UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2016.

SUMMARY: Pursuant to its authority under 28 U.S.C. § 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

DATE: The Commission has specified an effective date of November 1, 2016, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov. The amendments set forth in this notice also may be accessed through the Commission's website at www.ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing 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 generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the Federal Register on January 15, 2016 (see 81 FR 2295). The Commission held public hearings on the proposed amendments in Washington, D.C., on February 17 and March 16, 2016. On April 28, 2016, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2016.

AUTHORITY: 28 U.S.C. § 994(a), (o), and (p); USSC Rules of Practice and Procedure 4.1.

Patti B. Saris

Chair

1. Amendment: Section 1B1.13 is amended in the heading by striking "as a Result of Motion by Director of Bureau of Prisons" and inserting "Under 18 U.S.C. § 3582(c)(1)(A)".

The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 1 by striking the heading as follows: "Application of Subdivision (1)(A).—"; by striking Note 1(A) as follows:

(A) Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:

(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.

(iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).";

by redesignating Notes 1(B) and 2 as Notes 3 and 5, respectively, and inserting before Note 3 (as so redesignated) the following new Notes 1 and 2:

"1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

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

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. Foreseeability of Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.";

in Note 3 (as so redesignated) by striking "subdivision (1)(A)" and inserting "this policy statement";

and by inserting after Note 3 (as so redesignated) the following new Note 4:

"4. Motion by the Director of the Bureau of Prisons.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.".

The Commentary to §1B1.13 captioned "Background" is amended by striking "This policy statement implements 28 U.S.C. § 994(t)." and inserting the following:

"The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C.

§ 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to 'describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.' This policy statement implements 28 U.S.C. § 994(a)(2) and (t).".

Reason for Amendment: This amendment is a result of the Commission's review of the policy statement pertaining to "compassionate release" at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The amendment broadens certain eligibility criteria and encourages the Director of the Bureau of Prisons to file a motion for compassionate release when "extraordinary and compelling reasons" exist.

Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant if "extraordinary and compelling reasons" warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3582(c)(1)(A); see also 28 U.S.C. §§ 992(a)(2) (stating that the Commission shall promulgate general policy statements regarding "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18"); and 994(t) (stating

that the Commission, in promulgating any such policy statements, "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples"). In turn, the Commission promulgated the policy statement at §1B1.13, which defines "extraordinary and compelling reasons" for compassionate release.

The Bureau of Prisons has developed its own criteria for the implementation of section 3582(c)(1)(A). See U.S. Department of Justice, Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Program Statement 5050.49, CN-1). Under its program statement, a sentence reduction may be based on the defendant's medical circumstances (e.g., a terminal or debilitating medical condition; see 5050.49(3)(a)–(b)) or on certain non-medical circumstances (e.g., an elderly defendant, the death or incapacitation of the family member caregiver of an inmate's minor child, or the incapacitation of the defendant's spouse or registered partner when the inmate would be the only available caregiver; see 5050.49(4),(5),(6)).

The Commission has conducted an in-depth review of this topic, including consideration of Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates, as well as two reports issued by the Department of Justice Office of the Inspector General that are critical of the Bureau of Prisons' implementation of its compassionate release program. See U.S. Department of Justice,

Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program, I-2013-006 (April 2013); U.S. Department of Justice, Office of the Inspector General, The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E-15-05 (May 2015). In February 2016, the Commission held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants.

The amendment revises §1B1.13 in several ways. First, the amendment broadens the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release. It provides four categories of criteria: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons."

The "Medical Condition of the Defendant" category has two prongs: one for defendants with terminal illness, and one that applies to defendants with a debilitating condition. For the first subcategory, the amendment clarifies that terminal illness means "a serious and advanced illness with an end of life trajectory," and it explicitly states that a "specific prognosis of life expectancy (i.e. a probability of death within a specific time period) is not required." These changes respond to testimony and public comment on the challenges associated with diagnosing terminal illness. In particular, while an end-of-

life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period. For that reason, the Commission concluded that requiring a specified prognosis (such as the 18-month prognosis in the Bureau of Prisons' program statement) is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications. For added clarity, the amendment also provides a non-exhaustive list of illnesses that may qualify as a terminal illness.

For the non-terminal medical category, the amendment provides three broad criteria to include defendants who are (i) suffering from a serious condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating health because of the aging process, for whom the medical condition substantially diminishes the defendant's ability to provide self-care within a correctional facility and from which he or she is not expected to recover. The primary change to this category is the addition of prong (II) regarding a serious functional or cognitive impairment. This additional prong is intended to include a wide variety of permanent, serious impairments and disabilities, whether functional or cognitive, that make life in prison overly difficult for certain inmates.

