

Chapter Two

The Sentencing Guidelines

The legislation creating the Commission provides that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.” 28 U.S.C. § 994(o). Given this congressional directive, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, enactment of new statutes, and input from federal criminal justice practitioners. By statute, the Commission annually may transmit guideline amendments to Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Policy Issues

Fair Sentencing Act

The Fair Sentencing Act of 2010 (Act)⁵ reduced the statutory penalties for cocaine base offenses, directed the Commission to account for specified aggravating and mitigating circumstances, and eliminated the statutory mandatory minimum sentence for simple possession. Section 8 of the Act granted the Commission emergency amendment authority to promulgate the guidelines, policy statements, or amendments provided for in the Act not later than 90 days after the enactment of the Act.

To respond to the directive, the Commission reviewed federal sentencing data, public comment and testimony, recent scholarly literature, and current federal and state practices.

As a result of the review, in October 2010, the Commission promulgated a multi-part temporary, “emergency” amendment effective November 1, 2010. Part A of the amendment amended the Drug Quantity Table at subsection (c) at §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to conform the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs. Part B limited the maximum base offense level under §2D1.1 applicable to an offender who received a four-level adjustment under USSG §3B1.2 (Mitigating Role), created new specific offense characteristics, and made conforming changes to other guidelines. Part C deleted the cross reference at USSG §2D2.1 (Unlawful Possession; Attempt or Conspiracy) under which an offender who possessed more than five grams of crack cocaine was sentenced under the drug trafficking guideline, §2D1.1 (Amendment 748).

As part of its work on the permanent amendment, the Commission continued its review of federal sentencing data, public comment, and federal sentencing practices. In March 2011, the Commission held a public hearing on the Act in Washington, D.C.

As a result of the review, the Commission re-promulgated without change the multi-part temporary, “emergency” amendment, Amendment 748, as a permanent amendment (Amendment 750). The permanent amendment took effect November 1, 2011.

Because Amendment 750 reduced the term of imprisonment recommended in the guidelines for certain offenders, the Commission had a statutory duty to consider whether the amendment should be made available for retroactive application.⁶ The Commission considered the applicable standards set forth in USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline

⁵ Pub. L. No. 111-220 (Aug. 3, 2010).

⁶ See 28 U.S.C. § 994(u).

Range) (Policy Statement),⁷ federal sentencing data, and public comment.⁸ In June 2011, the Commission held a public hearing on retroactive application in Washington, D.C., and heard testimony from the United States Attorney General, the Criminal Law Committee of the United States Judicial Conference, and other witnesses.

As a result of the Commission's work, §1B1.10 was amended to add Parts A and C of Amendment 750 as a guideline amendment that may be considered for retroactive application effective November 1, 2011.

Drug Disposal Act

The Secure and Responsible Drug Disposal Act of 2010 (Act)⁹ amended 21 U.S.C. § 822 (Persons required to register) to authorize certain persons in possession of controlled substances (*i.e.*, ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Drug Disposal Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide an appropriate penalty increase of up to two levels if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility.

In response to this directive, the Commission reviewed federal sentencing data, case law, and public comment. After consideration of this review, the Commission amended Application Note 8 to USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide that an adjustment under USSG §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in a case in

which an offender is convicted of a drug offense resulting from the authorization of the offender to receive scheduled substances from an ultimate user or long-term care facility (Amendment 751).

Patient Protection and Affordable Care Act of 2010

The Commission responded to a directive in the Patient Protection and Affordable Care Act (PPACA),¹⁰ which required the Commission to review the guidelines and policy statements applicable to persons convicted of federal health care offenses. Section 10606(a)(2)(B) of the PPACA directed the Commission to amend the guidelines and policy statements applicable to persons convicted of federal health care offenses related to Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute *prima facie* evidence of the amount of the intended loss by the defendant. Section 10606(a)(2)(C) directed the Commission to amend the guidelines to provide a 2-level increase in the offense level for any defendant convicted of a federal health care offense related to a Government health care program which involves a loss of not less than \$1,000,000 and less than \$7,000,000; a 3-level increase for those federal health care offenses related to a Government health care program involving a loss of not less than \$7,000,000 and less than \$20,000,000; and a 4-level increase for those federal health care offenses related to a Government health care program involving a loss of not less than \$20,000,000. Section 10606(a)(3) required the Commission, in carrying out the directive, to "ensure reasonable consistency with other relevant directives and with other guidelines" and to "account for any aggravating or mitigating circumstances that might justify exceptions," among other requirements.

