

[Federal Register: January 21, 2010 (Volume 75, Number 13)]  
[Notices]  
[Page 3525-3539]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr21ja10-106]

=====

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

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

-----

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

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment on alternatives to incarceration, including a proposed new guideline that would provide authority under the guidelines to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria, and proposed changes to the Sentencing Table in Chapter Five that would expand Zones B and C by one level in each criminal history category, and related issues for comment on alternatives to incarceration; (2) issues for comment on the extent to which specific offender characteristics should be considered at sentencing generally and in the Guidelines Manual in particular, including issues for comment on age; mental and emotional condition; physical condition; military service, public service, and good works; and lack of guidance as a youth, and issues for comment on when, if at all, a downward departure may be appropriate based on the collateral consequences of a defendant's status as a non-citizen, or based on cultural assimilation; (3) a proposed amendment to Sec. 1B1.1 (Application Instructions) in light of *United States v. Booker*, 543 U.S. 220 (2005); (4) a proposed amendment on the computation of criminal history points under subsection (e) of Sec. 4A1.1 (Criminal History Category), known as the ``recency'' provision, including proposed changes to Sec. 4A1.1 to reduce the cumulative impact of ``recency'', and issues for comment on whether the Commission should instead address the cumulative impact of ``recency'' only for one or more specific Chapter Two offense guidelines; (5) a proposed amendment in response to the Matthew Shephard and James Byrd, Jr. Hate Crime Prevention Act, division E of

Public Law 111-84, including proposed changes to Sec. 3A1.1 (Hate Crime Motivation or Vulnerable Victim); (6) a proposed amendment to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations, including proposed changes to Sec. 8B2.1 (Effective Compliance and Ethics Program) and Sec. 8D1.4 (Recommended Conditions of Probation--Organizations), and a related issue for comment; (7) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues, including proposed changes to the guidelines' treatment of offenses involving commodities fraud, paleontological resources, unauthorized disclosures of personal information regarding health insurance eligibility, and iodine; and (8) a proposed amendment in response to certain technical issues that have arisen in the guidelines.

DATES: (1) Written Public Comment.--Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 22, 2010.

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

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

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

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

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the

[[Page 3526]]

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 also requests public comment regarding whether the

Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to Sec. 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

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

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

William K. Sessions III,  
Chair.

#### 1. Alternatives to Incarceration

**Synopsis of Proposed Amendment:** In September 2009, the Commission indicated that one of its policy priorities would be continued study of alternatives to incarceration, including consideration of any potential changes to the zones incorporated in the Sentencing Table in Chapter Five and/or other changes to the guidelines that might be appropriate in light of the information obtained from that study. See 74 FR 46478, 46479 (September 9, 2009). The Commission is publishing this proposed amendment to inform the Commission's consideration of alternatives to incarceration.

The proposed amendment contains two parts (A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

Part A expands the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. This part does so by creating a new guideline, Sec. 5C1.3, that provides the court with authority under the guidelines to impose a sentence of probation (with a requirement that the offender participate in a [residential] treatment program) rather than a sentence of imprisonment, without regard to the applicable Zone of the Sentencing Table. To use this authority, the court must find that the drug offender has demonstrated a willingness to participate in a substance abuse treatment program and [will likely benefit from such a program][that participation in such a program will likely address the defendant's need for substance abuse treatment], and the court must impose a condition of probation that requires the defendant to participate in a [residential] substance abuse treatment program. To be eligible for this alternative to incarceration, a drug offender must have committed the offense while addicted to a controlled substance[, and the controlled substance addiction must have contributed substantially to the commission of the offense]. Also, the drug offender's total offense level must be not greater than [11]-[16]. Finally, the drug offender must meet the ``safety valve'' criteria set forth in Sec. 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Part A also makes conforming changes to Sec. 5B1.1 (Imposition of a Term of Probation) and Sec. 5C1.1 (Imposition of a Term of Imprisonment).

Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I

through VI (taking this area from Zone D). Part B also provides guidance on the effectiveness of residential treatment programs. Finally, Part B makes conforming changes to Sec. Sec. 5B1.1 and 5C1.1. Issues for comment are also included.

#### Proposed Amendment

##### Part A:

Chapter Five, Part C is amended by adding at the end the following new guideline:

``Sec. 5C1.3. Substance Abuse Treatment Program as Alternative to Incarceration for Certain Drug Offenders

(a) Subject to subsection (b), in the case of an offense under 21 U.S.C. 841, 844, 846, 960, or 963, the court may sentence the defendant to a term of probation without regard to the applicable Zone of the Sentencing Table, if the court finds that the defendant meets the criteria set forth below:

(1) The defendant committed the offense while addicted to a controlled substance[, and the controlled substance addiction contributed substantially to the commission of the offense];

(2) The defendant has demonstrated a willingness to participate in a substance abuse treatment program, and [will likely benefit from such a program][participation in such a program will likely address the defendant's need for substance abuse treatment];

(3) The total offense level for purposes of the Sentencing Table in Chapter Five, Part A, is not greater than [11]-[16];

(4) Each of the criteria set forth in Sec. 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

(b) If the court imposes probation under subsection (a), the court must include a condition that requires the defendant to participate in a [residential] substance abuse treatment program.''

Section 5B1.1(a) is amended in paragraph (2) by striking the period at the end and inserting ``; or''; and by adding at the end the following:

``(3) Sec. 5C1.3 applies.''

The Commentary to Sec. 5B1.1 captioned ``Application Notes'' is amended in Note 1 by adding at the end the following:

``(c) Where Sec. 5C1.3 applies. See Sec. 5C1.3.'';

And in Note 2 by inserting ``, except as provided in Sec. 5C1.3'' after ``probation''.

Section 5C1.1 is amended by adding at the end the following:

``(g) Notwithstanding subsections (a)-(f), a sentence of imprisonment is not required if Sec. 5C1.3 applies.''

The Commentary to Sec. 5C1.1 captioned ``Application Notes'' is amended by adding at the end the following:

``9. Subsection (g) provides that, notwithstanding subsections (a) through (f), a sentence of imprisonment is not required if Sec. 5C1.3 applies.''

##### Part B:

The Sentencing Table in Chapter Five, Part A, is amended--

(1) By increasing Zone B by one level in each of Criminal History Categories I through VI (so that Zone B contains offense levels 9-11 in Criminal History Category I; 6-10 in Criminal History Category II; 5-9 in Criminal History Category III; 4-7 in Criminal History Category IV; 3-6 in Criminal History

[[Page 3527]]

Category V; and 2-5 in Criminal History Category VI), and, correspondingly, by removing each such offense level from Zone C; and

(2) By increasing Zone C by one level in each of Criminal History Categories I through VI (so that Zone C contains offense levels 12-13 in Criminal History Category I; 11-12 in Criminal History Category II; 10-11 in Criminal History Category III; 8-9 in Criminal History Category IV; 7 in Criminal History Category V; and 6 in Criminal History Category VI).

For an illustration of the proposed amendment to the Sentencing Table, as executed, see table. The existing boundaries of Zones B and C are marked with straight lines; the new proposed lower boundary of Zone B is shaded; and the new proposed lower boundary of Zone C is marked with a wavy line.

