Chapter Two

The Sentencing Guidelines and Other Policy Issues

Reports to Congress

The Sentencing Reform Act created the Commission and enumerated its duties and powers.[5] Among other things, the Sentencing Reform Act specifically authorized the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy."[6] The Commission often exercises this authority by submitting written reports to Congress, either on its own initiative or in response to specific directives from Congress. In preparing such reports, the Commission reviews legislation, analyzes sentencing data, studies scholarly literature, and elicits the views of stakeholders in the criminal justice system. Throughout the fiscal year, the Commission's policy agenda included work on several reports to Congress.

Report on the Impact of *United States v. Booker* on Federal Sentencing

In early 2013, the Commission submitted a report to Congress assessing the continuing impact of *United States v. Booker* on federal sentencing. The Commission prepared the report pursuant to its general authority under 28 U.S.C. §§ 994–995, and its specific authority under 28 U.S.C. § 995(a)(2), which authorizes the Commission "to make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy." In preparing the report, the Commission reviewed case law, analyzed sentencing data, and studied scholarly literature. The Commission also sought the views of stakeholders in the federal criminal justice system in a variety of ways, including conducting a hearing on post-*Booker* sentencing, at which more than twenty witnesses representing various stakeholder and community-interest groups testified.

The report outlined the history of the Sentencing Reform Act, the creation of the Commission, and Supreme Court case law and statutory changes that have affected the guidelines' operation. The Commission examined case law, public comment, and relevant Commission data to describe the post-*Booker* sentencing and appellate process. The Commission analyzed sentencing data for federal offenses overall and separately by offense type, including drug trafficking, immigration, firearms, fraud, child pornography, and career offender. The Commission reported on data at the national, circuit, and district level, and updated its analysis of demographic differences in federal sentencing.

The report also included specific findings and recommendations. The Commission found that the sentencing guidelines have remained the essential starting point in all federal sentence, and have continued to exert significant influence on federal sentencing trends over time. The relationship between the guidelines and the sentences imposed for some of the most frequently prosecuted offenses, including drug trafficking, immigration, and firearms, has been stable over time, while in fraud and child pornography offenses, the influence of the guidelines appears to have diminished, as seen in decreasing rates of sentences imposed within the guideline range, and increasing rates of sentences imposed below the range and not in response to a government motion. Increasing rates of government-sponsored below range sentences for reasons other than substantial assistance also contributed to increasing variation in sentencing for some offenses. The Commission also found that regional disparities have increased, as measured by variation in within range rates, and that sentencing outcomes increasingly depend upon the identity of the

[5] *See generally* 28 U.S.C. §§ 994-995.

[6] *See* 28 U.S.C. § 995(a)(20).

sentencing judge. Finally, demographic characteristics have been more strongly correlated with sentencing outcomes than during previous periods, and the courts of appeals lack adequate standards and uniform procedures to promote the degree of uniformity in sentencing anticipated by the Supreme Court in *Booker*.

The Commission made several recommendations for Congress to consider. The recommendations were aimed at strengthening the guidelines system and providing more effective substantive appellate review in order to promote the goals of the Sentencing Reform Act. The Commission recommended that Congress develop more robust substantive appellate review, reconcile the statutes that govern the Commission's consideration of certain offender characteristics with statutory interpretations that govern the courts' consideration of those same offender characteristics, codify the three-step sentencing process established by the Supreme Court and incorporated into the guidelines, and resolve uncertainties about the weight to be given the guidelines at sentencing by requiring courts to give them substantial weight. The Commission concluded that these proposals, if adopted, would promote the purposes of the Sentencing Reform Act while respecting the defendant's Sixth Amendment rights to trial by jury.

Report on Penalties for Child Pornography Offenses

In early 2013, the Commission submitted a report to Congress examining penalties for non-production child pornography offenses, including possession, receipt, transportation, and distribution of child pornography. The Commission prepared the report pursuant to its general authority under 28 U.S.C. §§ 994-995, and pursuant to its specific authority under 28 U.S.C. § 995(a)(2), which authorizes the Commission "to make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy." In preparing the report, the Commission reviewed statutory changes, case law, social science and legal literature, and engaged in extensive data analyses of child pornography cases dating back over twenty years, as well as recidivism rates of child pornography offenders. The Commission held a public hearing in which it received testimony from experts in technology and the social sciences, treatment providers, law enforcement officials, legal practitioners, victims' advocates and members of the judiciary. The report complemented and expanded upon the Commission's 2009 report, *History of the Child Pornography Guidelines*, which chronicled the federal non-production guidelines from their inception.

