to inmates 65 years or older are ''unclear'' and ''confusing.''

In light of its review, the OIG recommended that the Bureau of Prisons should consider revising its compassionate release program to facilitate the release of appropriate elderly inmates. The report provided the following specific recommendations, among others: (1) Revising the inmate age provisions to define an aging inmate as age 50 or above; and (2) revising the time-served provision for those inmates 65 and older without medical conditions to remove the requirement that they serve 10 years, and require only that they serve 75 percent of their sentence. In April 2015, the Bureau of Prisons responded to a draft of the OIG report and concurred with each of the recommendations made by the OIG.

Issue for Comment. The Commission seeks comment whether any changes should be made to the Commission's policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Should the Commission amend the current policy statement describing what constitutes ''extraordinary and compelling reasons'' and, if so, how?

Should the list of extraordinary and compelling reasons in the *Guidelines Manual* closely track the criteria set forth by the Bureau of Prisons in its program statement? Should the Commission develop further criteria and examples of what circumstances constitute ''extraordinary and compelling reasons''? If so, what specific criteria and examples should the Commission provide? Should the Commission further define and expand the medical and non-medical criteria provided in the Bureau's program statement?

In addition, the Commission seeks comment on how, if at all, the policy statement at § 1B1.13 should be revised to address the recommendations in the OIG report. Should the Commission adopt the recommendations in the OIG report as part of its revision of the policy statement at § 1B1.13? Should the Commission expand upon these recommendations to revise the Bureau's requirements that limit the availability of compassionate release for aging inmates? Alternatively, should the Commission defer action on this issue during this amendment cycle to consider any possible changes that the Bureau of Prisons might promulgate to its compassionate release program statement in response to the OIG report?

Finally, the Commission adopted the policy statement at § 1B1.13 to implement the directive in 28 U.S.C. 994(t). As noted above, the directive requires the Commission to ''describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.'' The Commission also has authority to promulgate general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. 3582(c). *See* 28 U.S.C. 994(a)(2)(C). Under this general authority, should the Commission further develop the policy statement at § 1B1.13 to provide additional guidance or limitations regarding the circumstance in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? If so, what should the specific guidance or limitations be? For example, should the Commission provide that the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. 3582(c)(1)(A) if the defendant meets any of the circumstances listed as ''extraordinary and compelling reasons'' in § 1B1.13?

(B) Proposed Amendment

Synopsis of Proposed Amendment: This part of the proposed amendment illustrates one possible set of changes to the Commission's policy statement at § 1B1.13. The proposed amendment would revise the list of ''extraordinary and compelling reasons'' for compassionate release consideration in the Commentary to § 1B1.13 to reflect the criteria set forth in the Bureau of Prisons' program statement. The language used in this part parallels the language in the Bureau's program statement.

Proposed Amendment:

The Commentary to § 1B1.13 captioned ''Application Notes'' is amended in Note 1(A) by striking ''following circumstances'' and inserting ''circumstances set forth below''; by redesignating clause (iv) as clause (viii); by striking clauses (i) through (iii) and inserting the following:

''(i) The defendant (I) has been diagnosed with a terminal, incurable disease; and (II) has a life expectancy of 18 months or less.

(ii) The defendant has an incurable, progressive illness.

(iii) The defendant has suffered a debilitating injury from which he or she will not recover.

(iv) The defendant meets the following criteria—

(I) the defendant is at least 65 years old;

(II) the defendant has served at least 50 percent of his or her sentence;

(III) the defendant suffers from a chronic or serious medical condition related to the aging process;

(IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and

(V) conventional treatment promises no substantial improvement to the defendant's mental health or physical condition.

(v) The defendant (I) is at least 65 years old; and (II) has served at least 10 years or 75 percent of his or her sentence, whichever is greater.

(vi) The death or incapacitation of the family member caregiver of the defendant's child.

[''Incapacitation'' means the family member caregiver suffered a severe injury or suffers from a severe illness that renders the caregiver incapable of caring for the child. ''Child'' means an individual who had not attained the age of 18 years.]

(vii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

[''Incapacitation'' means the spouse or registered partner (I) has suffered a serious injury or suffers from a debilitating physical illness and the result of the injury or illness is that the spouse or registered partner is completely disabled, meaning that the spouse or registered partner cannot carry on any self-care and is totally confined to a bed or chair; or (II) has a severe cognitive deficit, caused by an illness or injury, that has severely affected the spouse's or registered partner's mental capacity or function but may not be confined to a bed or chair. ''Spouse'' means an individual in a relationship with the defendant, where that relationship has been legally recognized as a marriage, including a legally-recognized common-law marriage. ''Registered partner'' means an individual in relationship with the defendant, where the relationship has been legally recognized as a civil union or registered domestic partnership.]'';

and in clause (viii), as so redesignated, by striking ''(i), (ii), and (iii)'' and inserting ''(i) through (vii)''.

3. Conditions of Probation and Supervised Release

Synopsis of Proposed Amendment: This proposed amendment revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission's multi-year review of federal sentencing practices relating to conditions of probation and supervised release. *See* United States Sentencing Commission, ''Notice of Final Priorities,'' 80 FR 48957 (Aug. 14, 2015). It is also informed by a series of opinions issued by the Seventh Circuit in recent years.

Specifically, the Seventh Circuit has found several of the standard conditions to be unduly vague, overbroad, or inappropriately applied. *See, e.g., United States* v. *Adkins,* 743 F.3d 176 (7th Cir. 2014); *United States* v. *Goodwin,* 717 F.3d 511 (7th Cir. 2013); *United States* v. *Quinn,* 698 F.3d 651 (7th Cir. 2012); *United States* v. *Siegel,* 753 F.3d 705 (7th Cir. 2014). The Seventh Circuit has also suggested that the language of the conditions be revised to be more comprehensible to defendants and probation officers, and to contain a stated mens rea requirement where one was lacking. *United States* v. *Kappes,* 782 F.3d 828, 848 (7th Cir. 2015) (''We have suggested that sentencing judges define the crucial terms in a condition in a way that provides clear notice to the defendant (preferably through objective rather than subjective terms), and/or includes a mens rea requirement (such as intentional conduct). We have further suggested that the judge make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult.'' (quotation and alteration marks omitted)).

The Statutory and Guidelines Framework

When imposing a sentence of probation, the court is required to impose certain conditions of probation listed by statute. *See* 18 U.S.C. 3563(a). In addition, the court has discretion to impose additional conditions of probation ''to the extent that such conditions are reasonably related to the factors set forth in sections 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).'' *See* 18 U.S.C. 3563(b). Similarly, when imposing a sentence of supervised release, the court is required to impose certain conditions of supervised release listed by statute, and the court has discretion to impose additional conditions of supervised release, to the extent that the additional condition ''is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)'' and ''involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D).'' *See* 18 U.S.C. 3583(d). The additional condition of supervised release must also be consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. 3583(d)(3).