BILLING CODE 2210-40-P

[[Page 3528]]

[GRAPHIC] [TIFF OMITTED] TN21JA10.000

BILLING CODE 2210-40-C

The Commentary to Sec. 5B1.1 captioned ``Application Notes'' is amended in Note 1(b) by striking ``six'' and inserting

[[Page 3529]]

``nine''; and in Note 2 by striking ``eight'' and inserting ``ten''.

The Commentary to Sec. 5C1.1 captioned ``Application Notes'' is amended in Note 3 by striking ``six'' after ``not more than'' and inserting ``nine''; and in Note 4 by striking ``eight, nine, or ten months'' and inserting ``ten or twelve months''; by striking ``8-14'' both places it appears and inserting ``10-16''; by striking ``sentence of four'' both places it appears and inserting ``sentence of five''; and by striking ``five'' after ``and a sentence of'' and inserting ``ten''; and by redesignating Notes 6, 7, and 8 as Notes 7, 8, and 9, respectively; and by inserting after Note 5 the following:

``6. There may be cases in which community confinement in a residential treatment program is warranted to accomplish a specific treatment purpose. In such a case, the court should consider the effectiveness of the residential treatment program.

An effective program should possess, at a minimum, the following features:

(A) The program is licensed, certified, accredited, or otherwise approved by the relevant state regulatory agency.

(B) The program is operated by professionals who are well trained, qualified, and experienced in the evaluation and treatment of participants and who follow established ethical and professional standards.

(C) The evaluation and treatment of participants is based on ``the best available scientific knowledge.''; and in Note 9 (as so redesignated) by striking ``twelve'' and inserting ``15''.

Issues for Comment

1. The Commission requests comment on how Part A of the proposed amendment should interact with other provisions in the Guidelines Manual. In particular, if the Commission were to promulgate Part A, what other amendments to Chapter Five of the Guidelines Manual would be appropriate?

For example, Sec. 5H1.4 (Physical Condition, Including Drug or

Alcohol Dependence or Abuse; Gambling Addiction) currently provides, among other things, that physical condition ``is not ordinarily relevant in determining whether a departure is warranted'' and that ``drug or alcohol dependence or abuse is not a reason for a downward departure''. If the Commission were to promulgate Part A, what changes, if any, should the Commission make to Sec. 5H1.4?

2. The Commission requests comment on whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.

3. The Commission requests comment on whether the proposed amendment should include standards for effective treatment programs. The Commission has provided standards for other types of programs; for example, Sec. 8B2.1 (Effective Compliance and Ethics Program) provides minimum requirements for corporate compliance and ethics programs. Should the Commission similarly provide standards for effective treatment programs? If so, what standards should the Commission provide?

4. The Commission requests comment on whether the Zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The Zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?

5. The Commission requests comment on what revisions to Chapter Five, Part B (Probation), and Chapter Five, Part F (Sentencing Options), may be appropriate to provide more guidance on the use of alternatives to incarceration.

As explained in the Introductory Commentary to Chapter Five, Part B, ``probation is a sentence in and of itself'', and may be used as an alternative to incarceration, ``provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant''.

Are there changes the Commission should make to the guidelines to guide courts in fashioning sentences that meet the statutory purposes of sentencing, see 18 U.S.C. 3553(a)(2), and to better implement the requirements of 28 U.S.C. 994(j) (requiring the Commission to ensure that ``the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense'')?

In particular, should the Commission make changes to Chapter Five, Parts B and F, to more broadly encourage the use of alternatives to incarceration, such as community confinement, home detention, and intermittent confinement (see Sec. 5F1.1 (Community Confinement), 5F1.2 (Home Detention), and 5F1.8 (Intermittent Confinement))? If so, what changes should the Commission make?

Should the Commission make changes to Chapter Five, Parts B and F, to provide more guidance to the court in deciding whether to impose an alternative to incarceration in a particular case and, if so, in deciding what specific alternative to incarceration should be imposed?

For example, what guidance should the Commission provide with regard to how the court should decide among sentencing a particular defendant to imprisonment, intermittent confinement, community confinement, or home detention?

## 2. Specific Offender Characteristics

### Issues for Comment

1. In September 2009, the Commission indicated that one of its policy priorities would be a ``review of departures within the guidelines, including (A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the Guidelines Manual.'' See 74 FR 46478, 46479 (September 9, 2009).

The Sentencing Reform Act (the ``Act'') contained several provisions regarding the relevance of specific offender characteristics to sentencing:

First, the Act directs the Commission to consider whether eleven specific offender characteristics, ``among others'', have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. 994(d).

Second, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the ``general inappropriateness'' of considering five of those characteristics-- education; vocational

[[Page 3530]]

skills; employment record; family ties and responsibilities; and community ties. See 28 U.S.C. 994(e).

Third, the Act directs the Commission to ensure that the guidelines and policy statements ``are entirely neutral'' as to five other characteristics--race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. 994(d).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, ``the history and characteristics of the defendant''. See 18 U.S.C. 3553(a)(1).

As part of its review of departures, the Commission is reviewing the relevance of specific offender characteristics to sentencing. The Commission contemplates that work on this priority will continue beyond the amendment cycle ending May 1, 2010. During the amendment cycle ending May 1, 2010, the Commission is focusing on specific offender characteristics addressed in Chapter Five, Part H, of the Guidelines Manual that are not listed in 28 U.S.C. 994(e).

The Commission requests comment on the extent to which specific offender characteristics should be considered at sentencing generally and in the Guidelines Manual in particular. The Commission has received some public comment suggesting that, in light of *United States v. Booker*, 543 U.S. 220 (2005), the Commission amend the Guidelines Manual to eliminate provisions regarding specific offender characteristics, which are addressed in the Guidelines Manual primarily through the policy statements in Chapter Five, Part H. Eliminating Chapter Five, Part H, however, would contravene the mandates to the Commission in the Act.

Are specific offender characteristics already adequately addressed in the Guidelines Manual? If not, how should the Commission amend the Guidelines Manual to more adequately address specific offender characteristics?

2. The Commission requests comment regarding five specific offender characteristics in particular. Those characteristics, and the statutes and policy statements currently addressing those characteristics, are as follows:

(1) Age (28 U.S.C. 994(d)(1)), see Sec. 5H1.1 (Age).

(2) Mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant (28 U.S.C. 994(d)(4)), see Sec. 5H1.3 (Mental and Emotional Conditions).

(3) Physical condition, including drug dependence (28 U.S.C. 994(d)(5)), see Sec. 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(4) Military, civic, charitable, or public service, employment-related contributions, record of prior good works, see Sec. 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works).

(5) Lack of guidance as a youth, see Sec. 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

#### A. In General

Are the guidelines adequate as they apply to these five specific offender characteristics? If not, what amendments to the guidelines should be made to address these specific offender characteristics?

#### B. Relevance to Decisions Regarding Prison and Probation

For each of these five specific offender characteristics, the Commission requests comment regarding whether, and to what extent, the characteristic is relevant to decisions regarding prison and probation. In particular:

(1) Is the characteristic relevant in making the ``in/out'' decision, i.e., the decision whether to sentence the defendant to prison or probation?

(2) Assuming the defendant is to be sentenced to prison, is the characteristic relevant in deciding the length of imprisonment?

(3) Assuming the defendant is to be sentenced to probation, is the characteristic relevant in deciding the length of probation, or the conditions of probation?