Over the past twenty years, although still a small percentage of the overall federal criminal offender population, the number of offenders sentenced under the child pornography guidelines has grown substantially. The Commission found that technological advances in Internet and computer technologies have made child pornography readily available on the Internet, and have enabled the existence of online child pornography "communities" that validate and normalize the exploitation of children. As a result, child pornography offenses inherently involve continued harm to the children who were sexually abused, due to the perpetual distribution of the images of that abuse on the Internet. Further, some non-production child pornography offenders engage in a variety of behaviors reflecting different degrees of culpability and sexual dangerousness, including actual or attempted contact and non-contact sex offenses, and prior non-production child pornography offenses.

Guideline ranges, average sentences, and average terms of supervised release for child pornography offenses have substantially increased, in part because of the growth in the number and severity of enhancements in the guideline following the statutory and guideline amendments that resulted from the PROTECT Act, and in part because of an increase in the incidence of the underlying conduct and circumstances triggering the enhancements. However, most stakeholders in the federal criminal justice system consider the non-production sentencing scheme to be outmoded. Since Congress enacted the PROTECT Act in 2003 and the Supreme Court decided *United States v. Booker* in 2005, the rate of sentences imposed within the applicable guidelines range in non-production cases has steadily decreased, and the corresponding rate of below

range sentences for reasons other than an offender's substantial assistance to the authorities has significantly increased.

The Commission found that most stakeholders believe that the sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degree of culpability or sexually dangerous behavior because of recent changes in both computer and Internet technologies. As a result, courts and parties in non-production cases have limited the sentencing exposure for some offenders through charging and sentencing practices. Inconsistent application of guideline and statutory penalty provisions has led to growing disparities in sentencing among similarly situated child pornography offenders.

The Commission found that the rate of known general recidivism of offenders sentenced under the non-production guidelines was similar to the rate of known general recidivism by a comparable segment of the entire federal offender population. The Commission cited emerging research indicating that child pornography offenders with clinical sexual disorders may respond favorably to treatment, particularly if administered as part of a "containment model" involving cooperation among treatment providers, polygraph examiners, and probation or other supervising officers.

Finally, the Commission found that federal laws relating to victim notification and restitution present challenges for victims of non-production offenses. While the law requires notification to victims each time an offender is charged with a child pornography offense relating to the victim, such notification can be emotionally traumatic because it reminds victims that the images of their abuse are indelible and widespread.

The Commission made several recommendations for Congress' consideration to account for recent technological changes in offense conduct and to better promote the purposes of punishment by accounting for the variation in offenders' culpability and sexual dangerousness. First, the Commission recommended that Congress enact legislation authorizing the Commission to amend the guideline provisions promulgated pursuant to congressional directives, including those directives that directly amended the child pornography guidelines. The Commission further recommended that Congress amend the statutory scheme to align the penalties for receipt and possession offenses because the underlying conduct for a typical offender prosecuted for possession is indistinguishable from the offense conduct for a typical offender prosecuted for receipt. Finally, the Commission recommended that Congress consider amending the federal statutes governing notice to and restitution for victims of non-production child pornography offenses.

Amendments Promulgated

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."[7] 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.

Proposed amendments were published in the *Federal Register* on January 18, 2013. The Commission received written comment on the proposed amendments from a variety of sources, as discussed below. The Commission also conducted a public hearing on the proposed amendments on March 13, 2013. On April 30, 2013, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For

[7] *See* 28 U.S.C. § 994(o).

these amendments, the Commission established an effective date of November 1, 2013. Congress took no action with respect to these amendments so they became effective November 1, 2013.

Trade Secrets

The Commission responded to the directives in the Foreign and Economic Espionage Penalty Enhancement Act of 2012.[8] Section 3(a) of the Act directed the Commission to "review and, if appropriate, amend" the guidelines applicable to persons convicted of offenses involving the theft of trade secrets or economic espionage to reflect the intent of Congress that guideline penalties appropriately reflect the seriousness of these offenses, account for the potential and actual harm in such offenses, and provide adequate deterrence. Section 3(b) directed the Commission to consider whether the guidelines adequately address the simple misappropriation of a trade secret; the transmission or attempted transmission of a stolen trade secret outside of the United States; and the transmission or attempted transmission of a stolen trade secret outside of the United States for the benefit of a foreign government, foreign instrumentality, or foreign agent.