The Commission reviewed the legislative history of the PPACA and undertook an analysis of cases sentenced under USSG §2B1.1 (Theft, Property Destruction, and Fraud) involving health care fraud, including an examination of the guideline application factors relevant to the offense. The Commission also analyzed additional information about the specific health care programs involved in the fraud, the

⁷ See USSG §1B1.10, comment. (backg'd). The standards include (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively.

⁸ The Commission received 43,500 pieces of public comment on the issue including letters from Members of Congress.

⁹ Pub. L. No. 111-273.

¹⁰ Pub. L. No. 111-148.

offenders' role in the offense, and, where available, the total dollar amount of the fraudulent bills submitted to the health care program. In addition, the Commission received testimony at a public hearing and through written public comment from the Department of Justice (DOJ), the Federal Public Defenders (FPD), the Commission's advisory groups, and other interested parties.

After consideration of this information, the Commission promulgated an amendment to the guidelines in response to the PPACA that became effective on November 1, 2011. The amendment responded to the directive by adding two provisions to §2B1.1, both of which apply to cases in which the defendant was convicted of a federal health care offense involving a Government health care program. The first provision is a new tiered enhancement at subsection (b)(8) that applies in such cases if the loss is more than \$1,000,000. The enhancement is two levels if the loss is more than \$1,000,000, three levels if the loss is more than \$7,000,000, and four levels if the loss is more than \$20,000,000. The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a federal health care offense involving a Government health care program. The special rule provides that, in such a case, the aggregate dollar amount of fraudulent bills submitted to the Government health care program constitutes *prima facie* evidence of the amount of the intended loss. The amendment clarifies that *prima facie* evidence means evidence sufficient to establish the amount of the intended loss, if not rebutted.

The Commission also amended the commentary in §2B1.1 to provide definitions for the terms "Federal health care offense" and "Government health care program." "Federal health care offense" is defined to have the meaning given that term in 18 U.S.C. § 24, as required by section 10606(a)(1) of the Patient Protection Act. "Government health care program" is defined to mean any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. The amendment listed the Medicare program, the Medicaid program, and the CHIP program as examples of such programs. Finally, the Commission amended Application Note 3(A) to

§3B1.2 (Mitigating Role) to make clear that a defendant in a health care fraud scheme whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount under §2B.1 is not precluded from consideration for a mitigating role adjustment.

In addition to responding to the directive, the Commission promulgated amendments to Appendix A (Statutory Index) to include an offense created by the PPACA. The PPACA created a new offense at 29 U.S.C. § 1149 that prohibits making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. Pursuant to 29 U.S.C. § 1131(b), a person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The amendment references the new offense at 29 U.S.C. § 1149 to §2B1.1. As a clerical change, the amendment also amends Appendix A (Statutory Index) to make clear that 29 U.S.C. § 1131(a), not the new § 1131(b), is referenced to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records).

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Commission studied the directive in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹¹ Section 1079A(a)(1)(A) of the Dodd-Frank Act directed the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of offenses related to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements account for the potential and actual harm to the public and financial markets from the offenses." Section 1079A(a)(2)(A) directed the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons

¹¹ Pub. L. No. 111–203.

convicted of fraud offenses related to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.”

The Commission undertook an analysis of cases sentenced under §2B1.1 involving securities fraud, commodities fraud, bank fraud, and mortgage fraud, including an examination of the guideline application factors relevant to those offenses. The Commission also studied its prior work in these areas, including its “Economic Crime Package,” a six-part amendment to the guidelines effective November 1, 2001, and applicable to economic crimes, as well as its implementation of the directives relating to fraud offenses, obstruction of justice offenses, and other economic crimes in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204. The Commission also received testimony at a public hearing and written public comment from the DOJ, the Securities and Exchange Commission, the FPD, the American Bar Association, the Commission’s advisory groups, and other interested parties. After consideration of this information, the Commission concluded that a more comprehensive review of the guidelines related to securities fraud, commodities fraud, bank fraud, and mortgage fraud should be completed in the next amendment cycle, with amendments submitted to Congress in May 2012.