In addition, the court is required to direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which he or she is subject, which must be ''sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.'' *See* 18 U.S.C. 3563(d), 3583(f). The Judgment in a Criminal Case Form, AO 245B, sets forth a series of mandatory and ''standard'' conditions in standardized form and provides space for the court to impose additional ''standard'' and ''special'' conditions devised by the court.

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release. *See* 28 U.S.C. 994(a)(2)(B). Sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) implement this directive. Subsections (a) and (b) of § 5B1.3 set forth the conditions of probation that are required by statute. Subsections (c), (d), and (e) of § 5B1.3 provide guidance on discretionary conditions of probation, which are categorized as ''standard'' conditions, ''special'' conditions, and ''additional'' special conditions, respectively. Subsections (a) through (e) of § 5D1.3 follow the same structure in setting forth the mandatory conditions of supervised release and providing guidance on discretionary conditions of supervised release.

The Proposed Changes to §§ 5B1.3 and 5D1.3

The changes made by the proposed amendment would revise, clarify, and rearrange the provisions in the *Guidelines Manual* on conditions of probation and supervised release. These changes would not necessarily affect the conditions of probation and supervised release as set forth in the Judgment in a Criminal Case Form, AO 245B. However, in light of the responsibilities

of the Judicial Conference of the United States and the Administrative Office of the United States Courts in this area, the Commission works with the Criminal Law Committee and the Probation and Pretrial Services Office on these issues and anticipates that the Commission's work on this proposed amendment may inform their consideration of possible changes to the judgment form.

In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce. For some conditions that do not have a mens rea standard, a ''knowing'' standard is inserted.

First, the proposed amendment amends the ''mandatory'' conditions set forth in subsection (a) of §§ 5B1.3 and 5D1.3. It inserts new language directing that, if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. *See* 18 U.S.C. 3572(d). This new language is similar to paragraph (14) of the ''standard'' conditions; accordingly, paragraph (14) of the ''standard'' conditions is deleted, as described below.

Second, the proposed amendment amends the ''standard'' conditions set forth in subsection (c) of §§ 5B1.3 and 5D1.3. Paragraphs (1)–(3), (5)–(6), and (9)–(13) are revised, clarified, and rearranged into a new set of paragraphs (1) through (12). A new paragraph (13) is added, which provides that the defendant ''must follow the instructions of the probation officer related to the conditions of supervision.''

Several provisions are moved from the ''standard'' conditions list to the ''special'' conditions list, or vice versa. Specifically, paragraph (1) of the ''special'' conditions list (relating to possession of a firearm or dangerous weapon) is moved to the ''standard'' conditions list. Paragraphs (4) and (7) of the ''standard'' conditions list (relating to support of dependents and child support, and alcohol use, respectively) are moved to the ''special'' conditions list. In addition, as mentioned above, paragraph (14) on the ''standard'' conditions list (relating to payment of special assessment) is incorporated into the ''mandatory'' conditions list. Finally, paragraph (8) of the ''standard'' conditions list (relating to frequenting places where controlled substances are trafficked) is deleted.

Third, the proposed amendment adds two new provisions to the ''special'' conditions set forth in subsection (d) of §§ 5B1.3 and 5D1.3. The first new provision, based on paragraph (7) of the ''standard'' conditions, would specify that the defendant must not use or possess alcohol. The second new provision, based on paragraph (4) of the ''standard'' conditions, would specify that, if the defendant has one or more dependents, the defendant must support his or her dependents; and if the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child, the defendant must make the payments and comply with the other terms of the order.

Issues for comment are also included.

Proposed Amendment:

Section 5B1.3 is amended in subsection (a)(6) by inserting before the semicolon at the end the following: ''. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. 3572(d)), the defendant shall adhere to the schedule'';

in subsection (b) by striking ''The'' and inserting the following:

''Discretionary Conditions

The'';

in subsection (c) by striking ''(Policy Statement) The'' and inserting the following:

'' 'Standard' Conditions (Policy Statement)

The'';

and by striking paragraphs (1) through (14) and inserting the following:

''(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.

(5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.

(10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.,* anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person

about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.

(13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.'';

and in subsection (d) by striking ''(Policy Statement) The'' and inserting the following:

'' '*Special' Conditions* (Policy Statement)

The'';

by striking paragraph (1) and inserting the following:

''(1) Support of Dependents

If the defendant—

(A) has one or more dependents—a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child—a condition specifying that the defendant must make the payments and comply with the other terms of the order.'';

and in paragraph (4) by striking ''*Program Participation''* in the heading; by inserting ''(A)'' before ''a condition requiring''; and by inserting ''; and (B) a condition specifying that the defendant must not use or possess alcohol'' before the period at the end.

Section 5D1.3 is amended in subsection (a)(6) by inserting before the semicolon at the end the following: ''. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. 3572(d)), the defendant shall adhere to the schedule'';

in subsection (b) by striking ''The'' and inserting the following:

''Discretionary Conditions

The'';

in subsection (c) by striking ''(Policy Statement) The'' and inserting the following:

'' '*Standard' Conditions* (Policy Statement)

The'';

and by striking paragraphs (1) through (15) and inserting the following:

''(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.

(5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.

(10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.,* anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.

(13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

(14) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.'';

and in subsection (d) by striking ''(Policy Statement) The'' and inserting the following:

'' '*Special' Conditions* (Policy Statement)

The'';

by striking paragraph (1) and inserting the following:

''(1) Support of Dependents

If the defendant—

(A) has one or more dependents—a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order.'';

and in paragraph (4) by striking ''*Program Participation''* in the heading; by inserting ''(A)'' before ''a condition requiring''; and by inserting ''; and (B) a condition specifying that the defendant must not use or possess alcohol'' before the period at the end.

Issues for Comment:

1. The Commission seeks comment on the bracketed options in paragraph (3) of the ''special'' conditions, which would

become (4) under the proposed amendment. Specifically, the proposed amendment brackets whether the defendant should ''answer truthfully'' the questions of the probation officer or, instead, should ''be truthful when responding to'' the questions of the probation officer. The Commission seeks comment on the policy implications and the Fifth Amendment implications of each of these bracketed options. Which option, if any, is appropriate? Should the Commission clarify that an offender's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this special condition?

2. The Commission seeks comment on the standard condition of supervised release in § 5D1.3(c)(15), which states that the defendant ''shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.'' Under the proposed amendment, this would remain a standard condition and would be redesignated as subsection (c)(14). The Commission seeks comment on whether this condition should be made a special condition rather than a standard condition.