The amendment also adds an age-based category ("Age of the Defendant") for eligibility in §1B1.13. This new category would apply if the defendant (i) is at least 65 years old, (ii) is experiencing a serious deterioration in health because of the aging process, and (iii)

has served at least 10 years or 75 percent of his or her term of imprisonment (whichever is less). The age-based category resembles criteria in the Bureau of Prisons' program statement, but adds a limitation that the defendant must be experiencing seriously deteriorating health because of the aging process. The amendment also clarifies that the time-served aspect should be applied with regard to "whichever is less," an important distinction from the Bureau of Prisons' criteria, which has limited application to only those elderly offenders serving significant terms of imprisonment. The Commission determined that 65 years should be the age for eligibility under the age-based category after considering the Commission's recidivism research, which finds that inmates aged 65 years and older exhibit a very low rate of recidivism (13.3%) as compared to other age groups. The Commission expects that the broadening of the medical conditions categories, cited above, will lead to increased eligibility for inmates who suffer from certain conditions or impairments, and who experience a diminished ability to provide self-care in prison, regardless of their age.

The amendment also includes a "Family Circumstances" category for eligibility that applies to (i) the death or incapacitation of the caregiver of the defendant's minor child, or (ii) the incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver. The amendment deletes the requirement under prong (i) regarding the death or incapacitation of the "defendant's only family member" caregiver, given the possibility that the existing caregiver may not be of family relation. The Commission also added prong (ii), which makes this category of

criteria consistent with similar considerations in the Bureau of Prisons' program statement.

Second, the amendment updates the Commentary in §1B1.13 to provide that an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction. The Commission heard from stakeholders and medical experts that the corresponding limitation in the Bureau of Prisons' program statement ignores the often precipitous decline in health or circumstances that can occur after imprisonment. The Commission determined that potential foreseeability at the time of sentencing should not automatically preclude the defendant's eligibility for early release under §1B1.13.

Finally, the amendment adds a new application note that encourages the Director of the Bureau of Prisons to file a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in §1B1.13. The Commission heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility. While only the Director of the Bureau of Prisons has the statutory authority to file a motion for compassionate release, the Commission finds that "the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of

reduction), including the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community." The Commission's policy statement is not legally binding on the Bureau of Prisons and does not confer any rights on the defendant, but the new commentary is intended to encourage the Director of the Bureau of Prisons to exercise his or her authority to file a motion under section 3582(c)(1)(A) when the criteria in this policy statement are met.

The amendment also adds to the Background that the Commission's general policy-making authority at 28 U.S.C. § 994(a)(2) serves as an additional basis for this and other guidance set forth in §1B1.13, and the amendment changes the title of the policy statement. These changes are clerical.

2. Amendment: Section 2E3.1 is amended in subsection (a) by striking subsection (a)(2) as follows:

"(2) 10, if the offense involved an animal fighting venture; or";

by redesignating subsections (a)(1) and (a)(3) as subsections (a)(2) and (a)(4), respectively; in subsection (a)(2) (as so redesignated) by striking "operation; or" and

inserting “operation;”; by inserting before subsection (a)(2) (as so redesignated) the following new subsection (a)(1):

“(1) 16, if the offense involved an animal fighting venture, except as provided in subdivision (3) below;”;

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

“(3) 10, if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or”.

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

The Commentary to §2E3.1 captioned “Application Notes” is amended in Note 1 by striking “: ‘Animal” and inserting “, ‘animal”;

and in Note 2 by striking “If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.”, and inserting the following:

"The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).".

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

Reason for Amendment: This amendment responds to two legislative changes to the Animal Welfare Act (the "Act") (codified at 7 U.S.C. § 2156) made by Congress in 2008 and 2014. First, in 2008, Congress amended the Act to increase the maximum term of imprisonment for offenses involving an animal fighting venture from three years to five years. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, § 14207(b), 122 Stat. 1461, 1462 (May 22, 2008). Second, in 2014, Congress again amended the Act to create two new offenses – the offense of attending an animal fight

and the offense of causing an individual under the age of 16 to attend an animal fight, with respective statutory maximum terms of imprisonment of one and three years. See Agricultural Act of 2014, Pub. L. 113–79, § 12308, 128 Stat. 990, 990 (Feb. 7, 2014).

The amendment makes several changes to §2E3.1 (Gambling Offenses, Animal Fighting Offenses) to account for these legislative actions. The amendment is informed by extensive public comment, recent case law, and analysis of Commission data regarding the current penalties for animal fighting offenses.

Higher Penalties for Animal Fighting Venture Offenses

First, the amendment increases the base offense level for offenses involving an animal fighting venture from 10 to 16. This change reflects the increase in the statutory maximum penalty from three to five years for offenses prohibited under 7 U.S.C. § 2156(a)–(e). See 18 U.S.C. § 49 (containing the criminal penalties for violations of section 2156). The Commission also determined that the increased base offense level better accounts for the cruelty and violence that is characteristic of these crimes, as reflected in the extensive public comment and testimony noting that a defeated animal is often severely injured or killed during or after a fight and that the animals used in these crimes are commonly exposed to inhumane living conditions or other forms of neglect.