The offenses described in the directive may be prosecuted under 18 U.S.C. § 1831 (Economic espionage) and 18 U.S.C. § 1832 (Theft of trade secrets). The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Both offenses are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

In responding to the directive, the Commission consulted with individuals and groups representing law enforcement, owners of trade secrets, victims of economic espionage offenses, the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State, the Office of the United States Trade Representative, the Federal Public and Community Defenders, and the Commission's advisory groups, among others. The Commission also considered relevant data and literature.

Based upon consideration of its analysis and the comment and testimony received, the Commission promulgated an amendment responding to the directive to the Commission in the Foreign and Economic Espionage Penalty Enhancement Act of 2012. The amendment—

- implemented the directive on offenses involving stolen trade secrets or economic espionage by revising the existing specific offense characteristic at subsection (b)(5) of §2B1.1 (Theft, Property Destruction, and Fraud), which provides an enhancement of 2 levels if "the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent," by (1) broadening the scope of the enhancement to provide a 2-level increase for trade secret offenses in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States; and (2) increasing the severity of the enhancement to provide a 4-level enhancement and a minimum offense level of 14 for trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.

Pre-Retail Medical Products

The Commission responded to a directive and a new offense in the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112-186 (enacted October 5, 2102) (the "SAFE DOSES Act"). The SAFE DOSES Act addressed various offenses involving "pre-retail medical products," defined as "a medical product that has not yet been made available for retail purchase by a consumer." It created a new criminal offense for theft of pre-retail medical products and increased statutory penalties for certain related offenses when a pre-retail medical product is involved.

[8] Pub. L. No. 112–269.

Table 2

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Federal Sentencing Guidelines
Washington, DC
March 13, 2013

John Lynch
Chief, Computer Crime and Intellectual Property Section
Criminal Division, United States Department of Justice

Thomas P. Reilly
Counsel to the Assistant Attorney General
National Security Division, United States Department of Justice

Louis E. Bladel, III
Section Chief, Counterintelligence Division
Federal Bureau of Investigation

Stanford K. McCoy
Assistant U.S. Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative

John W. Powell
Vice President and General Counsel
American Superconductor (AMSC)

David Debold
Chair
Practitioners Advisory Group

David Hirschmann
Senior Vice President
United States Chamber of Commerce

Charles E. Samuels, Jr.
Director
Federal Bureau of Prisons

Vijay Shanker
Senior Counsel to the Assistant Attorney General
Criminal Division
United States Department of Justice

Lisa Hay
Assistant Federal Public Defender
Portland, Oregon

Denise C. Barrett
National Sentencing Resource Counsel
Federal Public and Community Defenders

John Roth
Director, Office of Criminal Investigations
Food and Drug Administration

Kathryn Keneally
Assistant Attorney General, Tax Division
United States Department of Justice

Edward F. Cronin
Division Counsel and Associate Chief Counsel, Criminal Tax
Internal Revenue Service

Teresa Brantley
Chair
Probation Officers Advisory Group

Richard Albert
New York Council of Defense Lawyers

The SAFE DOSES Act also contained a directive to the Commission to "review, and if appropriate, amend" the guidelines applicable to the new offense and related offenses "to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses."

The Commission analyzed sentencing data on offenders sentenced under USSG §2B1.1 for crimes involving medical products generally, and received testimony at a public hearing and written public comment from the Food and Drug Administration, the Federal Public and Community Defenders, the Commission's advisory groups, and other interested parties.

The Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In addition, such offenses undermine the public's confidence in the medical regulatory and distribution system. The Commission also determined that a heightened enhancement should apply to offenders employed in the supply chain for pre-retail medical products to reflect the likelihood that the offender's position in the supply chain facilitated the commission or concealment of the offense. The Commission determined that existing specific offense characteristics generally account for other aggravating factors included in the Act, such as loss, use or threat of force, risk of death or serious bodily injury, and weapon involvement. However, public comment and testimony indicated that §2B1.1 may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products when serious bodily injury or death actually occurs as a result of the offense. For example, some pre-retail medical products are stolen as part of a scheme to re-introduce them into the supply chain, but if the products have not been properly stored in the interim, their subsequent use can seriously injure consumers.