4. Animal Fighting

Synopsis of Proposed Amendment: This proposed amendment revises § 2E3.1 (Gambling; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses, relating to attending an animal fighting venture, established by section 12308 of the Agricultural Act of 2014, Public Law 113–79 (Feb. 7, 2014).

Animal fighting ventures are prohibited by the Animal Welfare Act, 7 U.S.C. 2156. Under that statute, an ''animal fighting venture'' is an event that involves a fight between at least two animals for purposes of sport, wagering, or entertainment. *See* 7 U.S.C. 2156(g)(1). Section 2156 prohibits a range of conduct relating to animal fighting ventures, including making it unlawful to knowingly—

- sponsor or exhibit an animal in an animal fighting venture, *see* § 2156(a)(1);
- sell, buy, possess, train, transport, deliver, or receive an animal for purposes of having the animal participate in an animal fighting venture, *see* § 2156(b);
- advertise an animal (or a sharp instrument designed to be attached to the leg of a bird) for use in an animal fighting venture or promoting or in any other manner furthering an animal fighting venture, *see* § 2156(c); and
- sell, buy, transport, or deliver a sharp instrument designed to be attached to the leg of a bird for use in an animal fighting venture, *see* § 2156(e).

The criminal penalties for violations of section 2156 are provided in 18 U.S.C. 49. For any violation of section 2156 listed above, the statutory maximum term of imprisonment is 5 years. *See* 18 U.S.C. 49(a).

However, two new types of animal fighting offenses were added by the Agricultural Act of 2014. They make it unlawful to knowingly—

- attend an animal fighting venture, *see* § 2156(a)(2)(A); or
- cause an individual under 16 to attend an animal fighting venture, *see* § 2156(a)(2)(B).

The statutory maximum is 3 years if the offense of conviction is causing an individual under 16 to attend an animal fighting venture, *see* 18 U.S.C. 49(c), and 1 year if the offense of conviction is attending an animal fighting venture, *see* 18 U.S.C. 49(b).

All offenses under section 2156 are referenced in Appendix A (Statutory Index) to § 2E3.1 (Gambling Offenses; Animal Fighting Offenses). Under the penalty structure of that guideline, a defendant convicted of an animal fighting offense receives a base offense level of 12 if the offense involved gambling—specifically, if the offense was engaging in a gambling business, transmitting wagering information, or part of a commercial gambling operation—and a base offense level of 10 otherwise. The guideline contains no specific offense characteristics. There is an upward departure provision if an animal fighting offense involves exceptional cruelty.

Higher Penalties for Animal Fighting Offenses

First, the proposed amendment revises § 2E3.1 to provide a base offense level of [14][16] if the offense involved an animal fighting venture.

In addition, it revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

New Offenses Relating to Attending an Animal Fighting Venture

Next, the proposed amendment responds to the two new offenses relating to attendance at an animal fighting venture. It establishes new base offense levels for such offenses. Specifically, a base offense level of [8][10] in § 2E3.1 would apply if the defendant was convicted under section 2156(a)(2)(B) (causing an individual under 16 to attend an animal fighting venture). The class A misdemeanor at section 2156(a)(2)(A) (attending an animal fighting venture) would not be referenced in Appendix A (Statutory Index) to § 2E3.1; it would receive a base offense level of 6 in § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Issues for comment are also included.

Proposed Amendment:

Section 2E3.1 is amended in subsection (a) by striking subsection (a)(2); by redesignating subsections (a)(1) and (a)(3) as subsections (a)(2) and (a)(4), respectively; by striking ''or'' in subsection (a)(2), as so redesignated; by inserting before subsection (a)(2) (as so redesignated) the following new subsection (a)(1):

''(1) [14][16], if the offense involved an animal fighting venture, except as provided in subdivision (3) below;'';

and by inserting before subsection (a)(4), as so redesignated, the following new subsection (b)(3):

''(3) [8][10], if the defendant was convicted under 7 U.S.C. 2156(a)(2)(B); or''.

The Commentary to § 2E3.1 captioned ''Statutory Provisions'' is amended by inserting after ''7 U.S.C. 2156'' the following: ''(felony provisions only)''.

The Commentary to § 2E3.1 captioned ''Application Notes'' is amended in Note 2 by striking ''If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.'', and inserting ''There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal; or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 2156 by inserting after ''§ 2156'' the following: ''(felony provisions only)''.

Issues for Comment:

1. The Commission seeks comment on offenses involving animal fighting. How prevalent are these offenses, and do the guidelines adequately address these offenses? If not, how should the

Commission revise the guidelines to provide appropriate penalties in such cases?

What, if any, aggravating and mitigating factors are involved in these offenses that the guidelines should take into account? Should the Commission provide new departure provisions, enhancements, adjustments, or minimum offense levels to account for such aggravating or mitigating factors? If so, what should the Commission provide, and with what penalty levels?

For example, should the Commission provide an enhancement if the defendant possessed a dangerous weapon (including a firearm)? Should the Commission provide an enhancement if the defendant was in the business of breeding, selling, buying, possessing, training, transporting, delivering, or receiving animals for use in animal fighting ventures, or brokering such activities?

2. The proposed amendment includes an upward departure provision if the offense involved animal fighting ''on an exceptional scale (such as an offense involving an unusually large number of animals).'' What additional guidance, if any, should the Commission provide on what constitutes animal fighting on an exceptional scale?

Under the proposed amendment, the factors of exceptional cruelty and exceptional scale are departure provisions. Should the Commission provide enhancements, rather than departure provisions, for these factors? If so, what penalty levels should be provided?

3. The Commission seeks comment on how the multiple count rules should operate when the defendant is convicted of multiple counts of animal fighting offenses. How, if at all, should the guideline calculation be affected by the presence of multiple counts of conviction? For example, should the Commission specify that multiple counts involving animal fighting ventures are to be grouped together under subsection (d) of § 3D1.2 (Groups of Closely Related Counts)? Should the Commission specify that multiple counts involving animal fighting ventures are not to be grouped together?

5. Child Pornography Circuit Conflicts

Synopsis of Proposed Amendment: This proposed amendment addresses circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses. One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues typically arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. *See* United States Sentencing Commission, ''Report to the Congress: Federal Child Pornography Offenses'' at 33–35 (2012), available at *http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses.*

Offenses Involving Unusually Young and Vulnerable Minors

First, the proposed amendment responds to differences among the circuits in cases in which the offense involves minors who are unusually young and vulnerable (such as infants or toddlers). The production guideline provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. *See* § 2G2.1(b)(1). A similar tiered enhancement is contained in § 2G2.6 (Child Exploitation Enterprises). *See* § 2G2.6(b)(1). The non-production guideline provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. *See* § 2G2.2(b)(2).