In making this change, the Commission was also informed by data evidencing a high percentage of above range sentences in these cases. During fiscal years 2011 through 2014, almost one-third (31.0%) of the seventy-four offenders who received the base offense level of 10 under §2E3.1 received an above range sentence, compared to a national above range rate of 2.0 percent for all offenders. For those animal fighting offenders sentenced above the range, the average extent of the upward departure was more than twice the length of imprisonment at the high end of the guideline range, resulting in an average sentence of 18 months (and a median sentence of 16 months). Comparably, the amended base offense level will result in a guideline range of 12 to 18 months for the typical animal fighting venture offender who is in Criminal History Category I and receives a three-level reduction for acceptance of responsibility under §3E1.1 (Acceptance of Responsibility). Additionally, for offenders in the higher criminal history categories, the guideline range at base offense level 16 allows for applicable Chapter Three increases while remaining within the statutory maximum.

New Offenses Relating to Attending an Animal Fighting Venture

The amendment also establishes a base offense level of 10 in §2E3.1 if the defendant was convicted under section 2156(a)(2)(B) for causing an individual under 16 to attend an animal fighting venture. The Commission believes this level of punishment best reflects Congress's intent in creating this new crime. A base offense level of 10 for this new offense will result in a guideline range (before acceptance of responsibility) of 6 to

12 months of imprisonment for offenders in Criminal History Category I, while allowing for a guideline range approaching the three-year statutory maximum for offenders in higher criminal history categories. The Commission also noted that assigning a base offense level of 10 is consistent with the policy decision made by the Commission when it assigned a base offense level of 10 to an animal fighting crime in 2008, which, at that time, also had a three-year statutory maximum penalty. See USSG App. C, amend. 721 (effective November 1, 2008).

Lastly, the amendment establishes a base offense level of 6 for the new class A misdemeanor of attending an animal fighting venture prohibited by section 2156(a)(2)(A) by including only the felony provisions of 7 U.S.C. §2156 in the Appendix A reference to §2E3.1. Consistent with other Class A misdemeanor offenses, this base offense level is established through application of §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Departure Provision

The amendment also revises and expands the existing upward departure language in two ways.

First, the amendment clarifies the circumstances in which an upward departure for exceptional cruelty may be warranted. As reflected in the revised departure provision,

the base offense levels provided for animal fighting ventures in subsections (a)(1) and (a)(3) reflect the fact that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. The Commission heard testimony that in a typical dog fight, dogs puncture and tear at each other, until one animal is too injured to continue, and during a cock fight, roosters strike each other with their beaks and with sharp blades that have been strapped to their legs, suffering punctured lungs, broken bones, and pierced eyes. Nonetheless, as informed by public comment and testimony, the Commission's study indicates that some animal fighting offenses involve extraordinary cruelty to an animal beyond that which is common to such crimes, such as killing an animal in a way that prolongs the suffering of the animal. The Commission determined that such extraordinary cruelty may fall outside the heartland of conduct encompassed by the base offense level for animal fighting ventures and, therefore, that an upward departure may be warranted in those cases.

Similarly, the amendment expands the existing departure provision to include offenses involving animal fighting on an exceptional scale (such as offenses involving an unusually large number of animals) as another example of conduct that may warrant an upward departure. As with the example of extraordinary cruelty, the Commission determined that the base offense level under the revised guideline may understate the seriousness of the offense in those cases.

3. Amendment: Section 2G2.1 is amended in subsection (b)(3) by striking "If the offense involved distribution" and inserting "If the defendant knowingly engaged in distribution";

and in subsection (b)(4) by inserting "(A)" before "sadistic or masochistic", and by inserting after "violence" the following: "; or (B) an infant or toddler".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by inserting at the end the following: "For additional statutory provision(s), see Appendix A (Statutory Index).".

The Commentary to §2G2.1 captioned "Application Notes" is amended by redesignating Notes 3, 4, 5, and 6 as Notes 5, 6, 7, and 8, respectively, and by inserting after Note 2 the following new Notes 3 and 4:

"3. Application of Subsection (b)(3).— For purposes of subsection (b)(3), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).".

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

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

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

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant knowingly engaged in distribution,";

and in subsection (b)(4) by inserting "(A)" before "sadistic or masochistic", and by inserting after "violence" the following: "; or (B) sexual abuse or exploitation of an infant or toddler".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting at the end the following: "For additional statutory provision(s), see Appendix A (Statutory Index).".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 1 by striking the fourth undesignated paragraph as follows:

" 'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.",

and inserting the following:

" 'The defendant distributed in exchange for any valuable consideration' means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.";

by redesignating Notes 2 through 7 as Notes 3, 5, 6, 7, 8, and 9, respectively;

by inserting after Note 1 the following new Note 2:

"2. Application of Subsection (b)(3)(F).— For purposes of subsection (b)(3)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.";

in Note 3 (as so redesignated) by inserting "(A)" after "(b)(4)" both places such term appears;

and by inserting after Note 3 (as so redesignated) the following new Note 4:

"4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).".

Section 2G3.1 is amended in subsection (b)(1) by striking "If the offense involved";

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

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

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant knowingly engaged in distribution,".