For each of the decisions identified in (1), (2), and (3) above, if the characteristic is relevant in making the decision, when is it relevant, why is it relevant, what effect should it have, and how much effect should it have? Are there categories of offenses, or categories of offenders, for which the characteristic should be more relevant, or less relevant? What criteria should be used to establish such categories?

#### C. Use as Proxy for Forbidden Factors

As stated above, the Act specified that the guidelines and policy statements must be ``entirely neutral'' as to race, sex, national origin, creed, and socioeconomic status; these characteristics are known as the ``forbidden'' factors. See 28 U.S.C. 994(d).

For each of these five specific offender characteristics, could the characteristic be used as a proxy for one or more of the ``forbidden'' factors? If so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?

3. The Commission also has separate requests for comment for each of these five specific offender characteristics. The separate requests are as follows:

#### A. Age

Section 5H1.1 (Age) generally provides that age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should an offender's youth be a reason to decrease the sentence to reflect a view that younger offenders are less accountable for their actions, or a reason to increase the sentence to reflect a view that younger offenders are more likely to recidivate? Should an offender's advanced age be a reason to increase the sentence to reflect a view that older offenders should be more mature and responsible, or a reason to decrease the sentence to reflect a view that older offenders are less likely to recidivate?

#### B. Mental and Emotional Conditions

Section 5H1.3 (Mental and Emotional Conditions) generally provides that mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should a mental or emotional condition be a reason to increase the sentence (e.g., if the mental or emotional condition, such as an antisocial personality disorder, makes the defendant a particular danger to the community)? On the other hand, should a mental or emotional condition be a reason to decrease the sentence (e.g., if the mental or emotional condition could more effectively be treated outside of prison)?

In a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, how should mental or emotional condition interact with the policy statements regarding diminished capacity, see Sec. 5K2.13 (Diminished Capacity), and coercion and duress, see Sec. 5K2.12 (Coercion and Duress)? In particular, in a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, but does not meet the requirements of Sec. 5K2.13 and Sec. 5K2.12, when, if at all, should the

[[Page 3531]]

mental or emotional condition be a reason for a departure?

The Commission has heard testimony that service members have been returning from combat with traumatic brain injuries that cause them to act out violently toward family members and others, or have been returning with other mental or emotional conditions (such as post-traumatic stress disorder). If such a service member commits a crime, when, and to what extent, would a departure be warranted?

#### C. Physical Condition (Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)

Section 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) generally provides that physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. Should the Commission revise this policy statement? If so, how?

For example, should a physical condition or addiction be a reason to decrease the sentence (e.g., if the physical condition or addiction could more effectively be treated outside of prison or if the physical condition renders the offender so infirm that home confinement may be sufficient)? Conversely, should a physical condition or addiction be a reason to increase the sentence (e.g., if the addiction increases the risk of recidivism)?

#### D. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works

Section 5H1.11 (Military, Civic, Charitable, or Public Service;

Employment-Related Contributions; Record of Prior Good Works) provides that military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should military service be a reason to decrease the sentence (e.g., to reflect a view that an exemplary military record reflects courage, loyalty, and personal sacrifice that a sentencing court should take into account)? Conversely, should military service be a reason to increase the sentence (e.g., to reflect a view that the offender is a role model who ``should have known better'')?

Similarly, should civic or charitable contributions be a reason to decrease the sentence to reflect the view that credit should be given for past good deeds or that past good deeds predict that the defendant will continue to add value to the community when not in prison? If so, what level of contributions should be demonstrated before a decrease in sentence is warranted?

#### E. Lack of Guidance as a Youth and Similar Circumstances

Section 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances) provides that lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should lack of guidance as a youth not be a reason to decrease the sentence (e.g., to reflect a view that many or most offenders may be able to demonstrate some lack of guidance or disadvantaged upbringing)? Should physical abuse, emotional abuse, or sexual abuse suffered as a child be a reason to decrease the sentence under this policy statement or elsewhere in Chapter Five, Part H?

3. The Commission requests comment regarding what, if any, conforming changes should be made to Chapter Five, Part K, of the Guidelines Manual, or elsewhere in the Guidelines Manual, if the Commission were to amend the policy statements applicable to the five specific offender characteristics discussed above.

4. The Commission requests comment on when, if at all, the collateral consequences of a defendant's status as a non-citizen may warrant a downward departure. There are differences among the circuits on this issue. Compare, e.g., *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993) (holding that none of the following collateral consequences are a basis for departure: (1) The fact that an alien is not eligible to be imprisoned in a lower-security facility or to participate in certain prison programs; (2) the fact that an alien will face deportation upon release from prison; and (3) the fact that an alien, upon release from prison, will be civilly detained until deportation), with *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994) (``[A] downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence.'').

The circuits appear to be in agreement, however, that the defendant's status as a non-citizen is never a proper basis for departure when the defendant is sentenced under the illegal reentry guideline, Sec. 2L1.2 (Unlawfully Entering or Remaining in the United States). See, e.g., *United States v. Martinez-Carillo*, 250 F.3d 1101, 1107 (7th Cir. 2001); *United States v. Garay*, 235 F.3d 230, 234 (5th Cir. 2000).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted on the basis of such collateral consequences? If so, how?

5. The Commission requests comment on when, if at all, a downward departure may be appropriate in an illegal reentry case sentenced under

Sec. 2L1.2 on the basis of ``cultural assimilation'', that is, the defendant's cultural ties to the United States. Several circuits have held that such a departure may be warranted. See, e.g., *United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998); *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 433 (5th Cir. 2001); *United States v. Sanchez-Valencia*, 148 F.3d 1273, 1274 (11th Cir. 1998). Other circuits, such as the First and Tenth Circuits, have declined to rule on whether such a departure may be warranted. See, e.g., *United States v. Melendez-Torres*, 420 F.3d 45, 51 (1st Cir. 2005); *United States v. Galarza-Payan*, 441 F.3d 885, 889 (10th Cir. 2006).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted in an illegal reentry case on the basis of ``cultural assimilation''? If so, how?

### 3. Application Instructions

Synopsis of Proposed Amendment: This proposed amendment amends Sec. 1B1.1 (Application Instructions) in light of *United States v. Booker*, 543 U.S. 220 (2005).

As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the Guidelines Manual, a district court is required to properly calculate and consider the guidelines when sentencing. See 18 U.S.C. 3553(a)(4); *Booker*, 543 U.S. at 264 (``The district courts, while not bound to apply the Guidelines, must \* \* \* take them into account when sentencing.''); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) (``As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'').

After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure.

[[Page 3532]]

``Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.' See *Irizarry v. United States*, 128 S.Ct. 2198, 2202 (2008). A ``variance''--i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual--is considered only after departures have been considered.

As the Fifth Circuit has explained: ``Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) A sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence.' *United States v. Tzep-Mejia*, 462 F.3d 522 (5th Cir. 2006) (internal footnote and citation omitted). On this point most other circuits agree. See, e.g., *United States v. Dixon*, 449 F.3d 194, 203-4 (1st Cir. 2006) (court must consider ``any applicable departures''); *United States v. Selioutsy*, 409 F.3d 114 (2d Cir. 2005) (court must consider ``available departure authority''); *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006) (same); *United States v. Morehead*, 437 F.3d 424, 433 (4th Cir. 2006) (departures ``remain an important part of sentencing even after Booker''); *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006) (same); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) (``the district court must

decide if a traditional departure is appropriate'', and after that must consider a variance); *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States v. Jordi*, 418 F.3d 1212 (11th Cir. 2005) (stating that ``the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered''). But see *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006) (departures ``obsolete'').