In addition to studying the directive, the Commission promulgated amendments to Appendix A (Statutory Index) to include two new offenses created by the Dodd-Frank Act at 12 U.S.C. § 5382 and 15 U.S.C. § 78jjj(d). With regard to 12 U.S.C. § 5382, under authority granted by sections 202-203 of the Dodd-Frank Act, the Secretary of the Treasury may make a “systemic risk determination” concerning a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for approval by a federal district court. The Dodd-Frank Act made it a crime, codified at

12 U.S.C. § 5382, to recklessly disclose a systemic risk determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. § 5382 is subject to imprisonment for not more than five years. The Commission amended Appendix A by referencing 12 U.S.C. § 5382 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

The second new offense, 15 U.S.C. § 78jjj(d), makes it a crime for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that had not been referenced in Appendix A. The Commission amended Appendix A to reference these offenses to §2B1.1.

Firearms

The Commission studied the guidelines’ treatment of offenses involving firearms crossing the United States border and offenses involving “straw purchasers” of firearms (*i.e.*, individuals who buy firearms on behalf of others, typically “prohibited persons” who are not allowed to buy or possess firearms themselves) in response to concerns that such offenses threaten the national security of the United States and may contribute to violence along the southwestern border of the United States.

With respect to offenses involving firearms crossing the border, the Commission added a provision to an existing enhancement in the primary firearms guideline, §2K2.1(b)(6). The new prong provides increased punishment if the defendant committed a firearms offense and either possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred to another person any firearm or ammunition with the knowledge, intent or reason to believe the firearm or ammunition would be transferred out of the United States. If the defendant engaged in either of these types of conduct, the new prong provides a 4-level enhancement and a minimum offense level of 18.

The Commission addressed cases involving straw purchasers by increasing the penalty applicable to a straw purchaser convicted under a firearms statute who committed the offense with knowledge, intent or reason to believe that the offense would result in the transfer of a firearm or ammunition to a person who, for specified reasons such as a particular criminal history, is not permitted to purchase or possess firearms. In such a case, the base offense level will increase by two.

The Commission also added a new application note suggesting that, in the case of a straw purchaser, a downward departure may be warranted if the offense is not aggravated, the defendant was motivated to commit the offense by an intimate or familial relationship or by threats or fear and was otherwise unlikely to commit such an offense, and the defendant did not receive monetary compensation for the offense.

The Commission also addressed cases involving firearms and ammunition crossing the border where the offense is a violation of laws governing exportation of firearms. The Commission amended §2M5.2 by reducing the threshold number of firearms warranting a higher base offense level from ten firearms to two. Additionally, the Commission clarified that if a defendant is sentenced under this guideline for an offense involving only 500 or fewer rounds of ammunition for small arms, the lower base offense level applies.

Illegal Reentry

The Commission studied whether certain enhancements for predicate criminal convictions under §2L1.2 (Unlawfully Entering or Remaining in the United States) proportionately increase the guideline range. The Commission undertook this study in response to case law and public comment expressing concern that the enhancements produced unnecessarily lengthy increases, to the extent the enhancements were based on remote predicate convictions that did not receive criminal history points under Chapter Four, Part A (Criminal History) of the *Guidelines Manual*.

The Commission analyzed the extent to which reducing the magnitude of the enhancements would

affect illegal reentry offenders who received enhancements on account of predicate convictions that were too remote in time to receive criminal history points. The Commission also reviewed public comment received from Members of Congress, the Criminal Law Committee of the Judicial Conference of the United States, the DOJ, the FPD, probation officers, the Commission's advisory groups, and others. The Commission received testimony at a March 2011 hearing in Washington, D.C.

In light of this analysis, comment, and testimony, the Commission promulgated an amendment to §2L1.2 that reduced the enhancements at subsections (b)(1)(A) and (B) from 16- to 12-levels and from 12- to 8-levels, respectively, for offenders whose prior convictions do not receive criminal history points under Chapter Four of the *Guidelines Manual*. The amendment made no changes to the enhancements for offenders whose prior convictions do receive criminal history points. The Commission further amended the commentary to state that an upward departure may be warranted where the reduced enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction.

Supervised Release

The Commission studied whether to amend the guidelines and policy statements contained in Chapter 5, Part D (Supervised Release) of the *Guidelines Manual*. The Commission undertook this study upon completing its July 2010 report on supervised release, *Federal Offenders Sentenced to Supervised Release*, and in light of changes in federal immigration law and the federal offender population in recent years.

The Commission received public comment and heard testimony at a hearing in March 2011 in Washington, D.C. concerning amendments to the supervised release guidelines. This public comment and testimony included the views of the Criminal Law Committee of the Judicial Conference of the United States, the DOJ, the FPD, probation officers, and the Commission's Probation Officers Advisory Group. The Commission further considered data analyses on the impact of potential amendments to

the guidelines and conducted outreach with interested parties.