Based upon its analysis and the comment and testimony received, the Commission promulgated an amendment responding to the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012. The amendment—

- responded to the new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products by amending Appendix A (Statutory Index) to reference the new offense to §2B1.1 (Theft, Property Destruction, and Fraud); and

- amended §2B1.1 to address offenses involving pre-retail medical products by (1) adding a new specific offense characteristic at subsection (b)(8) that provides a 2-level enhancement if the offense involved conduct described in section 670 or a 4-level enhancement if the offense involved conduct described in section 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail medical product; and (2) amending the upward departure provisions to provide, as an example of a case in which an upward departure would be warranted, a case involving conduct described in section 670 "if the offense resulted in serious bodily injury or death resulting from the use of the pre-retail medical product."

Counterfeit and Adulterated Drugs; Counterfeit Military Parts

The Commission responded to two recent acts that increased penalties for offenses that involve counterfeit military goods and services or counterfeit drugs and are prosecuted under 18 U.S.C. § 2320 (Trafficking in counterfeit goods or services). The Commission also responded to recent statutory changes that increased penalties for offenses involving intentionally adulterated drugs.

Section 818 of the National Defense Authorization Act for Fiscal Year 2012 added a

new subsection (a)(3) to section 2320 prohibiting trafficking in counterfeit military goods and services where such goods or services would likely cause serious bodily injury or death to a member of the Armed Services or cause significant harm to national security. A violation of section 2320(a)(3) is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense.

Section 717 of the Food and Drug Administration Safety and Innovation Act added a new criminal offense at section 2320(a)(4) prohibiting trafficking in a counterfeit drug. A violation of section 2320(a)(4) is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. Section 717 also directed the Commission to "review and amend, if appropriate" the guidelines applicable to persons convicted of such an offense to ensure that the guidelines reflect the serious nature of the offenses and to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines.

Section 716 of the Food and Drug Administration Safety and Innovation Act created a new offense at 21 U.S.C. § 333(b)(7) that applies to any person who knowingly and intentionally adulterates a drug such that the drug has a reasonable probability of causing serious adverse health consequences or death to humans or animals. A violation of section 333(b)(7) is subject to a statutory maximum term of imprisonment of 20 years.

Based upon consideration of its analysis and the comment and testimony received, the Commission promulgated an amendment responding to the criminal provisions contained in the National Defense Authorization Act for Fiscal Year 2012 and the Food and Drug Administration Safety and Innovation Act. The amendment—

- responded to the new criminal offense at 18 U.S.C. § 2320(a)(3) for trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security, by amending §2B5.3 (Criminal Infringement of Copyright or Trademark) to create a new specific offense characteristic that provides a 2-level enhancement and a minimum offense level of 14 if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security;

- responded to the new criminal offense at 18 U.S.C. § 2320(a)(4) for trafficking in a counterfeit drug, and implemented the directive to the Commission on offenses involving trafficking in counterfeit drugs, by amending §2B5.3 to create a new specific offense characteristic that provides a 2-level enhancement if the offense involves a counterfeit drug;

- responded to both of the new criminal offenses at section 2320 by amending §2B5.3 to add an upward departure consideration if the offense resulted in death or serious bodily injury; and

- responded to the new criminal offense at 21 U.S.C. § 333(b)(7) for knowingly and intentionally adulterating a drug such that the drug is adulterated and has a reasonable probability of causing serious adverse health consequences or death to humans or animals by amending Appendix A (Statutory Index) to reference the new offense to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Circuit Conflicts

The Commission's statutory obligation to "periodically review and revise the guidelines"[9] includes the task of eliminating conflicts among the circuit courts with respect to the interpretation of the guidelines.[10] The Commission considered three circuit conflicts during fiscal year 2013 — one conflict involving tax deductions, and two other conflicts involving acceptance of responsibility — and promulgated amendments to resolve those circuit conflicts.

Circuit Conflict on Tax Deductions

The Commission promulgated an amendment responding to a circuit conflict regarding whether a sentencing court, in calculating tax loss as defined in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), may consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return.