In short, the district court, in determining the appropriate sentence in a particular case, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. 3553(a). See *Rita*, 551 U.S. at 351. This has been described as a ``3-step process'':

First, because the Booker decision requires that courts consult the sentencing guidelines, a sentencing court must calculate the applicable guideline range in the customary fashion. Second, the court should determine whether a departure from the guideline range is consistent with the guidelines' policy statements and commentary. Third, the court should evaluate whether a variance, i.e., a sentence outside the advisory guideline range is warranted under the authority of 18 U.S.C. 3553(a).

See *United States Sentencing Commission, ``Final Report on the Impact of United States v. Booker on Federal Sentencing''* (2006) at 42.

The proposed amendment follows the approach adopted by a majority of circuits and structures Sec. 1B1.1 to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in this manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. 3553(a) in determining the appropriate sentence. In addition, the proposed amendment amends the Commentary to Sec. 1B1.1 to define the term ``variance''.

#### Proposed Amendment

Section 1B1.1 is amended by striking ``Except as specifically directed, the provisions of this manual are to be applied in the following order:'' and inserting the following:

``(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. 3553(a) (4)) by applying the provisions of this manual in the following order, except as specifically directed:''; by redesignating subdivisions (a) through (h) as (1) through (8), respectively; in subdivision (4) (as so redesignated) by striking ``(a)'' and inserting ``(1)'', and by striking ``(c)'' and inserting ``(3)'';

By redesignating subdivision (i) as subsection (b) and, in that subsection, by striking ``Refer to'' and inserting ``The court shall then consider'', and by adding at the end ``See 18 U.S.C. 3553(a) (5).''; and

By adding at the end the following:

``(c) The court shall then determine the sentence (i.e., a sentence within the guideline range, a departure, or a variance), considering the applicable factors in 18 U.S.C. 3553(a) taken as a whole.''.

The Commentary to Sec. 1B1.1 captioned ``Application Notes'' is amended in Note 1, in subparagraph (E) (i), by inserting ``as provided for in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, or any other policy statements or commentary in the

guidelines'' after ``guideline sentence''; and by adding at the end the following:

``(M) `Variance' means imposition of a sentence other than as provided in the guidelines, policy statements, and commentary of the Guidelines Manual.''.

#### 4. Recency

Synopsis of Proposed Amendment: In September 2009, the Commission indicated that one of its policy priorities would be consideration of miscellaneous guideline application issues, including ``examination of, and possible guideline amendments relating to, the computation of criminal history points under Sec. 4A1.1(e)'. See 74 FR 46478, 46479 (September 9, 2009). Subsection (e) of Sec. 4A1.1 (Criminal History Category) is known as the ``recency'' provision. The Commission is examining how the ``recency'' provision interacts with the ``status'' provision in subsection (d) of Sec. 4A1.1 and also how the ``recency'' provision interacts with other provisions regarding criminal history in various Chapter Two offense guidelines.

Section 4A1.1 currently provides that if the instant offense was committed while under another criminal justice sentence, 2 criminal history points are added under subsection (d) for ``status''; if the instant offense was committed less than two years after release from imprisonment, or while in imprisonment or escape status, 2 points are added under subsection (e) for ``recency''. If 2 points are added for ``status'' under (d), however, only 1 point is added for ``recency'' under (e). See Sec. 4A1.1 comment. (backg'd.) (``Because of the potential overlap of (d) and (e), their combined impact is limited to three points.'').

Under Sec. 4A1.1, a sentence for a single prior conviction may count up to three times in the calculation of the Criminal History Category (e.g., such a sentence could count under Sec. Sec. 4A1.1(a) or (b), 4A1.1(d), and 4A1.1(e)). Additionally, the prior conviction can increase the offense level determined under certain Chapter Two guidelines (e.g., Sec. 2L1.2 (Unlawfully Entering or Remaining in the United States)). Therefore, in a case in which the prior conviction increases the Chapter Two offense level, the single prior conviction may be counted four times in the determination of the applicable guideline range.

The proposed amendment presents two options for amending Sec. 4A1.1 that would reduce the cumulative impact of ``recency''. Under Option 1, ``recency'' points are eliminated for all offenders in all cases; conforming changes to Sec. 4A1.2 (Definitions and Instructions for Computing Criminal History) are also

[[Page 3533]]

made. Under Option 2, ``recency'' points are retained but are not cumulative with ``status'' points; thus, in the case of an offender eligible for both ``status'' points and ``recency'' points, the combined impact is limited to 2 points rather than 3.

The proposed amendment also makes stylistic changes to Sec. 4A1.1 so that its subdivisions are referred to as ``subsections'' rather than as ``items''.

Issues for comment are also provided that, in part, request comment on whether the Commission should instead address the cumulative impact of ``recency'' more narrowly, i.e., only for cases sentenced under Chapter Two offense guidelines that increase the offense level based on criminal history.

## Proposed Amendment

## [Option 1:

Section 4A1.1 is amended by striking ``items (a) through (f)'' and inserting ``subsections (a) through (e)''; in subsection (c) by striking ``item'' and inserting ``subsection''; by striking subsection (e) and redesignating subsection (f) as (e); and in subsection (e) (as so redesignated) by striking ``item'' and inserting ``subsection''.

The Commentary to Sec. 4A1.1 captioned ``Application Notes'' is amended by striking ``item'' each place it appears and inserting ``subsection''; by striking Note 5 and redesignating Note 6 as Note 5; and in Note 5 (as so redesignated) by striking ``(f)'' and inserting ``(e)'' each place it appears.

The Commentary to Sec. 4A1.1 captioned ``Background'' is amended by striking ``Subdivisions'' and inserting ``Subsections''; by striking ``implements one measure of recency by adding'' and inserting ``adds''; and by striking the paragraph that begins ``Section 4A1.1(e)''.

Section 4A1.2 is amended in subsection (a)(2) by striking ``(f)'' and inserting ``(e)''; in subsection (k) by striking subparagraph (A) and by striking ``(B)''; in subsection (l) by striking ``(f)'' and inserting ``(e)''; and by striking ``; Sec. 4A1.1(e) shall not apply''; in subsection (n) by striking ``and (e)''; and in subsection (p) by striking ``(f)'' and inserting ``(e)''.

The Commentary to Sec. 4A1.2 captioned ``Application Notes'' is amended in Note 12(A) by striking ``subdivision'' and inserting ``subsection''.]

## [Option 2:

Section 4A1.1(e) is amended by striking ``If 2 points are added for item (d), add only 1 point for this item'' and inserting ``If subsection (d) applies, do not apply this subsection''.

The Commentary to Sec. 4A1.1 captioned ``Application Notes'' is amended in Note 5 by striking ``if two points are added under Sec. 4A1.1(d), only one point is added under Sec. 4A1.1(e)'' and inserting ``if Sec. 4A1.1(d) applies, do not apply Sec. 4A1.1(e)''.

The Commentary to Sec. 4A1.1 captioned ``Background'' is amended in the paragraph that begins ``Section 4A1.1(e)'' by striking ``three'' and inserting ``two''; and by striking the sentence that begins ``However, ''.]