These three guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable. However, the adjustment at § 3A1.1(b)(1) provides a 2-level increase if the defendant knew or should have known that the victim was a ''vulnerable victim,'' *i.e.,* a victim ''who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.'' *See* § 3A1.1, comment. (n.2). The Commentary further provides:

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

See § 3A1.1, comment. (n.2).

There are differences among the circuits over whether the vulnerable victim adjustment applies when the victim is extremely young, such as an infant or toddler. The Ninth Circuit has indicated that the under-12 enhancement ''does not take especially vulnerable stages of childhood into account'' and that, ''[t]hough the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having 'attained the age of twelve years.' '' *United States* v. *Wright,* 373 F.3d 935, 943 (9th Cir. 2004). Accordingly, it held, a vulnerable victim adjustment may be applied based on extreme youth and small physical size, such as when the victim is in the infant or toddler stage. *Id.* Similarly, the Fifth Circuit has stated, ''we do not see any logical reason why a 'victim under the age of twelve' enhancement should bar application of the 'vulnerable victim' enhancement when the victim is especially vulnerable, even as compared to most children under twelve.'' *United States* v. *Jenkins,* 712 F.3d 209, 214 (5th Cir. 2013).

The Fourth Circuit, in contrast, has indicated that the vulnerable victim adjustment may not be applied based solely on extreme youth or on factors that are for conditions that ''necessarily are related to . . . age.'' *United States* v. *Dowell,* 771 F.3d 162, 175 (4th Cir. 2014). The line drawn by the under-12 enhancement ''implicitly preclude[s] courts from drawing additional lines below that point,'' and ''once the offense involves a child under twelve, any additional considerations based solely on age simply are not appropriate to the Guidelines calculation.'' *Id.*

The proposed amendment generally adopts the approach of the Fifth and Ninth Circuits. It amends the Commentary in the child pornography guidelines to provide that application of the age enhancement does not preclude application of the vulnerable victim adjustment. Specifically, if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, § 3A1.1(b) applies, assuming the mens rea requirement of § 3A1.1(b) is also met (*i.e.,* the defendant knew or should have known of this vulnerability).

Two Issues Relating to the Tiered Enhancement for Distribution in § 2G2.2

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution in § 2G2.2(b)(3), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors.

There are two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant's use of a peer-to-peer file sharing

program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.

(1) *The 2-Level Distribution Enhancement at Subsection (b)(3)(F)*

The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file sharing program, regardless of whether he did so purposefully, knowingly, or negligently. *See, e.g., United States* v. *Baker,* 742 F.3d 618, 621 (5th Cir. 2014) (the enhancement applies ''regardless of the defendant's mental state''); *United States* v. *Ray,* 704 F.3d 1307, 1312 (10th Cir. 2013) (the enhancement ''does not require that a defendant know about the distribution capability of the program he is using''; the enhancement ''requires no particular state of mind''); *United States* v. *Creel,* 783 F.3d 1357, 1360 (11th Cir. 2015) (''No element of *mens rea* is expressed or implied . . . The definition requires only that the 'act . . . relates to the transfer of child pornography.' '').

The Second, Fourth, and Fifth Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program. *See, e.g., United States* v. *Baldwin,* 743 F.3d 357, 361 (2nd Cir. 2015) (requiring knowledge); *United States* v. *Robinson,* 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); *United States* v. *Layton,* 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard).

Other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file sharing program was used, absent ''concrete evidence'' of ignorance. *United States* v. *Dodd,* 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a ''presumption'' that ''users of file-sharing software understand others can access their files.'' *United States* v. *Conner,* 521 Fed. App'x 493, 499 (6th Cir. 2013).

The proposed amendment generally adopts the approach of the Second, Fourth, and Fifth Circuits. It amends subsection (b)(3)(F) to provide that the 2-level enhancement requires ''knowing'' distribution by the defendant.

As a conforming change, the proposed amendment also revises the 2-level distribution enhancement at § 2G2.1(b)(3) to provide that the enhancement requires that the defendant knowingly distributed.

(2) *The 5-Level Distribution Enhancement at Subsection (b)(3)(B)*

The 5-level distribution enhancement at subsection (b)(3)(B) applies if the offense involved distribution ''for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.'' The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the ''thing of value'' is the material received in exchange.

The circuits have taken different approaches to this issue. The Fifth Circuit has indicated that when the defendant knowingly uses file sharing software, the requirements for the 5-level enhancement are generally satisfied. *See United States* v. *Groce,* 784 F.3d 291, 294 (5th Cir. 2015) (''Generally, when a defendant knowingly uses peer-to-peer file sharing software . . . he engages in the kind of distribution contemplated by'' the 5-level enhancement).

The Fourth Circuit appears to have a higher standard. It has required the government to show that the defendant (1) ''knowingly made child pornography in his possession available to others by some means''; and (2) did so ''for the specific purpose of obtaining something of valuable consideration, such as more pornography.'' *United States* v. *McManus,* 734 F.3d 315, 319 (4th Cir. 2013).

The proposed amendment revises subsection (b)(3)(B) to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

Proposed Amendment:

Section 2G2.1 is amended in subsection (b)(3) by striking ''offense involved distribution'' and inserting ''defendant knowingly distributed''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by redesignating Notes 2 through 6 as Notes 3 through 7, respectively, and by inserting after Note 1 the following new Note 2:

''2. *Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§ 3A1.1(b)).*—If subsection (b)(1) applies, § 3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. *See* § 3A1.1, comment. (n.2). However, if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply § 3A1.1(b).''.

Section 2G2.2 is amended in subsection (b)(3) by striking ''If the offense involved'';

in subparagraphs (A), (C), (D), and (E) by striking ''Distribution'' and inserting ''If the offense involved distribution'';

in subparagraph (B) by striking ''Distribution for the receipt, or expectation of receipt, of a thing of value,'' and inserting ''If the defendant distributed in exchange for any valuable consideration,'';

and in subparagraph (F) by striking ''Distribution'' and inserting ''If the defendant knowingly distributed,''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended in Note 1 by striking the paragraph that begins '' 'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means'' and inserting '' 'The defendant distributed in exchange for any valuable consideration' means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.'';

and by redesignating Notes 2 through 7 as Notes 3 through 8, respectively, and by inserting after Note 1 the following new Note 2:

''2. *Interaction of Age Enhancement (Subsection (b)(2)) and Vulnerable Victim (§ 3A1.1(b)).*—If subsection (b)(2) applies, § 3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. *See* § 3A1.1, comment. (n.2). However, if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply § 3A1.1(b).''.