In resolving this conflict, the Commission considered the competing rationales set forth by the circuit courts addressing the issue, in conjunction with an analysis of sentencing data for cases sentenced under Part T of Chapter Two of the *Guidelines Manual* and a review of prior policy choices the Commission has made in this area. In addition, the Commission received testimony at a public hearing and written public comment from the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, and other interested parties.

The resolution of the conflict reflects the Commission's view that consideration of legitimate unclaimed credits, deductions, or exemptions, subject to certain limitations and exclusions, is most consistent with existing provisions regarding the calculation of tax loss in §2T1.1, including the principles that a court must simply make a reasonable estimate based on available facts, that a greater tax loss is more harmful to the treasury than a smaller one, and that courts may go beyond the presumptive loss in the guidelines if the parties provide sufficient information for a more accurate assessment of the tax loss. The principles set forth in §6A1.3 (Resolution of Disputed Factors) (Policy Statement) are also reflected.

Based upon consideration of its analysis and the comment and testimony received, the Commission promulgated an amendment that —

- revised the commentary to §2T1.1 such that it (1) provides that courts should always account for the standard deduction and personal and dependent exemptions to which the defendant was entitled; (2) provides that courts should also account for any other previously unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only if the credit, deduction, or exemption was related to the tax offense, could have been claimed at the time the tax offense was committed, is reasonably and practicably ascertainable, and is supported by information presented by the defendant sufficiently in advance of sentencing to provide an adequate opportunity to evaluate its reliability and probable accuracy; (3) provides that certain categories of credits, deductions, or exemptions — in particular, "payments to third parties made in a manner that encouraged or facilitated a separate violation of law," such as "under the table" payments to employees or expenses incurred to obstruct justice —shall not be considered by the court in any case; and (4) makes clear that the burden is on the defendant to establish any credit, deduction, or exemption by a preponderance of the evidence.

[9] *See* 28 U.S.C. § 994(o).

[10] *Braxton v. United States*, 500 U.S. 344 (1991) (holding that the initial and primary task of eliminating conflicts among the circuit courts with respect to the interpretation of the guidelines lies with the Commission).

Circuit Conflicts on Acceptance of Responsibility

The Commission promulgated amendments addressing two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility for his offense receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involved the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1.

The first circuit conflict involved the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion for the third level of reduction based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal. The second conflict involved the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

In considering the two circuit conflicts, the Commission reviewed the rationales set forth by the circuit courts that had addressed these issues as well as the comment and testimony the Commission received. The Commission also studied the operation of §3E1.1 before the PROTECT Act, congressional action to amend §3E1.1, and the legislative history of that congressional action. Based on its analysis, the Commission promulgated an amendment to address the two circuit conflicts involving §3E1.1. The amendment—

- addressed the conflict involving the government's discretion under §3E1.1(b) by amending the commentary to include a statement that the government "should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal"; and

- addressed the conflict involving the court's discretion under subsection (b) by amending the commentary to include a statement that, if the government files a motion for the third level of reduction, "and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion".

Miscellaneous and Technical Amendments

Other guideline amendments promulgated in fiscal year 2013 made various miscellaneous and technical changes to the guidelines that responded to jurisprudence, legislation, and guideline application issues. The amendments—

- responded to the Supreme Court's decision in *Setser v. United States*, 132 S. Ct. 1463 (2012), holding that federal courts have discretion to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence, by amending the background commentary to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to include a statement describing the discretion recognized by *Setser* and providing heightened awareness of the Supreme Court's decision;

- responded to section 311 of the FAA Modernization and Reform Act of 2012, Public Law 112–95 (enacted February 14, 2012), which established a new criminal offense at 18 U.S.C. § 39A for the aiming of a laser pointer at an aircraft, by amending Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch,

Navigation, Operation, or Maintenance of Mass Transportation Vehicle);

- responded to section 3(a) of the Child Protection Act of 2012, Public Law 112–206 (enacted December 7, 2012), which established a new offense at 18 U.S.C. § 1514(c) for violating an order restraining harassment of a victim or witness, by amending Appendix A (Statutory Index) to reference offenses under section 1514(c) to §2J1.2 (Obstruction of Justice);