## Issues for Comment

1. The Commission seeks comment on whether the Commission should reduce the cumulative impact of ``recency'' points in Sec. 4A1.1(e), when they apply in combination with ``status'' points in Sec. 4A1.1(d) or in combination with provisions regarding criminal history in Chapter Two.

An example of such a provision is the specific offense characteristic in subsection (b)(1) of Sec. 2L1.2 (Unlawfully Entering or Remaining in the United States), which provides an enhancement of 4 to 16 levels if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a certain type of offense. Other examples can be found in the alternative base offense levels in Sec. Sec. 2K2.1(a) and 2D1.1(a), which provide a heightened base offense level if the defendant had one or more prior convictions for certain types of offenses; the ``pattern of activity'' enhancement in Sec. 2S1.3(b)(2), which provides an enhancement based on a pattern of criminal activity; and the enhancements in Sec. Sec. 2N2.1(b)(1) and 2K2.6(b)(1), which provide an enhancement based on a past conviction.

If the Commission were to retain ``recency'' in subsection (e) of

Sec. 4A1.1, should the Commission amend the guidelines to specify that, in a case in which a conviction is used to increase the Chapter Two offense level, ``recency'' points shall not apply?

A. Should the Commission Reduce the Impact in Cases Sentenced Under Sec. 2L1.2 Only?

With regard to the specific offense characteristic in Sec. 2L1.2(b)(1), should the Commission insert an application note in the commentary to Sec. 4A1.1 and a corresponding, parallel application note in the commentary to Sec. 2L1.2? One approach for such an application note, which would apply only if the Chapter Two provision and the ``recency'' provision were both derived from the same conviction, would be the following:

``Interaction with Sec. 2L1.2(b)(1).--If a conviction is used as a basis for an enhancement under Sec. 2L1.2(b)(1), do not use the sentence resulting from that conviction as a basis for adding points for `recency' under subsection (e).''

Another approach for such an application note, which would apply even if the Chapter Two provision and the ``recency'' provision were derived from different convictions, would be the following:

``Interaction with Sec. 2L1.2(b)(1).--If Sec. 2L1.2(b)(1) applies, do not apply subsection (e).''

Should the Commission follow one of these approaches? Is there a different approach the Commission should follow?

B. Should the Commission Reduce the Impact in Cases Under Other Specific Guidelines?

Should such an application note also be provided for a case in which (1) a conviction is used as a basis for an alternative base offense level, such as in Sec. Sec. 2K2.1(a) and 2D1.1(a); or (2) a conviction is used as a basis for a pattern of activity enhancement, such as in Sec. 2S1.3(b)(2); or (3) a conviction is otherwise used as a basis for an enhancement, such as in Sec. Sec. 2N2.1(b)(1) and 2K2.6(b)(1)? Are there other provisions in Chapter Two for which such an application note should be provided?

## 5. Hate Crimes

Synopsis of Proposed Amendment: This proposed amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111-84) (the ``Act''). With regard to hate crimes, the Act created a new offense and amended a 1994 congressional directive to the Commission. The Act also created a second new offense, relating to attacking a United States serviceman on account of his or her service.

The new hate crimes offense, 18 U.S.C. 249 (Hate crime acts), makes it unlawful, whether or not acting under color of law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt to cause bodily injury to any person, because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. A person who violates section 249 is subject to imprisonment for not more than 10 years (or, if the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, or if death results from the offense, for any term of

[[Page 3534]]

years or for life). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to Sec. 2H1.1 (Offenses Involving Individual Rights).

The Act also amended section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322; 28 U.S.C. 994 note), which contains a congressional directive to the Commission regarding hate crimes that the Commission implemented in subsection (a) of Sec. 3A1.1 (Hate Crime Motivation or Vulnerable Victim). The Act expanded the definition of ``hate crime'' in section 280003(a) to include crimes motivated by actual or perceived ``gender identity'', which has the effect of expanding the scope of the congressional directive in section 280003(b) to require the Commission to provide an enhancement for crimes motivated by actual or perceived ``gender identity''. To reflect that congressional action, the proposed amendment amends Sec. 3A1.1(a) to include crimes motivated by actual or perceived ``gender identity'', and makes conforming changes to Sec. Sec. 2H1.1 and 3A1.1.

In addition, the proposed amendment contains a bracketed proposal to strike the special instruction in Sec. 3A1.1(c), which states that the 3-level enhancement in Sec. 3A1.1(a) shall not apply if the 6-level enhancement in Sec. 2H1.1(b) applies. Currently, the 3-level enhancement in Sec. 3A1.1(a) applies if the offense was a hate crime, i.e., was motivated by the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person; the 6-level enhancement in Sec. 2H1.1(b) applies if (A) the defendant was a public official at the time of the offense, or (B) the offense was committed under color of law. By striking the special instruction in Sec. 3A1.1(c), the proposed amendment would allow both enhancements to operate, if applicable in a particular case. Conforming changes to Sec. Sec. 2H1.1 and 3A1.1 are also bracketed.

The second new offense, 18 U.S.C. 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or status of that individual as a United States serviceman. A person who violates section 1389 is subject to imprisonment for not more than 2 years (in the case of a simple assault, or damage of not more than \$500), for not more than 5 years (in the case of damage of more than \$500), or for not less than 6 months nor more than 10 years (in the case of a battery, or an assault resulting in bodily injury). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to Sec. Sec. 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault) and 2B1.1 (Theft, Property Destruction, and Fraud). The Commission anticipates that the official victim adjustment in Sec. 3A1.2 (Official Victim) would apply in such a case.

#### Proposed Amendment

The Commentary to Sec. 2H1.1 captioned ``Statutory Provisions'' is amended by inserting ``249,'' after ``248,''.

The Commentary to Sec. 2H1.1 captioned ``Application Notes'' is amended in Note 4 by inserting ``gender identity,'' after ``gender,''.

[The Commentary to Sec. 2H1.1 captioned ``Application Notes'' is amended in Note 4 by striking the sentence that begins ``An adjustment'' and all that follows through ``See Sec. 3A1.1(c).''.]

Section 3A1.1 is amended in subsection (a) by inserting ``gender identity,'' after ``gender,''.

[Section 3A1.1 is amended by striking subsection (c).]

[The Commentary to Sec. 3A1.1 captioned ``Application Notes'' is amended in Note 1 by striking the sentence that begins ``Moreover,''.]

The Commentary to Sec. 3A1.1 captioned ``Application Notes'' is amended in Note 3 by inserting ``gender identity,'' after ``gender,'';

and by adding after Note 4 the following:

``5. For purposes of this guideline, `gender identity' means actual or perceived gender-related characteristics. See 18 U.S.C. Sec. 249(c) (4).''.

The Commentary to Sec. 3A1.1 captioned ``Background'' is amended in the first paragraph by adding at the end the following: ``In section 4703(a) of Public Law 111-84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 247 the following:

``18 U.S.C. Sec. 249 2H1.1'';

and by inserting after the line referenced to 18 U.S.C. 1369 the following:

``18 U.S.C. Sec. 1389 2A2.2, 2A2.3, 2B1.1''.

## 6. Organizational Guidelines

Synopsis of Proposed Amendment: This proposed amendment makes several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.