The Commentary to §2G3.1 captioned "Application Notes" is amended in Note 1 by striking the fourth undesignated paragraph as follows:

"'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration.",

and inserting the following:

"'The defendant distributed in exchange for any valuable consideration' means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.";

by redesignating Notes 2 and 3 as Notes 3 and 4, respectively;

and by inserting after Note 1 the following new Note 2:

"2. Application of Subsection (b)(1)(F).— For purposes of subsection (b)(1)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.".

Reason for Amendment: This amendment addresses circuit conflicts and application issues related to the child pornography guidelines. One issue generally arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues frequently arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, "Report to the Congress: Federal Child Pornography Offenses," at 33–35 (2012).

Offenses Involving Infants and Toddlers

First, the amendment addresses differences among the circuits when cases involve infant and toddler victims. The production guideline at §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in

Production) provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. See §2G2.1(b)(1)(A)–(B). The non-production guideline at §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

A circuit conflict has arisen as to whether a defendant who receives an age enhancement under §§2G2.1 and 2G2.2 may also receive a vulnerable victim adjustment at §3A1.1 (Hate Crime Motivation or Vulnerable Victim) when the victim is extremely young and vulnerable, such as an infant or toddler. Section 3A1.1(b)(1) provides for a 2-level increase if the defendant knew or should have known that a victim was a "vulnerable victim," which is defined in the accompanying commentary as a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." See §3A1.1, comment. (n.2). The commentary also provides that the vulnerable victim adjustment does not apply if the factor that makes the victim a "vulnerable victim," such as age, is incorporated in the offense guidelines, "unless the victim was unusually vulnerable for reasons unrelated to age." Id.

The Fifth and Ninth Circuits have held that it is permissible to apply both enhancements in cases involving infant or toddler victims because their level of vulnerability is not fully incorporated in the offense guidelines. See United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). These circuits have reasoned that although the victim's small physical size and extreme vulnerability tend to correlate with age, such characteristics are not the same as compared to most children under 12 years. Jenkins, 712 F.3d at 214; Wright, 373 F.3d at 942–43. The Fourth Circuit, by contrast, has held that the age enhancement and vulnerable victim adjustment may not be simultaneously applied because the child pornography guidelines fully address age-related factors. See United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The Fourth Circuit reasoned that cognitive development or psychological susceptibility necessarily is related to age. Id.

The amendment resolves the circuit conflict by explicitly accounting for infant and toddler victims in the child pornography guidelines. Specifically, the amendment revises §§2G2.1 and 2G2.2 by adding a new basis for application of the "sadistic or masochistic" enhancement when the offense involves infants or toddlers. The amendment amends §2G2.1(b)(4) to provide for a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler," and amends §2G2.2(b)(4) to provide a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler." The accompanying

application note to each guideline provides that if subsection (b)(4)(B) applies, do not apply the vulnerable victim adjustment in Chapter Three.

The amendment reflects the Commission's view, based on testimony and public comment, that child pornography offenses involving infants and toddlers warrant an enhancement. Because application of the vulnerable victim adjustment necessarily relies on a fact-specific inquiry, the Commission determined that expanding the "sadistic or masochistic" enhancement (§§2G2.1(b)(4) and 2G2.2(b)(4)) to include infant and toddler victims would promote more consistent application of the child pornography guidelines and reduce unwarranted sentencing disparities. In making its determination, the Commission was informed by case law indicating that most circuits have found depictions of the sexual abuse or exploitation of infants or toddlers involving penetration or pain portray sadistic conduct. See, e.g., United States v. Hoey, 508 F.3d 687, 691 (1st Cir. 2007) ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' . . . ."); United States v. Delmarle, 99 F.3d 80, 83 (2d Cir. 1996) ("[S]ubjection of a young child to a sexual act that would have to be painful is excessively cruel and hence is sadistic . . . ."); United States v. Maurer, 639 F.3d 72, 79 (3d Cir. 2011) ("[W]e join other circuits in holding that the application of §2G2.2(b)(4) is appropriate where an image depicts sexual activity involving a prepubescent minor that would have caused pain to the minor."); United States v. Burgess, 684 F.3d 445, 454 (4th

Cir. 2012) (image depicting vaginal penetration of five-year-old girl by adult male, which would "necessarily cause physical pain to the victim," qualified for sentencing enhancement under §2G2.2(b)); United States v. Lyckman, 235 F.3d 234, 238–39 (5th Cir. 2000) (agreeing with the Second, Seventh, and Eleventh Circuits that application of subsection (b)(4) is warranted when the image depicts "the physical penetration of a young child by an adult male."); United States v. Groenendal, 557 F.3d 419, 424–26 (6th Cir. 2009) (penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies application of §2G2.2(b)(4)); United States v. Meyers, 355 F.3d 1040, 1043 (7th Cir. 2004) (finding vaginal intercourse between a prepubescent girl and an adult male sadistic); United States v. Belflower, 390 F.3d 560, 562 (8th Cir. 2004) (images involving the anal penetration of minor boy or girl adult male are per se sadistic or violent within the meaning of subsection (b)(4)); United States v. Henderson, 649 F.3d 995 (9th Cir. 2010) (vaginal penetration of prepubescent minor qualifies for (b)(4) enhancement); United States v. Kimler, 335 F.3d 1132, 1143 (10th Cir. 2003) (finding no expert testimony necessary for a sentence enhancement [(b)(4)] when the images depicted penetration of prepubescent children by adults); United States v. Bender, 290 F.3d 1279, 1286 (11th Cir. 2002) (photograph was sadistic within the meaning of subsection (b)(4) when it depicts the "subjugation of a young child to a sexual act that would have to be painful"). The Commission intends the new enhancement to apply to any sexual images of an infant or toddler.