After consideration of this testimony and research, the Commission promulgated an amendment to §5D1.1, inserted as new subsection (c), which states that supervised release ordinarily should not be imposed when it is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment. Additionally, the Commission lowered the minimum term of supervised release required by the guidelines for certain defendants, regardless of their citizenship status, when a statute does not require a higher term. Finally, the Commission added commentary in §§ 5D1.1 and 5D1.2 that provides factors a court should consider in deciding whether to order a term of supervised release (when not required by statute) and how long such a term should be.

Amendment Promulgation Process

Proposed amendments were published in the *Federal Register* on January 19, 2011. The Commission received written comment on the proposed amendments from a variety of sources. The Commission also conducted public hearings on the proposed amendments on February 16, 2011, and March 17, 2011. On April 28, 2011, the Commission submitted to Congress multiple amendments to the federal sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2011.

The amendments promulgated by the Commission in fiscal year 2011—

- re-promulgated as a permanent amendment the temporary, emergency amendment (effective November 1, 2010) implementing the Fair Sentencing Act of 2010, Pub. L. No. 111–220, including re-promulgating the emergency amendment’s revisions to (1) the crack cocaine quantity levels in the Drug Quantity Table in the drug trafficking guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), to

account for the changes to statutory penalties for crack cocaine trafficking made by the Act; (2) certain provisions in §2D1.1(a) and (b) to implement the directives in sections 5, 6, and 7 of the Act and account for certain aggravating and mitigating factors specified in those directives; and (3) the drug possession guideline, §2D2.1 (Unlawful Possession; Attempt or Conspiracy), to account for the changes to statutory penalties for crack cocaine possession made by the Act.

- responded to the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, by (1) amending §2B1.1 (Theft, Property Destruction, and Fraud) to provide a tiered enhancement applicable to certain health care fraud offenses in which the loss is more than \$1,000,000; (2) amending the commentary to §2B1.1 to add a special rule for certain health care fraud offenses under which the aggregate dollar amount of fraudulent bills submitted is *prima facie* evidence of the amount of the intended loss; (3) amending the commentary to §3B1.2 (Mitigating Role) to make clear that a defendant who is accountable for a loss amount that greatly exceeds the defendant’s personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment; and (4) ensuring that certain new offenses created by those Acts are referenced to the appropriate guidelines in Appendix A (Statutory Index).
- amended certain guidelines applicable to firearms trafficking offenses, including by (1) amending the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving

Table 2

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Sentencing Guidelines
Washington, DC
February 16, 2011

Preet Bharara

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Southern District of New York*

Carmen M. Ortiz

*United States Attorney
District of Massachusetts*

Matthew T. Martens

*Chief Litigation Counsel
Division of Enforcement
Securities and Exchange Commission*

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Susan Howley

*Director, Public Policy
National Center for Victims of Crime
Chair, Victims Advisory Group to the
United States Sentencing Commission*

James E. Felman

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Criminal Justice Section Committee on Sentencing
American Bar Association*

Michael Anderson

*Chair of Government Affairs
National Association of Mortgage Brokers*

Thomas S. Crane

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*Chair
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United States Sentencing Commission
Washington, DC*

Teresa M. Brantley

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Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Sentencing Guidelines
Washington, DC
March 17, 2011

Harley Lappin

*Director
Federal Bureau of Prisons*

Laura Duffy

*United States Attorney
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Richard Fulginiti

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Families Against Mandatory Minimums*

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Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Retroactivity of Fair Sentencing Act Amendment
Washington, DC
June 1, 2011

The Honorable Eric H. Holder, Jr.
Attorney General of the United States

The Honorable Stephanie M. Rose
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Thomas R. Kane
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The Honorable Asa Hutchinson
Senior Partner
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David Hiller
National Vice President
Fraternal Order of Police

Christopher D. Chiles
Chairman of the Board
National District Attorneys Association

The Honorable Reggie Walton
Criminal Law Committee of the Judicial Conference
United States District Judge
Washington, DC

Michael M. O'Hear
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Pat Nolan
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Jasmine L. Tyler
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Firearms or Ammunition), to provide a 4-level enhancement and a minimum offense level of 18 if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States; (2) further amended §2K2.1 to increase penalties for certain defendants convicted of acting as “straw purchasers,” *i.e.*, of making a false statement in connection with a firearms transaction with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; (3) amending the guideline for arms export violations, §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), to provide greater penalties for export offenses involving small arms and more guidance on export offenses involving ammunition; and (4) ensuring that certain offenses, including a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111–195, are referenced to the appropriate guidelines in Appendix A (Statutory Index).