First, the proposed amendment amends the Commentary to Sec. 8B2.1 (Effective Compliance and Ethics Program) to clarify the remediation efforts required to satisfy subsection (b) (7) (the seventh requirement for an effective compliance and ethics program). The proposed amendment adds a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution. Notably, restitution is already a significant remediation step considered under current Department of Justice guidelines in determining whether to prosecute business organizations. See U.S. Attorney's Manual, Chapter 9-28.300(A) (6) and Chapter 9-28.900(A) & (B).

Second, the proposed amendment amends Sec. 8D1.4 (Recommended Conditions of Probation--Organizations) (Policy Statement) to augment and simplify the recommended conditions of probation for organizations. The policy statement currently distinguishes between conditions of probation imposed solely to enforce a monetary penalty (addressed in subsection (b)) and conditions of probation imposed for any other reason (addressed in subsection (c)). Under the proposed amendment, subsections (b) and (c) are consolidated; accordingly, when a court determines there is a need for organizational probation, all conditional probation terms are available for consideration by the court. The proposed amendment also inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects current governmental policy and best practices with regard to the appointment of such independent corporate monitors. Finally, the proposed amendment inserts specific language requiring the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.

In addition, the proposed amendment contains, in brackets, two proposed additions to the Commentary of Sec. 8B2.1. The first bracketed addition amends Application Note 3 to include a new paragraph which clarifies what is expected of high-level personnel and

[[Page 3535]]

substantial authority personnel. Such personnel ``should be aware of

the organization's document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law''.

The second bracketed addition amends Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the ``nature and operations of the organization with regard to particular ethics and compliance functions'' should be included among the other matters assessed. This bracketed addition also states, as an example, that ``all employees should be aware of the organization's document retention policy or policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law''.

Finally, the proposed amendment makes technical and conforming changes.

An issue for comment is also included on whether to encourage direct reporting to the board by responsible compliance personnel by allowing an organization with such a structure to benefit from a three level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct.

#### Proposed Amendment

[The Commentary to Sec. 8B2.1 captioned ``Application Notes'' is amended in Note 3 by adding at the end the following:

``Both high-level personnel and substantial authority personnel should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (e.g. 18 U.S.C. Sec. 1519; 18 U.S.C. Sec. 1512(c)).'';

and in Note 6(A) by adding at the end the following:

``(iv) The nature and operations of the organization with regard to particular ethics and compliance functions. For example, all employees should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (e.g. 18 U.S.C. Sec. 1519; 18 U.S.C. Sec. 1512(c)).]

The Commentary to Sec. 8B2.1 captioned ``Application Notes'' is amended by redesignating Note 6 as Note 7, and by inserting after Note 5 the following:

``6. Application of Subsection (b) (7).--The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the

additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.''.

Section 8D1.4 is amended by striking subsections (b) and (c) and inserting the following:

``(b) If probation is imposed under Sec. 8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with Sec. 8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall be required to retain an independent corporate monitor agreed on by the parties or, in the absence of such an agreement, selected by the court. The independent corporate monitor must have appropriate qualifications and no conflict of interest in the case. The scope of the independent corporate monitor's role shall be approved by the court. Compensation to and costs of any independent corporate monitor shall be paid by the organization.

(4) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(5) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(6) The organization shall submit to: (A) A reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer, experts engaged by the court, or independent corporate monitor; (B) a reasonable number of regular or unannounced examinations of facilities subject to probation supervision; and (C) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court or independent corporate monitors shall be paid by the organization.

(7) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) Restitution; (B) fine; and (C) any other monetary sanction.''.

The Commentary to Sec. 8D1.4 captioned ``Application Note'' is amended in Note 1 by striking ``(a) (3) through (6)''; by inserting ``or require retention of an independent corporate monitor'' after ``experts''; and by striking ``(c) (3)'' and inserting ``(b) (4)''.

## Issue for Comment

1. Should the Commission amend Sec. 8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g. an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?

## 7. Miscellaneous

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

Part A of the proposed amendment responds to the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111-21), which expanded the securities fraud statute, 18 U.S.C. 1348, so that it also covers commodities fraud. Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)

[[Page 3536]]

contains an enhancement at subsection (b)(17)(B) that applies when a violation of commodities law is committed by certain specified persons who have fiduciary duties. The proposed amendment adds 18 U.S.C. 1348 to the list of offenses that qualify as ``commodities law'' for purposes of this enhancement.

Part B of the proposed amendment responds to the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11), which established a new offense at 16 U.S.C. 470aaa-5. The new offense makes it unlawful to excavate, remove, damage, or otherwise alter or deface any paleontological resource on federal land; to traffic in a paleontological resource taken from federal land; or to make or submit a false record relating to a paleontological resource taken from federal land. The proposed amendment adds 16 U.S.C. 470aaa-5 to Appendix A (Statutory Index) and references it to Sec. Sec. 2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources). Technical and conforming changes to Sec. Sec. 2B1.1 and 2B1.5 are also made.

Part C of the proposed amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111-3), which amends the Social Security Act to establish a new offense at 42 U.S.C. 1396w-2. This provision provides limited authority for private entities to disclose certain personal information related to eligibility determinations to appropriate State agencies, and also creates a new Class A misdemeanor for those who abuse this limited authority and communicate protected information to parties not entitled to view it. The proposed amendment adds 42 U.S.C. 1396w-2 to Appendix A (Statutory Index) and references it to Sec. 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part D of the proposed amendment responds to a regulatory change in the status of iodine as a listed chemical. Under that regulatory change, iodine was upgraded from a List II chemical to a List I chemical. The proposed amendment changes the Chemical Quantity Table in Sec. 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to reflect the upgrade. Because the maximum base offense level is higher for List I chemicals (level 30) than for List II chemicals (level 28), the proposed amendment also extends iodine's maximum base offense level to level 30 and specifies the amount of iodine that would be needed (1.3 kilograms) for a base offense level of 30 to apply.

#### Proposed Amendment

##### (A) Fraud Enforcement and Recovery Act of 2009

The Commentary to Sec. 2B1.1 captioned ``Application Notes'' is amended in Note 14(A) by inserting ``and 18 U.S.C. Sec. 1348'' after ``7 U.S.C. Sec. 1 et seq.)''.

##### (B) Omnibus Public Land Management Act of 2009

Section 2B1.1(c) (4) is amended by inserting ``or a paleontological resource'' after ``resource''; and by inserting ``or Paleontological Resources'' after ``Heritage Resources'' each place it appears.

The Commentary to Sec. 2B1.1 captioned ``Application Notes'' is amended in Note 1 by inserting after the paragraph that begins ``National cemetery' means'' the following:

``Paleontological resource' has the meaning given that term in Application Note 1 of the Commentary to Sec. 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).''

Section 2B1.5 is amended in the heading by inserting ``or Paleontological Resources'' after ``Heritage Resources'' each place it appears.

Section 2B1.5(b) is amended by inserting ``or paleontological resource'' after ``heritage resource'' each place it appears; and in paragraph (5) by inserting ``or paleontological resources'' after ``heritage resources''.

The Commentary to Sec. 2B1.5 captioned ``Statutory Provisions'' is amended by inserting ``470aaa-5,'' after ``16 U.S.C. Sec. ''.