The Two and Five Level Distribution Enhancements

Next, the amendment addresses differences among the circuits involving application of the tiered distribution enhancements in §2G2.2. Section 2G2.2(b)(3) provides for an increase for distribution of child pornographic material ranging from 2 to 7 levels depending on certain factors. See §2G2.2(b)(3)(A)–(F). The circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for "generic" distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks.

Peer-to-Peer File-Sharing Programs

The Commission's 2012 report to Congress discussed the use of file-sharing programs, such as Peer-to-Peer ("P2P"), in the context of cases involving distribution of child pornography. See 2012 Report at 33–35, 48–62. Specifically, P2P is a software application that enables computer users to share files easily over the Internet. These applications do not require a central server or use of email. Rather, the file-sharing application allows two or more users to essentially have access each other's computers and to directly swap files from their computers. Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can "opt in" to share files, and the software will automatically

scan the user's computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can "opt out" of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing. Once the user has downloaded and set up the file-sharing software, the user can begin searching for files shared on the connected network using search keywords in the same way one regularly uses a search engine such as Google. Users may choose to "opt in" for a variety of reasons, including, for example, to obtain faster download speeds, to have access to a greater range of material, or because the particular site mandates sharing.

The 2-Level Distribution Enhancement

The circuits have reached different conclusions regarding whether application of the 2-level distribution enhancement at §2G2.2(b)(3)(F) requires a mental state (mens rea), particularly in cases involving use of a file-sharing program or network. The Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); United States v.

Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard). The Eighth Circuit has held that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent "concrete evidence" of ignorance. See United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has held that there is a "presumption" that "users of file-sharing software understand others can access their files." United States v. Conner, 521 Fed. App'x 493, 499 (6th Cir. 2013); see also United States v. Abbring, 788 F.3d 565, 567 (6th Cir. 2015) ("the whole point of a file-sharing program is to share, sharing creates a transfer, and transferring equals distribution").

The amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level distribution enhancement applies if "the defendant knowingly engaged in distribution." Based on testimony, public comment, and data analysis, the Commission determined that the 2-level distribution enhancement is appropriate only in cases in which the defendant knowingly engaged in distribution. An accompanying application note clarifies that: "For purposes of subsection (b)(3)(F), the defendant 'knowingly engaged in distribution' if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute." Similar changes are made to the 2-level distribution enhancement at §2G2.1(b)(3) and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting

Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which contains a similarly tiered distribution enhancement.

The 5-Level Distribution Enhancement

Finally, the amendment responds to differences among the circuits in applying the 5-level enhancement for distribution not for pecuniary gain at §2G2.2(b)(3)(B). While courts generally agree that mere use of a file-sharing program or network, without more, is insufficient for application of the 5-level distribution enhancement, the circuits have taken distinct approaches with respect to the circumstances under which the 5-level rather than the 2-level enhancement is appropriate in such circumstances. The Fourth Circuit has held that the 5-level distribution enhancement applies when the defendant (1) "knowingly made child pornography in his possession available to others by some means"; and (2) did so "for the specific purpose of obtaining something of valuable consideration, such as more pornography." United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013). In contrast, while holding that the 5-level enhancement applies when the defendant knew he was distributing child pornographic material in exchange for a thing of value, the Fifth Circuit has indicated that when the defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015).

The amendment revises §2G2.2(b)(3)(B) and commentary to clarify that the 5-level enhancement applies "if the defendant distributed in exchange for any valuable consideration." The amendment further explains in the accompanying application note that this means "the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child." The amendment makes parallel changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

As with the 2-level distribution enhancement, the amendment resolves differences among the circuits in applying the 5-level distribution enhancement by clarifying the mental state required for distribution of child pornographic material for non-pecuniary gain, particularly when the case involves a file-sharing program or network. The Commission determined that the amendment is an appropriate way to account for the higher level of culpability when the defendant had the specific purpose of distributing child pornographic material to another person in exchange for valuable consideration.

4. Amendment: Section 2L1.1 is amended in subsection (b)(4) by striking the following:

"If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.",

and inserting the following:

"If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent, adult relative, or legal guardian, increase by 4 levels.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by striking the third undesignated paragraph as follows:

"'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).",

and inserting the following:

"'Aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.";

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

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

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

by renumbering Notes 2 through 6 according to the following table:

Before Amendment	After Amendment
4	2
5	3
6	5
2	6
3	7

and by rearranging those Notes, as so renumbered, to place them in proper order;

and by inserting after Note 3 (as so renumbered) the following new Note 4:

"4. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(L) of §1B1.1 (Application

Instructions), 'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.".