- made revisions to the supervised release guidelines, §5D1.1 (Imposition of a Term of Supervised Release) and §5D1.2 (Term of Supervised Release), including by (1) amending §5D1.1 to state that supervised release ordinarily should not be imposed in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment; (2) amending §5D1.2 to lower the minimum term of supervised release required by the guidelines for certain defendants (regardless of their citizenship status) when a statute does not require a higher minimum term; and (3) providing guidance on the factors a court should consider in deciding whether to order a term of supervised release (when not required by

statute) and, if so, how long such a term should be.

- amended §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide that the enhancements of 16 levels and 12 levels that apply under subsection (b)(1) if the defendant previously was deported, or unlawfully remained in the United States, after a prior conviction are reduced to 12 levels and 8 levels, respectively, if the prior conviction does not receive criminal history points under Chapter Four.
- addressed a circuit conflict in cases in which the defendant is convicted of an offense involving the willful failure to pay court-ordered child support (*i.e.*, a violation of 18 U.S.C. § 228) by amending the commentary to §2J1.1 (Contempt) to specify that, in such a case, the specific offense characteristic at §2B1.1(b)(8)(C) does not apply.
- implemented the directive in the Secure and Responsible Drug Disposal Act of 2010, Pub. L. No. 111–273, by amending the commentary to §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.

Other guideline amendments promulgated in fiscal year 2011 made various miscellaneous and technical changes to the guidelines that—

- deleted two sentences from the commentary to §3B1.2 (Mitigating Role) as unnecessary and possibly having the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.
- responded to jurisprudence and legislation by (1) updating the policy statement at §6B1.2 (Standards for Acceptance of Plea

Agreements) in light of *United States v. Booker*, 543 U.S. 220 (2005), to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range, including when the sentence is a “variance” (*i.e.*, a sentence that is outside the guidelines framework); (2) responding to the Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111–174, which required that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order), by making appropriate clerical changes to §6B1.2 and §5K2.0(e) to reflect this statutory change; and (3) ensuring that certain offenses amended or created by the Coast Guard Authorization Act of 2010, Pub. L. No. 111–281, are referenced to the appropriate guidelines in Appendix A (Statutory Index).

- made various technical and conforming changes to the guidelines to promote accuracy, completeness, and stylistic consistency.

In addition to these permanent amendments, the Commission in fiscal year 2011 published a request for comment on whether the permanent amendment implementing the Fair Sentencing Act of 2010 should, in whole or in part, be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. This request for comment was published in the *Federal Register* on May 3, 2011. After reviewing written comment from a variety of sources and conducting a public hearing on June 1, 2011, the Commission adopted an amendment to §1B1.10 under which two parts of the permanent amendment — the part making changes to the Drug Quantity Table, and the part making changes to simple possession — were included in §1B1.10 as amendments that may be applied retroactively. The Commission established an effective date of November 1, 2011, for the amendment to §1B1.10.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In fiscal year 2011, the Commission worked closely with Members of Congress and their staffs providing them with timely and valuable sentencing-related information and analyses.

The Commission continued providing Congress with extensive real-time data collection, analysis, and reporting on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission’s website in order to assist Congress in its work on criminal justice issues. The Commission also held numerous briefings with congressional staff to explain the Commission’s amendment process; developing sentencing case law; the case law’s impact on the Commission’s work and on federal sentencing generally; and information received by the Commission during its regional hearings.

Throughout the year, the Commission conducted numerous congressional briefings and answered congressional inquiries related to the penalty structure for crack and powder cocaine offenses and implementation of the Commission’s permanent amendment implementing the statutory changes and directives set forth in the Fair Sentencing Act of 2010. The Commission also worked closely with Congress as the Commission moved forward on considering whether to give retroactive effect to the changes made to the guidelines as a result of the Fair Sentencing Act of 2010.

The Commission also conducted congressional briefings and answered congressional inquiries in other areas of criminal law including health care and other white collar frauds, statutory mandatory minimum penalties generally, economic espionage offenses, sex offenses, drug offenses, and general sentencing policy.

The Commission also routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual

reports and sourcebooks, research reports, and other published materials.

The year 2011, as used in this report, refers to the fiscal year 2011 (October 1, 2010, through September 30, 2011).