The Commentary to Sec. 2B1.5 captioned ``Application Notes'' is amended in Note 1 by redesignating (A) through (G) as (i) through (vii), respectively; by striking ``Cultural Heritage Resource' Defined.--For purposes of this guideline, `cultural heritage resource' means any of the following:'' and inserting:

``Definitions.--For purposes of this guideline:

(A) `Cultural heritage resource' means any of the following:'';

By striking ``(A)'' before ``has the meaning'' and inserting ``(I)''; by striking ``(B)'' before ``includes'' and inserting ``(II)''; and by adding at the end the following:

``(B) `Paleontological resource' has the meaning given such term in 16 U.S.C. Sec. 470aaa.''

The Commentary to Sec. 2B1.5 captioned ``Application Notes'' is amended in Note 2 by striking ``Cultural Heritage'' both places it appears; and by striking ``cultural heritage'' each place it appears.

The Commentary to Sec. 2B1.5 captioned ``Application Notes'' is amended in Note 5(B) by striking ``cultural heritage''; in Note 6(A) by inserting ``or paleontological resources'' after ``resources'', and by striking ``cultural heritage'' after ``involving a'' each place it

appears; in Note 8 by striking ``cultural heritage'' each place it appears; and in Note 9 by inserting ``or paleontological resources'' after ``resources'' the first two places it appears; and by striking ``cultural heritage'' after ``or other''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. Sec. 413 the following:

``16 U.S.C. Sec. 470aaa-5 2B1.1, 2B1.5''.

(C) Children's Health Insurance Program Reauthorization Act of 2009

Appendix A (Statutory Index) is amended by inserting after the line referenced to 42 U.S.C. 1396h(b) (2) the following:

``42 U.S.C. Sec. 1396w-2 2H3.1''.

(D) Iodine

Section 2D1.11(e) is amended in subdivisions (1)-(10) by inserting the following list I chemicals in the appropriate place in alphabetical order by subdivision as follows:

- (1) ``1.3 KG or more of Iodine;''
- (2) ``At least 376.2 G but less than 1.3 KG of Iodine;''
- (3) ``At least 125.4 G but less than 376.2 G of Iodine;''
- (4) ``At least 87.8 G but less than 125.4 G of Iodine;''
- (5) ``At least 50.2 G but less than 87.8 G of Iodine;''
- (6) ``At least 12.5 G but less than 50.2 G of Iodine;''
- (7) ``At least 10 G but less than 12.5 G of Iodine;''
- (8) ``At least 7.5 G but less than 10 G of Iodine;''
- (9) ``At least 5 G but less than 7.5 G of Iodine;''
- (10) ``Less than 5 G of Iodine;''; and

in subdivisions (2)-(10), in list II chemicals, by striking the lines referenced to ``Iodine'', and in the lines referenced to ``Toluene'' by striking the semicolon and inserting a period.

## 8. Technical

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

[[Page 3537]]

Part A of the proposed amendment makes changes to the Guidelines Manual to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the Guidelines Manual provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:

- (1) Sec. 1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;
- (2) Sec. 1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the ``Probation Service'';
- (3) Sec. 1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;
- (4) Sec. 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;
- (5) Sec. 2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;
- (6) Sec. 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;
- (7) Sec. 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical

error;

(8) Sec. 2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;

(9) Sec. 2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;

(10) Sec. 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;

(11) Sec. 2B3.1 (Robbery), Application Note 2, to correct a typographical error;

(12) Sec. 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;

(13) Sec. 2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. Sec. 553(a)(2);

(14) Sec. 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to ``loss'' is accurately cited;

(15) Sec. 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;

(16) Sec. 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;

(17) Both Sec. 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and Sec. 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material) to provide a more accurate statutory citation and description;

(18) Sec. 2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;

(19) Sec. 2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;

(20) Sec. 2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of ``distribution'' in that guideline more consistent with the definition of ``distribution'' in the child pornography guidelines;

(21) Sec. 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Note 2, to ensure that a quotation contained in that note is accurate;

(22) Sec. 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;

(23) Both Sec. 2L2.2 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and Sec. 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;

(24) Sec. 2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;

(25) Sec. 2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;

(26) Sec. 2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;

(27) Sec. 2M6.1 (Unlawful Activity Involving Nuclear Material,

Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction), Application Note 1, to provide updated statutory references;

(28) Sec. 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to provide updated guideline references;

(29) Sec. 2Q1.6 (Hazardous or Injurious Devices on Federal Lands), subsection (a)(1), to correct a typographical error;

(30) Sec. 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), Application Note 3, to provide a more complete reference to regulations;

(31) Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), Introductory Commentary, to provide a more complete statutory reference;

(32) Sec. 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), to strike an erroneous statutory reference;

(33) Appendix A (Statutory Index), to provide updated statutory references and strike an erroneous statutory reference.

Part B of the proposed amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated. Specifically, when dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with ``a)`'), which are broken into paragraphs (starting with ``1)`'), which are broken into subparagraphs (starting with ``A)`'), which are broken into clauses (starting with ``i)`'), which are broken into subclauses (starting with ``I)`'). See *Koons Buick Pontiac GMC, Inc., v. Nigh*, 543 U.S. 50, 60 (2004). For a generic term, ``subdivision'' is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with ``A)`'). Part B of the proposed amendment identifies places in the Guidelines Manual where these principles are not followed and brings them into conformity.

#### Proposed Amendment

##### (A) Changes To Promote Accuracy and Completeness

The Commentary to Sec. 1B1.3 captioned ``Application Notes'' is amended in Note 6, in the paragraph that begins ``A particular guideline'', by striking ``is''

[[Page 3538]]

and inserting ``was''; and by striking ``was committed by the means set forth in'' and inserting ``involved conduct described in''.

The Commentary to Sec. 1B1.8 captioned ``Application Notes'' is amended in Note 2 by striking ``Probation Service'' and inserting ``probation office''.

The Commentary to Sec. 1B1.9 captioned ``Application Notes'' is amended in Note 1 by inserting ``or for which no imprisonment is authorized. See 18 U.S.C. 3559'' after ``five days''.

The Commentary to Sec. 1B1.11 captioned ``Application Notes'' is amended in Note 2 by striking ``Guideline'' and inserting ``Guidelines''.

The Commentary to Sec. 2A1.1 captioned ``Application Notes'' is amended in Note 1 by inserting ``, see Sec. 2A4.1(c)(1)'' after ``occurs''; and by inserting ``, see Sec. 2E1.3(a)(2)'' after ``racketeering''.

The Commentary to Sec. 2A3.2 captioned ``Application Notes'' is amended in Note 5 by striking ``kidnaping'' and inserting ``kidnapping'' each place it appears.

The Commentary to Sec. 2A3.3 captioned ``Application Notes'' is amended in Note 1 by inserting ``years'' before ``; (B)''.

The Commentary to Sec. 2A3.5 captioned ``Application Notes'' is amended in Note 1 by striking ``those terms in 42 U.S.C. Sec. 16911(2), (3) and (4), respectively'' and inserting ``the terms `tier I sex offender', `tier II sex offender', and `tier III sex offender', respectively, in 42 U.S.C. Sec. 16911''.

The Commentary to Sec. 2B1.4 captioned ``Application Notes'' is amended in Note 1 by striking ``Subsection of''.

The Commentary to Sec. 2B1.5 captioned ``Application Notes'' is amended in Note 1(C) by striking ``299'' and inserting ``229''; and in Note 1(E) by striking ``section 2(c) of Public Law 99-652 (40 U.S.C. 1002(c))'' and inserting ``40 U.S.C. Sec. 8902(a)(1)''.