Section 2L1.2 is amended by striking subsections (a) and (b) as follows:

" (a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter

Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.",

and inserting the following:

" (a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.".

The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by striking "8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326" and inserting "8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326".

The Commentary to §2L1.2 captioned "Application Notes" is amended by striking Notes 1 through 7 as follows:

"1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) ‘Alien smuggling offense’ has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) ‘Child pornography offense’ means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) ‘Crime of violence’ means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) ‘Drug trafficking offense’ means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) ‘Firearms offense’ means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) 'Human trafficking offense' means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

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

the revocation occurred before the defendant was deported or unlawfully remained in the United States.

(viii) 'Terrorism offense' means any offense involving, or intending to promote, a 'Federal crime of terrorism', as that term is defined in 18 U.S.C. § 2332b(g)(5).

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

2. Definition of 'Felony'.—For purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration

and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).

4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

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

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

5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.";

by redesignating Notes 8 and 9 as Notes 6 and 7, respectively, and inserting before Note 6 (as so redesignated) the following new Notes 1, 2, 3, 4, and 5:

"1. In General.—

(A) 'Ordered Deported or Ordered Removed from the United States for the First Time'.—For purposes of this guideline, a defendant shall be considered 'ordered deported or ordered removed from the United States' if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. 'For the first time' refers to the first time the defendant was ever the subject of such an order.

(B) Offenses Committed Prior to Age Eighteen.—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

2. Definitions.—For purposes of this guideline:

'Crime of violence' means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a

firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. 'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

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

'Illegal reentry offense' means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

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

'Sentence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. Criminal History Points.—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.

5. Departure Based on Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 2(B) by striking "an aggravated felony" and inserting "a prior conviction".

Reason for Amendment: This multi-part amendment is a result of the Commission's multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders. Based on this data, legal analysis, and public comment, the Commission identified a number of specific areas where changes were appropriate. The first part of this amendment makes several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revises the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States).

Alien Smuggling

The first part of the amendment amends the alien smuggling guideline (§2L1.1). A 2014 letter from the Deputy Attorney General asked the Commission to examine several aspects of this guideline in light of changing circumstances surrounding the commission of these offenses. See Letter from James M. Cole to Hon. Patti B. Saris (Oct. 9, 2014). In response, the Commission undertook a data analysis that, in conjunction with additional public comment, suggested two primary areas for change in the guideline.

Unaccompanied Minors

The specific offense characteristic at §2L1.1(b)(4) provides an enhancement "[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent." The amendment makes several changes to this enhancement.

First, the amendment increases the enhancement at subsection (b)(4) from 2 levels to 4 levels, and broadens its scope to offense-based rather than defendant-based. These two changes were made in light of data, testimony, and public comment indicating that: (1) in recent years there has been a significant increase in the number of unaccompanied minors smuggled into the United States; (2) unaccompanied minors being smuggled are often exposed to deprivation and physical danger (including sexual abuse); (3) the smuggling of unaccompanied minors places a particularly severe burden on public resources when they are taken into custody; and (4) alien smuggling is typically conducted by multimember commercial enterprises that accept smuggling victims without regard to their age, such that an individual defendant is likely to be aware of the risk that unaccompanied minors are being smuggled as part of the offense.

Second, the amendment narrows the scope of the enhancement at subsection (b)(4) by revising the meaning of an "unaccompanied" minor. Prior to the amendment, the enhancement did not apply if the minor was accompanied by the minor's parent or grandparent. The amendment narrows the class of offenders who would receive the enhancement by specifying that the enhancement does not apply if the minor was

accompanied by the minor's "parent, adult relative, or legal guardian." This change reflects the view that minors who are accompanied by a parent or another responsible adult relative or legal guardian ordinarily are not subject to the same level of risk as minors unaccompanied by such adults.

Third, the amendment expands the definition of "minor" in the guideline, as it relates to the enhancement in subsection (b)(4), to include an individual under the age of 18. The guideline currently defines "minor" to include only individuals under 16 years of age. The Commission determined that an expanded definition of minor that includes 16- and 17-year-olds is consistent with other aspects of federal immigration law, including the statute assigning responsibility for unaccompanied minors under age 18 to the Department of Health and Human Services. See 6 U.S.C. § 279(g)(2)(B). The Commission also believed that it was appropriate to conform the definition of minor in the alien smuggling guideline to the definition of minor in §3B1.4 (Using a Minor to Commit a Crime).

Clarification of the Enhancement Applicable to Sexual Abuse of Aliens

The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused. Specifically, it ensures that a "serious bodily injury" enhancement of 4 levels will apply in such a case. It achieves this by amending the commentary to §2L1.1 to clarify that the term "serious bodily injury" included in subsection (b)(7)(B) has the

meaning given that term in the commentary to §1B1.1 (Application Instructions). That instruction states that "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

The Commission's data indicated that the (b)(7)(B) enhancement has not been applied in some cases in which a smuggled alien had been sexually assaulted. The Commission determined that this clarification is warranted to ensure that the 4-level enhancement is consistently applied when the offense involves the sexual abuse of an alien.