The Commentary to § 2G2.6 captioned ''Application Notes'' is amended by redesignating Notes 2 and 3 as Notes 3

and 4, respectively, and by inserting after Note 1 the following new Note 2:

''2. *Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§ 3A1.1(b)).*—If subsection (b)(1) applies, § 3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. *See* § 3A1.1, comment. (n.2). However, if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply § 3A1.1(b).''.

Issues for Comment

1. With respect to the interaction of the age enhancements and the vulnerable victim adjustment, the proposed amendment would respond to the circuit conflict by clarifying the circumstances under which the vulnerable victim adjustment would also apply. Should the Commission use a different approach to resolving the circuit conflict? If so, what approach should the Commission use to clarify how the age enhancements interact with the vulnerable victim adjustment? For example, should the Commission revise the tiered age enhancements to provide an additional tier, 2 levels higher than the existing tiers, for cases involving unusually young and vulnerable victims, such as infants or toddlers? In the alternative, should the Commission provide an upward departure provision to address this factor?

Application Note 2 to § 3A1.1 provides that, ''if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.'' Should the Commission revise this provision to change or clarify how age enhancements in the guidelines (whether for child pornography offenses or otherwise) interact with the vulnerable victim adjustment? For example, should the Commission change ''unless the victim was unusually vulnerable for reasons unrelated to age'' to ''unless the victim was unusually vulnerable for reasons not based on age *per se''*?

2. With respect to the 2-level distribution enhancement, the proposed amendment generally adopts the approach of the circuits that require ''knowing'' distribution. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 2-level enhancement, even in cases where the defendant was in fact ignorant that use of the program would result in files being shared to others?

3. With respect to the 5-level distribution enhancement, the proposed amendment would generally require an agreement with another person in which the defendant trades child pornography for other child pornography or another thing of value, such as access to a child. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 5-level enhancement?

4. The proposed amendment amends § 2G2.2 to provide that the 2-level enhancement at subsection (b)(3) requires ''knowing'' distribution by the defendant. Should the Commission change any other enhancements in subsection (b) from an ''offense involved'' approach to a ''defendant-based'' approach? If so, should the Commission include a culpable state of mind requirement, such as, for example, requiring ''knowing'' distribution by the defendant?

5. The guideline for obscenity offenses, § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), contains a tiered distribution enhancement similar to the tiered distribution enhancement in § 2G2.2. If the Commission were to make revisions to the tiered distribution enhancement in § 2G2.2, should the Commission make similar revisions to § 2G3.1?

6. Immigration

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. *See* United States Sentencing Commission, ''Notice of Final Priorities,'' 80 FR 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission's consideration of these issues.

The proposed amendment contains two parts. The Commission is considering whether to promulgate any one or both of these parts, as they are not necessarily mutually exclusive. They are as follows—

Part A revises the alien smuggling guideline at § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). An issue for comment is also provided.

Part B revises the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States). Issues for comment are also included.

(A) Alien Smuggling

Synopsis of Proposed Amendment: This part of the proposed amendment revises the alien smuggling guideline at § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The Commission has received comment expressing concern that the guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors. *See, e.g.,* Annual Letter from the Department of Justice to the Commission (July 24, 2015), at *http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/DOJ.pdf.*

First, the proposed amendment revises the alternative base offense levels at § 2L1.1(a). Two options are provided. Option 1 would raise the base offense level at subsection (a)(3) from 12 to [16]. Option 2 adds an alternative base offense level of [16] if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.

Second, the proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. The Department of Justice in its annual letter to the Commission has suggested that the enhancement for smuggling, transporting, or harboring unaccompanied minors under § 2L1.1(b)(4) is inadequate in light of the serious nature of such offenses. The Department states that ''[t]hese smugglers often treat children as human cargo and subject them to a multitude of abuses throughout a long and dangerous journey, including sexual assault, extortion, and other crimes.'' The proposed amendment would amend § 2L1.1 to address the issue of unaccompanied minors. The proposed amendment first amends § 2L1.1(b)(4) to make the enhancement offense-based (with a mens rea requirement) as opposed to exclusively defendant-based. The proposed amendment would also amend the commentary to § 2L1.1 to clarify that the term ''serious bodily injury'' included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to § 1B1.1 (Application Instructions), which states that ''serious bodily injury'' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. 2241 or § 2242 or any similar offense under state law.

Finally, the proposed amendment would revise the definition of ''minor'' for purposes of the ''unaccompanied minor'' enhancement at § 2L1.1(b)(4) and change it from minors under the age of 16 to minors under the age of [18]. The proposed amendment also brackets the possibility of including a new departure provision in the commentary to § 2L1.1 for cases in which the offense involved the smuggling, transporting, or harboring of six or more unaccompanied minors.

An issue for comment is also provided.

Proposed Amendment

Section 2L1.1 is amended—

[Option 1:

in subsection (a)(3) by striking ''12, otherwise'' and inserting ''[16], otherwise'';]

[Option 2:

in subsection (a) by redesignating paragraph (3) as paragraph (4), and by inserting after paragraph (2) the following new paragraph (3):

''(3) [16], if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization; or'';]

and in subsection (b)(4) by striking ''If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent'' and inserting ''If the offense involved the smuggling, transporting, or harboring of a minor who the defendant knew [or had reason to believe] was unaccompanied by the minor's parent or grandparent''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended—

in Note 1—

[Option 2 (continued):

by inserting before the paragraph that begins '' 'The offense was committed other than for profit' means'' the following new paragraph:

'' 'As part of an ongoing commercial organization' means that the defendant participated (A) in a continuing organization or enterprise of five or more persons that had as one of its primary purposes the smuggling, transporting, or harboring of unlawful aliens for profit, and (B) with knowledge [or reason to believe] that the members of the continuing organization or enterprise smuggled, transported, or harbored different groups of unlawful aliens on more than one occasion.'';]

in the paragraph that begins '' 'Minor' means'' by striking ''16 years'' and inserting ''[18] years'';

and by inserting after the paragraph that begins ''Parent' means'' the following new paragraph:

'' 'Bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).'';

by redesignating Notes 2 through 6 as Notes 3 through 7, respectively, and by inserting after Note 1 the following new Note 2:

''2. *Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.*—Consistent with Application Note 1(L) of § 1B1.1 (Application Instructions), 'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. 2241 or § 2242 or any similar offense under state law.'';

and in Note 4, as so redesignated, by inserting at the end the following new subdivision:

''[(D) The offense involved the smuggling, transporting, or harboring of six or more minors who were unaccompanied by their parents or grandparents.]''.

Issue for Comment

1. The Department of Justice has stated that alien smuggling offenses often involved sexual abuse of the aliens smuggled, transported, or harbored, particularly of unaccompanied minors. The proposed amendment would amend the commentary to § 2L1.1 to clearly state that the term ''serious bodily injury'' included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to § 1B1.1 (Application Instructions), which is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. 2241 or § 2242 or any similar offense under state law. The Commission invites comment on whether the 4-level enhancement at § 2L1.1(b)(7)(B) adequately accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored. If not, what revisions to § 2L1.1 would be appropriate to account for this conduct? For example, should the Commission provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?