- responded to the Federal Restricted Buildings and Grounds Improvement Act of 2011, Public Law 112–98 (enacted March 8, 2012), which restated the criminal offense at 18 U.S.C. § 1752 for trespassing on federally restricted buildings or grounds, by amending Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing and Impeding Officers) and §2B2.3 (Trespass) and by amending §2B2.3 to ensure that a trespass under section 1752 provides a 4-level enhancement if the trespass occurred at the White House or the Vice President's official residence, or a 2-level enhancement if the trespass occurred at any other location permanently or temporarily protected by the Secret Service;

- responded to the Ultralight Aircraft Smuggling Prevention Act of 2012, Public Law 112–93 (enacted February 10, 2012), which amended the criminal offense at 19 U.S.C. § 1590 for aviation smuggling to clarify that the term "aircraft" includes ultralight aircraft, by amending Appendix A (Statutory Index) to reference section 1590 offenses to the drug guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), in cases involving drugs and to the smuggling guideline, §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) in other cases;

- responded to an application issue that may arise in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) by amending the commentary in those guidelines to clarify that in such a case the court is restricted from applying the Chapter Three adjustment for obstruction of justice, §3C1.1 (Obstructing or Impeding the Administration of Justice) but is not restricted from applying other adjustments in Chapter Three, Part C (Obstruction and Related Adjustments);

- responded to an application issue that may arise in cases in which the defendant is convicted of an export offense under 18 U.S.C. § 554 that does not involve munitions, cultural resources, or wildlife — such as cases involving ordinary commercial goods exported in violation of economic sanctions, or cases involving the export of "dual-use" goods (*i.e.*, goods that have both commercial and military applications) — by amending Appendix A (Statutory Index) to add §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) to the list of guidelines to which section 554 offenses are referenced; and

- made technical changes to the guidelines to provide updated references to provisions of statutes and regulations that have been renumbered and made stylistic revisions to change "court martial" to "court-martial."

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 2013 the Commission worked closely

with Members of Congress and their staffs to provide them timely sentencing-related information and analyses.

The Commission continued to provide Congress with extensive real-time sentencing data, analysis, and reports 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. In fiscal year 2013, legislation was introduced in both the Senate and the House to reform federal sentencing in several different ways, and the Senate Judiciary Committee prepared for consideration of several such pieces of legislation. The House Judiciary Committee convened a bipartisan Over-Criminalization Task Force to consider a number of issues including sentencing reform. Given this heightened attention to sentencing issues in both houses of Congress, the Commission responded to frequent requests from Congressional offices for data, analysis, and policy assistance, at times receiving and responding to requests on a near-daily basis.

The Commission held numerous briefings with congressional staff throughout the year regarding the Commission's recommendations, the Commission's policy priorities and proposed amendments; developing sentencing case law; and information received by the Commission during its public hearings. The Commission also conducted congressional briefings and answered congressional inquiries in other areas of criminal law, including immigration, fraud, sex offenses, and drug offenses.

In particular, the Commission conducted numerous congressional briefings related to the Commission's December 2012 report to Congress assessing the continuing impact of *United States v. Booker* on federal sentencing, including the Commission's conclusions that, while the guidelines remain highly influential in federal sentencing, disparities are increasing and recommend that Congress take steps to strengthen the guidelines system. The Commission also conducted congressional briefings related to its December 2012 *Report to the Congress on Federal Child Pornography Offenses*, including the Commission's recommendations that child pornography sentencing laws and guidelines be modernized to better reflect current technology and offense characteristics and more appropriately tailor sentences to conduct.

On September 18, 2013, the Commission submitted a statement for inclusion in the record of the Senate Judiciary Committee's hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." The statement reiterated some of the concerns and recommendations from the Commission's October 2011 *Report to the Congress on Mandatory Minimum Penalties In The Federal Criminal Justice System*, as well as heightened concerns based on further growth of the federal prison population and an increasing budget crisis. The statement recommended that Congress reduce mandatory minimum penalties for drug trafficking, make the Fair Sentencing Act of 2010 reducing mandatory sentences for crack cocaine offenders retroactive, and consider modestly expanding the "safety valve" which allows sentences below mandatory minimum penalties for non-violent low-level drug offenders .

The Commission 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 2013, as used in this report, refers to the fiscal year 2013 (October 1, 2012, through September 30, 2013).