Illegal Reentry

The second part of the amendment is the product of the Commission's multi-year study of the illegal reentry guideline. In considering this amendment, the Commission was informed by the Commission's 2015 report, Illegal Reentry Offenses; its previous consideration of the "categorical approach" in the context of the definition of "crimes of violence"; and extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.

The amendment responds to three primary concerns. First, the Commission has received significant comment over several years from courts and stakeholders that the "categorical

approach" used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty. The existing guideline's single specific offense characteristic provides for enhancements of between 4 levels and 16 levels, based on the nature of a defendant's most serious conviction that occurred before the defendant was "deported" or "unlawfully remained in the United States." Determining whether a predicate conviction qualifies for a particular level of enhancement requires application of the categorical approach to the penal statute underlying the prior conviction. See generally United States v. Taylor, 495 U.S. 575 (1990) (establishing the categorical approach). Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of "sentence imposed" is the same definition that appears in Chapter Four of the Guidelines Manual.

Second, comment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.

Third, the Commission's research identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. The Commission's 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations.

The amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant's first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant's first order of deportation. It also responds to concerns that prior convictions for illegal reentry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.

The manner in which the amendment responds to each of these concerns is discussed in more detail below.

Accounting for Prior Illegal Reentry Offenses

The amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of 4 levels. "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under § 1325(a). A defendant who has two or more misdemeanor illegal entry convictions under 8 U.S.C. § 1325(a) will receive an increase of 2 levels.

The Commission's data indicates that the extent of a defendant's history of illegal reentry convictions is associated with the number of his or her prior deportations or removals from the United States, with the average illegal reentry defendant having been removed from the United States 3.2 times. Illegal Reentry Offenses, at 14. Over one-third (38.1%) of the defendants were previously deported after an illegal entry or reentry conviction. Id. at 15. The Commission determined that a defendant's demonstrated history of violating §§ 1325(a) and 1326 is appropriately accounted for in a separate enhancement. Because defendants with second or successive § 1325(a) convictions (whether they were charged as felonies or misdemeanors) have entered illegally more than once, the Commission determined that this conduct is appropriately accounted for under this enhancement.

For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the 4-level enhancement in the new subsection (b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under the existing subsection (b)(1)(D). The Commission concluded that an enhancement is also appropriate for defendants previously convicted of two or more misdemeanor offenses under § 1325(a).

Accounting for Other Prior Convictions

Subsections (b)(2) and (b)(3) of the amended guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the Guidelines Manual determines a defendant's criminal history score based on his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection (b)(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any, that the defendant sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event).

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

- 10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more;
- 8 levels for a prior felony conviction that received a sentence of two years or more;
- 6 levels for a prior felony conviction that received a sentence exceeding one year and one month;
- 4 levels for any other prior felony conviction
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.

The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.

The Commission determined that the new specific offense characteristics more appropriately provide for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants' prior convictions. The (b)(2) specific offense characteristic reflects the same general rationale as the illegal reentry statute's increased statutory maximum penalties for offenders with certain types of serious pre-deportation predicate offenses (in particular, "aggravated felonies" and "felonies"). See 8 U.S.C. § 1326(b)(1) and (b)(2). The Commission's data analysis of offenders' prior felony convictions showed that the more serious types of

offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data.

The (b)(3) specific offense characteristic focuses on post-reentry criminal conduct which, if it occurred after a defendant's most recent illegal reentry, would receive no enhancement under the existing guideline. The Commission concluded that a defendant who sustains criminal convictions occurring before and after the defendant's first order of deportation warrants separate sentencing enhancement.

The Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court's assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in the Chapter Four of the Guidelines Manual. In amending the guideline, the Commission also took into consideration public testimony and comment indicating that tiered enhancements based on the length of the sentence imposed, rather than the classification of a prior offense under the categorical approach, would greatly simplify application of the guideline. With respect an offender's prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.

The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses. See Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 344, 110 Stat. 3009.

The amendment also addresses another frequent criticism of the existing guideline – that its use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement of up to 16 levels is often disproportionate to a defendant's culpability or recidivism risk. The Commission's data shows an unusually high rate of downward variances and departures from the guideline for such defendants. For example, the Commission's report found that less than one-third of defendants who qualify for a 16-level enhancement have received a within-range sentence, while 92.7 percent of defendants who currently qualify for no enhancement receive a within-range sentence. Illegal Reentry Report, at 11.