(B) Illegal Reentry

Synopsis of the Proposed Amendment: This part of the proposed amendment is also informed by the Commission's recent report on offenders sentenced under § 2L1.2 (Unlawfully Entering or Remaining in the United States). *See* United States Sentencing Commission, *Illegal Reentry Offenses* (2015), available at *http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.*

The key findings from the report include—

- the average sentence for illegal reentry offenders was 18 months;
- all but two of the 18,498 illegal reentry offenders—including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. 1326(b)(2)—were sentenced at or below the ten-year statutory maximum under 8 U.S.C. 1326(b)(1) for offenders with less serious criminal histories (*i.e.,* those without ''aggravated felony'' convictions);
- the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to § 2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under § 2L1.2(b) (92.7%);
- significant differences in the rates of application of the various enhancements in § 2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted;
- the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction;
- 61.9 percent of offenders were convicted of at least one criminal offense after illegally reentering the United States;
- 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions; and
- most illegal reentry offenders were apprehended by immigration officials at or near the border.

The statutory penalty structure for illegal reentry offenses is based on whether the defendant had a criminal conviction *before* he or she was deported. The offense of illegal reentry, set forth in 8 U.S.C. 1326, applies to defendants who previously were deported from, or unlawfully remained in, the United States. Specifically, the statutory maximum term of imprisonment is—

- **two years,** in general (*see* 8 U.S.C. 1326(a)); but
- **10 years,** if the defendant was deported after sustaining (A) three misdemeanor convictions involving drugs or crimes against the person, or

both, or (B) one felony conviction (*see* 8 U.S.C. § 1326(b)(1)); or

• **20 years,** if the defendant was deported after sustaining an ''aggravated felony''—a term that covers a range of offense types, listed in 8 U.S.C. § 1101(a)(43), that includes such different offense types as murder and tax evasion (*see* 8 U.S.C. § 1326(b)(2)).

The penalty structure of the guideline is similar to the statutory penalty structure. The guideline provides a base offense level of 8 and a tiered enhancement based on whether the defendant had a criminal conviction before he or she was deported. Specifically, the enhancement is—

• **4 levels,** for (A) three misdemeanor convictions for crimes of violence or drug trafficking offenses, or (B) any felony (*see* § 2L1.2(b)(1)(D),(E));

• **8 levels,** for an ''aggravated felony'' (*see* § 2L1.2(b)(1)(C));

• **12 levels,** for a felony drug trafficking offense for which the sentence imposed was 13 months or less (*see* § 2L1.2(b)(1)(B)); and

• **16 levels,** for specific types of felonies: a drug trafficking offense for which the sentence imposed was more than 13 months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense (*see* § 2L1.2(b)(1)(A)).

The penalties in the illegal reentry statute apply based on the criminal convictions the defendant had before he or she was deported, regardless of the age of the prior conviction. Likewise, until 2011, the enhancements in § 2L1.2 applied regardless of the age of the prior conviction. In 2011, the Commission revised the guideline to provide that the 16- and 12-level enhancements would be reduced to 12 and 8 levels, respectively, if the conviction was too remote in time (too ''stale'') to receive criminal history points under the timing limits set forth in Chapter Four (Criminal History and Criminal Livelihood). *See* USSG App. C, Amend. 754 (effective Nov. 1, 2011). The other enhancements continue to apply regardless of the age of the prior conviction (*i.e.,* without regard to whether the conviction receives criminal history points). *See* § 2L1.2, comment. (n.1(C)).

Part B of the proposed amendment amends § 2L1.2 to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions. The enhancements for these convictions would be based on the sentence imposed rather than on the type of offense (*e.g.,* ''crime of violence'')—in other words, the proposed amendment would eliminate the use of the ''categorical approach'' for predicate felony convictions in § 2L1.2. Also, the proposed amendment accounts for prior convictions for illegal reentry separately from other types of convictions.

First, the proposed amendment amends subsection (a) of § 2L1.2 to provide alternative base offense levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. 1253, § 1325(a), or § 1326. For defendants without such prior convictions, the proposed amendment increases the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels at subsection (a) apply without regard to whether the prior conviction receives criminal history points.

Second, the proposed amendment changes how subsection (b)(1) accounts for pre-deportation convictions—basing them not on the type of offense (*e.g.,* ''crime of violence'') but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivision (A) through (C) at subsection (b)(1). Specifically, if the defendant had a felony conviction and the sentence imposed was [24] months or more, an enhancement of [8] levels would apply. If the defendant had a felony conviction and the sentence imposed was at least [12] months but less than [24] months, an enhancement of [6] levels would apply. If the defendant had a felony conviction and the sentence imposed was less than [12] months, an enhancement of [4] levels would apply. Finally, an enhancement of [2] levels would apply if the defendant had three or more convictions for misdemeanors involving drugs or crimes against the person. If more than one of these enhancements apply, the court is instructed to apply the greatest.

Third, the proposed amendment would permit prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.

To account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(2) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more felony offenses after the defendant's first deportation or first order of removal. The structure of the new subsection (b)(2) parallels the proposed changes to subsection (b)(1), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(1), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Finally, the proposed amendment provides a new departure provision for cases in which the defendant was previously deported on multiple occasions not reflected in prior convictions under 8 U.S.C. 1253, § 1325(a), or § 1326. It also revises the departure provision based on seriousness of a prior conviction to bring it more into parallel with § 4A1.3 (Adequacy of Criminal History Category) and provide examples related to: (1) cases in which serious offenses do not qualify for an adjustment under subsection (b)(1) and the new subsection (b)(2) because they did not receive criminal history points; and (2) for cases in which a defendant committed one or more felony offenses but no conviction resulted from the commission of such offense or offenses. The proposed amendment also brackets the possibility of deleting the departure based on time served in state custody.

In addition, the proposed amendment would make conforming changes to the application notes, including the consolidation of all guideline definitions in one place.

Issues for comment are also included.

Proposed Amendment

Section 2L1.2 is amended—

in subsection (a) by striking ''Base Offense Level: 8'' and inserting the following:

''Base Offense Level (Apply the Greatest):

(1) [14], if the defendant committed the instant offense of conviction after sustaining two or more convictions for illegal reentry offenses;

(2) [12], if the defendant committed the instant offense of conviction after sustaining a conviction for an illegal reentry offense;

(3) [10], otherwise.'';

in subsection (b) by striking ''Characteristic'' in the heading and inserting ''Characteristics''; by striking subsection (b)(1) and inserting the following new subsection (b)(1):

''(1) Apply the Greatest:

If, before the defendant's first deportation or first order of removal, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for

which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.'';

and by inserting at the end the following new subsection (b)(2):

''(2) Apply the Greatest:

If, at any time after the defendant's first deportation or first order of removal, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.''.