The Commentary to Sec. 2B3.1 captioned ``Application Notes'' is amended in Note 2 by striking ``(d)'' and inserting ``(D)''.

The Commentary to Sec. 2B4.1 captioned ``Background'' is amended in the paragraph that begins ``This guideline also applies'' by striking ``was recently increased from two to'' and inserting ``is''; and by striking the sentence that begins ``Violation'' and all that follows through ``to the Medicaid program.'' and inserting ``Violations of 42 U.S.C. Sec. 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).''.

The Commentary to Sec. 2B6.1 captioned ``Background'' is amended by striking ``Sec. Sec. 511 and 553(a)(2)'' and inserting ``Sec. 511''; and by inserting ``Sec. 553(a)(2) and'' before ``2321''.

The Commentary to Sec. 2C1.1 captioned ``Application Notes'' is amended in Note 3 by striking ``(A)'' after ``(b)(2)''.

The Commentary to Sec. 2C1.2 captioned ``Application Notes'' is amended in Note 4 by striking ``or'' before ``Trust'' and inserting ``of''.

Section 2D1.1(c) is amended in each of Notes (H) and (I) to the Drug Quantity Table by striking ``(25)'' and inserting ``(30)''.

The Commentary to Sec. 2D1.11 captioned ``Application Notes'' is amended in Note 6 by striking ``or'' after ``1319(c),''; by striking Sec. 5124,``; and by inserting after ``9603(b)'' the following: ``, and 49 U.S.C. Sec. 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)''.

The Commentary to Sec. 2D1.12 captioned ``Application Notes'' is amended in Note 3 by striking ``or'' after ``1319(c),''; by striking Sec. 5124,``; and by inserting after ``9603(b)'' the following: ``, and 49 U.S.C. 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)''.

Section 2D1.14(a)(1) is amended by striking ``(3)'' and inserting ``(5)'' both places it appears.

The Commentary to Sec. 2D2.1 captioned ``Background'' is amended in the paragraph that begins ``Section 2D2.1(b)(1)'' by striking ``Section 6371 of the Anti-Drug Abuse Act of 1988'' both places it appears and inserting ``21 U.S.C. Sec. 844'' both places it appears.

The Commentary to Sec. 2G3.1 captioned ``Application Notes'' is amended in Note 1 in the paragraph that begins ``Distribution'' means'' by inserting ``transmission,`` after ``production,``.

The Commentary to Sec. 2K2.1 captioned ``Application Notes'' is amended in Note 2 by inserting ``That Is'' after ``Firearm''; and by

inserting ``that is'' after ``semiautomatic firearm''.

The Commentary to Sec. 2K2.5 captioned ``Application Notes'' is amended in Note 2 by striking ``(f)'' and inserting ``(g)''; and in Note 3 by inserting ``See 18 U.S.C. Sec. 924(a)(4).'' after ``other offense.''

The Commentary to Sec. 2L2.1 captioned ``Statutory Provisions'' is amended by striking ``(b),'' after ``1325''; and by inserting `` , (d)'' after ``(c)''.

The Commentary to Sec. 2L2.2 captioned ``Statutory Provisions'' is amended by striking ``(b),'' after ``1325''; and by inserting `` , (d)'' after ``(c)''.

The Commentary to Sec. 2M3.1 captioned ``Application Notes'' is amended in Note 1 by striking ``12356'' and inserting ``12958 (50 U.S.C. Sec. 435 note)''.

The Commentary to Sec. 2M3.3 captioned ``Statutory Provisions'' is amended by striking ``(b), (c)''.

The Commentary to Sec. 2M3.9 captioned ``Application Notes'' is amended in Note 3 by inserting ``See 50 U.S.C. Sec. 421(d).'' after ``imprisonment.''

The Commentary to Sec. 2M6.1 captioned ``Application Notes'' is amended in Note 1 in the paragraph that begins ``Foreign terrorist'' by striking ``1219'' and inserting ``1189''; and in the paragraph that begins ``Restricted person'' by striking ``(b)'' and inserting ``(d)''.

The Commentary to Sec. 2Q1.2 captioned ``Background'' is amended by striking ``last two'' and inserting ``fifth and sixth''.

Section 2Q1.6(a)(1) is amended by striking ``Substance'' and inserting ``Substances''.

The Commentary to Sec. 2Q2.1 captioned ``Application Notes'' is amended in Note 3 by inserting `` , Subtitle B, '' after ``7 CFR''.

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking ``section'' and inserting ``subpart''; and by inserting ``of Chapter 51 of Subtitle E'' after ``Subchapter J''.

The Commentary to Sec. 2X5.2 captioned ``Statutory Provisions'' is amended by striking ``Sec. 1129(a),''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. Sec. 13(f) by striking ``(f)'' and inserting ``(e)'';

In the line referenced to 8 U.S.C. 1325(b) by striking ``(b)'' and inserting ``(c)'';

In the line referenced to 8 U.S.C. 1325(c) by striking ``(c)'' and inserting ``(d)'';

By inserting after the line referenced to 18 U.S.C. 47 the following:

``18 U.S.C. Sec. 248 2H1.1'';

By striking the line referenced to 18 U.S.C. 1129(a);

By inserting after the line referenced to 42 U.S.C. 1320a-7b the following:

``42 U.S.C. Sec. 1320a-8b 2X5.1, 2X5.2'';

In the line referenced to 50 U.S.C. 783(b) by striking ``(b)''; and

By striking the line referenced to 50 U.S.C. 783(c).

(B) Changes To Promote Stylistic Consistency

The Commentary to Sec. 1B1.3 captioned ``Application Notes'' is amended in Note 2 in the second paragraph by striking ``(i)'' and inserting ``(A)''; and by striking ``(ii)'' and inserting ``(B)''.

The Commentary to Sec. 1B1.13 captioned ``Application Notes'' is amended in Note 1 by striking

[[Page 3539]]

``Subsection'' and inserting ``Subdivision''.

Section 2H4.2(b)(1) is amended by striking ``(i)'' and inserting ``(A)''; and by striking ``(ii)'' and inserting ``(B)''.

The Commentary to Sec. 2K1.3 captioned ``Application Notes'' is amended in Note 10 by striking ``(1)'' and inserting ``(A)''; by striking ``(2)'' and inserting ``(B)''; by striking ``(3)'' and inserting ``(C)''; and by striking ``(4)'' and inserting ``(D)''.

The Commentary to Sec. 2K2.1 captioned ``Application Notes'' is amended in Note 11 by striking ``(1)'' and inserting ``(A)''; by striking ``(2)'' and inserting ``(B)''; by striking ``(3)'' and inserting ``(C)''; and by striking ``(4)'' and inserting ``(D)''.

The Commentary to Sec. 3C1.1 captioned ``Application Notes'' is amended in Note 4 by redesignating subdivisions (a) through (k) as (A) through (K); and in Note 5 by redesignating subdivisions (a) through (e) as (A) through (E).

The Commentary to Sec. 3E1.1 captioned ``Application Notes'' is amended in Note 1 by redesignating subdivisions (a) through (h) as (A) through (H).

Section 5K2.17 is amended by striking ``(A)'' and inserting ``(1)''; and by striking ``(B)'' and inserting ``(2)''.

[FR Doc. 2010-970 Filed 1-20-10; 8:45 am]  
BILLING CODE 2210-40-P