The Commentary to § 2L1.2 captioned ''Statutory Provisions'' is amended by inserting after ''8 U.S.C.'' the following: ''§ 1253,''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended—

in Note 1, in the heading, by striking ''Subsection (b)(1)'' and inserting ''Subsections (b)(1) and (b)(2)'';

in Note 1(A) by striking ''For purposes of subsection (b)(1)'' and inserting ''For purposes of this guideline'';

by striking Notes 1(B) and 1(C), and inserting the following new Note 1(B):

''(B) *Interaction of Subsections (b)(1) and (b)(2).*—Subsections (b)(1) and (b)(2) are intended to divide the defendant's criminal history into two time periods. Subsection (b)(1) reflects the convictions, if any, that the defendant sustained before his first deportation or order of removal (whichever event occurs first). Subsection (b)(2) reflects the convictions, if any, that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).'';

by striking Notes 2 through 7 and inserting the following new Notes 2, 3, 4, and 5:

''2. *Definitions.*—For purposes of this guideline:

'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

'Illegal reentry offense' means (A) an offense under 8 U.S.C. 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. 1325(a) (regardless of whether the conviction was designated a felony or misdemeanor).

'Misdemeanor' means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

'Sentence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.

'Three or more convictions' means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. *Criminal History Points.*—The alternative base offense levels at subsection (a) apply without regard to whether a conviction for an illegal reentry offense receives criminal history points. However, for purposes of applying subsections (b)(1) and (b)(2), use only those convictions that receive criminal history points under § 4A1.1(a), (b), or (c), and that are counted separately under § 4A1.2(a)(2).

A conviction taken into account under subsection (a) or (b) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. *Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions.*—There may be cases in which the alternative base offense levels at subsections (a)(1) and (a)(2) do not apply and the defendant was previously deported (voluntarily or involuntarily) on multiple occasions not reflected in prior convictions under 8 U.S.C. 1253, § 1325(a), or § 1326. In such a case, an upward departure may be warranted to reflect both the increased culpability of a defendant with multiple prior deportations, as well as the increased risk of future illegal reentry (as reflected in the defendant's record of multiple prior deportations). For example, an upward departure may be warranted for a defendant who is convicted under 8 U.S.C. 1326 for the first time but was deported five times prior to the instant offense of illegal reentry.

5. *Departure Based on Seriousness of Criminal History.*—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a defendant's criminal history. In such a case, a departure may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). *Examples:* (A) In a case in which an adjustment under subsection (b)(1) or (b)(2) does not apply because a prior serious conviction (*e.g.,* murder) is not within the time limits set forth in § 4A1.2(e) and did not receive criminal history points, an upward departure may be warranted to reflect the serious nature of the defendant's prior conviction. (B) In a case in which a defendant committed one or more felony offenses but subsections (b)(1) and (b)(2) do not apply because no conviction resulted from the commission of such offense or offenses, an upward departure may be warranted.'';

[by striking Note 8 as follows:

8. *Departure Based on Time Served in State Custody.*—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under § 5G1.3(b) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). *See* § 5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous

weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.'';]

and by redesignating Note 9 as Note 6.

Issues for Comment

1. Some commentators have expressed concern about the operation of the illegal reentry guideline and the severity of the enhancements available in subsection (b) for some offenders. The Commission's recent report found that the rate of within-range sentences differed substantially depending on the level of enhancement under § 2L1.2(b)(1). The rate of within-guideline range sentences was significantly lower among defendants who received the 16-level enhancement (31.3%) as compared to the within-range rate for those who received no enhancements (92.7%). The report showed that the greater enhancements result in the lowest within-range sentences (52.5% within range for 4-level enhancement, 46.7% within range for 8-level enhancement, 32.8% within range for 12-level enhancement).

The Commission seeks comment on whether illegal reentry offenses are adequately addressed by the guidelines. Should the Commission consider amending § 2L1.2 and, if so, how?

2. Currently, § 2L1.2 requires the court to classify the defendant's prior convictions by type (*e.g.,* is it a ''crime of violence'' or is it an ''aggravated felony''?), a task that involves the Supreme Court's ''categorical approach.'' In recent years, the Commission has received commentary from stakeholders in the federal criminal justice system—including district and circuit judges, federal probation officers, the Department of Justice, and some defense counsel—that the use of a ''categorical approach'' to determine if a predicate conviction qualifies for an enhancement under § 2L1.2(b) requires a cumbersome, overly detailed, and resource-intensive legal analysis that often is under- or over-inclusive regarding the actual seriousness of offenders' predicate convictions. *See, e.g.,* Comment Received by the Commission in Response to Request for Public Comment on Proposed Priorities from 2010 to 2015 (available on the Commission's Web site at *www.ussc.gov/amendment-process/public-comment*). *Cf. Almanza-Arenda* v. *Lynch,* ____F.3d ____, 2015 WL 9462976 at *8–*9 (9th Cir. Dec. 28, 2015) (Owens, J., concurring, joined by Tallman, Bybee & Callahan) (''The bedeviling . . . [']categorical approach' will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws and certain documents to determine if an offense is 'categorically['] [a predicate offense]. . . . A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence [to determine what is a predicate offense].'').

The proposed amendment would eliminate the use of the ''categorical approach'' for predicate felony convictions and provide for enhancements based on the sentence imposed rather than on the type of offense. What are the advantages and disadvantages of basing the enhancement on the type of the prior conviction? What are the advantages and disadvantages of basing the enhancement on the length of the sentence imposed on the prior conviction? If the Commission were to adopt the sentence-imposed model, are the 24- and 12-month gradations included in the proposed amendment appropriate? Should the Commission adopt different gradations, such as the ones currently used in Chapter Four of the *Guidelines Manual* (*i.e.,* ''exceeding one year and one month'' and ''at least sixty days''), or more or fewer gradations? If the Commission were to provide a different approach to apply the enhancements at § 2L1.2, what should that different approach be?

3. As noted in the Commission's recent report, both the illegal reentry statute and § 2L1.2 provide enhanced penalties only if the defendant sustained a conviction before being deported. A defendant receives at most a single enhancement under § 2L1.2—based on the most serious conviction. Additional convictions that occurred before the defendant's most recent deportation, and convictions that occurred after the defendant's most recent illegal reentry, are not taken into account in the calculation of the offense level (although they may be taken into account in the criminal history score).

Should the Commission amend how the enhancements at § 2L1.2 work and, if so, how? Should the Commission amend § 2L1.2 to account not only for pre-deportation convictions but also for other aggravating factors relevant to a defendant's culpability and need for incapacitation and deterrence?

For example, the proposed amendment would amend subsection (a) of § 2L1.2 to provide alternative base offense levels if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. What are the advantages and disadvantages of basing alternative base offense levels on illegal reentry convictions? Should the Commission use a different approach for such alternative base offense levels? Should the Commission use deportations and orders of removal instead to apply the base offense levels?

If the Commission provided additional enhancements to account for aggravating factors relevant to a defendant's culpability other than pre-deportation convictions, how should these enhancements interact? How much weight should be given to pre-deportation convictions in relation to prior illegal reentry convictions or post-reentry convictions in driving the guideline range? Should the guideline provide greater emphasis on one or more of these factors? For example, should the guideline give more weight to post-reentry convictions and less weight to pre-deportation convictions (*e.g.,* a 10-level enhancement for a post-reentry conviction for which the sentence imposed was 24 months or more with a corresponding 6-level enhancement for a pre-deportation conviction for which the sentence imposed was 24 months or more)?

What other aggravating factors, if any, should the Commission incorporate into § 2L1.2, and how should the Commission incorporate them? Should the factor be an enhancement, an alternative base offense level, a minimum offense level, an upward departure provision, or some combination of these? If so, what level of enhancement should apply?

What mitigating factors, if any, should the Commission incorporate into § 2L1.2, and how should the Commission incorporate them? For example, should the Commission provide a new departure provision for cases in which the defendant's predicate felony conviction is based on an offense that was classified by the laws of the state as a misdemeanor?

4. Currently, § 2L1.2 provides enhanced penalties based on convictions sustained prior to the defendant's most recent deportation from the United States. The proposed amendment would modify how the enhancements work in the illegal reentry guideline. Specifically, it would divide the defendant's criminal history

into two time periods. Subsection (b)(1) would reflect the convictions that the defendant sustained before his or her first deportation or order of removal (whichever event occurs first). Subsection (b)(2) would then reflect the convictions that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).

What are the advantages and disadvantages of using a particular deportation or order of removal as the determining event for whether a prior conviction qualifies for an enhancement under subsection (b)(1) or subsection (b)(2)? Should the Commission use a different approach to distinguish pre-deportation convictions from post-reentry convictions? For example, should the Commission provide instead that a prior conviction sustained before any deportation would qualify for an enhancement for pre-deportation convictions? If so, how should such enhancement interact with an enhancement based on post-reentry convictions as provided in the proposed amendment?

5. In 2014, the Commission amended the Commentary to § 2L1.1 to add a departure provision for cases in which the defendant is located by immigration authorities while the defendant is in state custody for a state offense unrelated to the federal illegal reentry offense. In such a case, the time served is not covered by adjustment under § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). Under the current guideline, the departure allows courts to depart to reflect all or part of the time served in state custody for the unrelated offense, from the time federal immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The proposed amendment brackets the possibility of deleting the departure provision at Application Note 8 to § 2L1.2.

If the Commission were to promulgate the proposed amendment revising how the enhancements at the illegal reentry guideline work, should the Commission delete the departure based on time served in state custody? If not, how should the new enhancements at § 2L1.2 interact with the departure provision? For example, should the Commission limit the applicability of the departure provision?

6. The Commission recently promulgated an amendment that amends the definition of ''crime of violence'' in subsection (a) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016 (to be published in a forthcoming edition of the **Federal Register**). The changes made by that amendment include revising the list of enumerated offenses and adding definitions for the enumerated offenses of extortion and a forcible sex offense. Finally, the amendment includes a downward departure provision in § 4B1.1 for cases in which the defendant's prior ''crime of violence'' or ''controlled substance offense'' is based on an offense that was classified by the laws of the state as a misdemeanor.

The proposed amendment would eliminate the use of the term ''crime of violence'' in § 2L1.2. In the event that the Commission does not promulgate the proposed amendment, and retains the term ''crime of violence'' in § 2L1.2, should the Commission incorporate all or part of the definition of ''crime of violence'' provided in the recently amended § 4B1.2 into § 2L1.2? If the Commission were to conform § 2L1.2 to the new definition in § 4B1.2(a), are there any particular offenses that would no longer qualify as a ''crime of violence'' but that nonetheless should receive an enhancement under subsection (b)(1) (*e.g.,* statutory rape or burglary of a dwelling)?

[FR Doc. 2016–00766 Filed 1–14–16; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS

Funding Availability Under Supportive Services for Veteran Families Program

AGENCY: Veterans Health Administration, VA.

ACTION: Notice of fund availability.

SUMMARY:

Funding Opportunity Title: Supportive Services for Veteran Families Program.

Announcement Type: Initial.

Funding Opportunity Number: VA–SSVF–011516.

Catalog of Federal Domestic Assistance Number: 64.033, VA Supportive Services for Veteran Families Program.

The Department of Veterans Affairs (VA) is announcing the availability of funds for supportive services grants under the Supportive Services for Veteran Families (SSVF) Program. This Notice of Fund Availability (NOFA) contains information concerning the SSVF Program, initial supportive services grant application processes, and the amount of funding available. Awards made for supportive services grants will fund operations beginning October 1, 2016.

DATES: Applications for supportive services grants under the SSVF Program must be received by the SSVF Program Office by 4:00 p.m. Eastern Time on February 5, 2016. In the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages, or other delivery-related problems.

ADDRESSES: For a Copy of the Application Package: Copies of the application can be downloaded directly from the SSVF Program Web site at: *www.va.gov/homeless/ssvf.asp.* Questions should be referred to the SSVF Program Office via email at *SSVF@va.gov.* For detailed SSVF Program information and requirements, see part 62 of Title 38, Code of Federal Regulations (38 CFR part 62).

Submission of Application Package: Applicants are strongly encouraged to submit applications electronically following instructions found at *www.va.gov/homeless/ssvf.asp.* Alternatively, applicants can mail in applications. If mailed, applicants must submit two completed, collated, hard copies of the application and two compact discs (CDs) containing electronic versions of the entire application are required. Each application copy must (i) be fastened with a binder clip, and (ii) contain tabs listing the major sections of and exhibits to the application. Each CD must be labeled with the applicant's name and must contain an electronic copy of the entire application. A budget template must be attached in Excel format on the CD, but all other application materials may be attached in a PDF or other format. The application copies and CDs must be submitted to the following address: Supportive Services for Veteran Families Program Office National Center on Homelessness Among Veterans, 4100 Chester Avenue, Suite 201, Philadelphia, PA 19104. Applicants must submit two hard copies and two CDs. Applications may not be sent by facsimile (FAX). Applications must be received in the SSVF Program Office by