The lengths of the terms of imprisonment triggering each level of enhancement were set based on Commission data showing differing median sentence lengths for a variety of predicate offense categories. For example, the Commission's data indicated that sentences for more serious predicate offenses, such as drug-trafficking and felony assault, exceeded the two- and five-year benchmarks far more frequently than did sentences for less serious felony offenses, such as drug possession and theft. With respect to drug-

trafficking offenses, the Commission found that 34.6 percent of such offenses received sentences of between two and five years, and 17.0 percent of such offenses received sentences of five years or more. With respect to felony assault offenses, the Commission found that 42.1 percent of such offenses received sentences of between two and five years, and 9.0 percent of such offenses received sentences of five years or more. With respect to felony drug possession offenses, 67.7 percent of such offenses received sentences of 13 months or less, while only 21.3 percent received sentences between two years and five years and only 3.0 percent received sentences of five years or more. With respect to felony theft offenses, 57.1 percent of such offenses received sentences of 13 months or less, while only 17.4 percent received sentences between two years and five years and only 2.0 percent received sentences of five years or more.

The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation. The Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.

Departure Provision

The amendment adds a new departure provision, at Application Note 5, applicable to situations where "an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense." This departure accounts for three situations in which an enhancement based on the length of a prior imposed sentence appears either inadequate or excessive in light of the defendant's underlying conduct. For example, if a prior serious conviction (e.g., murder) is not accounted for because it is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted. Conversely, if the time actually served by the defendant for the prior offense was substantially less than the length of the original sentence imposed, a downward departure may be warranted.

Excluding Stale Convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points. The Commission's research has found that a defendant's criminal history score is a strong indicator of recidivism risk, and it is therefore appropriate to employ the criminal history rules in this context. See U.S. Sent. Comm'n, Recidivism Among Federal Offenders: A Comprehensive Overview (2016). The limitation to offenses receiving criminal history

points also promotes ease of application and uniformity throughout the guidelines. See 28 U.S.C. § 994(c)(2) (directing the Commission to establish categories of offenses based on appropriate mitigating and aggravating factors); cf. USSG §2K2.1, comment. (n.10) (imposing enhancements based on a defendant's predicate convictions only if they received criminal history points).

Application of the "Single Sentence Rule"

The amendment also contains an application note addressing the situation when a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).

Because the amendment is intended to make a distinction between illegal reentry offenses and other types of offenses, the Commission concluded that it was appropriate to ensure that such convictions are separately accounted for under the applicable specific offense characteristics, even if they might otherwise constitute a "single sentence" under §4A1.2(a)(2). For example, if the single sentence rule applied, a defendant who was sentenced simultaneously for an illegal reentry and a federal felony drug-trafficking offense might receive an enhancement of only 4 levels under subsection (b)(1), even though, if the two sentences had been imposed separately, the drug offense would result in an additional enhancement of between 4 and 10 levels under subsection (b)(3).

Definition of "Crime of Violence"

The amendment continues to use the term "crime of violence," although now solely in reference to the 2-level enhancement for three or more misdemeanor convictions at subsections (b)(2)(E) and (b)(3)(E). The amendment conforms the definition of "crime of violence" in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016. See Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 FR 4741 (Jan. 27, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the Guidelines Manual.

5. Amendment: Section 5B1.3 is amended in the heading by striking "Conditions—" and inserting "Conditions";

in subsections (a)(1) through (a)(8) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: ". If there is a court-established payment schedule for making restitution or

paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule";

by striking subsection (a)(9) as follows:

"(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and

(iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;",

and inserting the following:

"(9) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3563(a)).";

and in subsection (a)(10) by striking "the defendant" and inserting "The defendant";

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

"Discretionary Conditions

The court";

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

" 'Standard' Conditions (Policy Statement)

The";

and by striking paragraphs (1) through (14) as follows:

"(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.",

and inserting the following:

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

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

to the probation officer, and the defendant shall report to the probation officer as instructed.

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

(4) The defendant shall answer truthfully the questions asked by the probation officer.

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

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

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

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

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was

modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

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

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

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

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

" <u>'Special' Conditions</u> (Policy Statement)

The";

by striking paragraph (1) as follows:

"(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.",

and inserting the following:

"(1) Support of Dependents

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

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

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

The Commentary to §5B1.3 captioned "Application Note" is amended by striking Note 1 as follows:

"1. Application of Subsection (a)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)",

and inserting the following:

"1. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to 'answer truthfully' the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege

against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.".

Section 5D1.3 is amended is amended in the heading by striking "Conditions—" and inserting "Conditions";

in subsections (a)(1) through (a)(6) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: ". If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule";

by striking subsection (a)(7) as follows:

"(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of

residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;",

and inserting the following:

"(7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3583(d)).";

and in subsection (a)(8) by striking "the defendant" and inserting "The defendant";

in subsection (b) by striking “The court” and inserting the following:

“Discretionary Conditions

The court”;

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

“ ‘Standard’ Conditions (Policy Statement)

The”;

and by striking paragraphs (1) through (15) as follows:

“(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

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

and inserting the following:

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

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

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

(4) The defendant shall answer truthfully the questions asked by the probation officer.

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

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

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the

defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

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

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

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

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

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

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

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

"'Special' Conditions (Policy Statement)

The";

by striking paragraph (1) as follows:

"(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course

of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.”,

and inserting the following:

“(1) Support of Dependents

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

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

in paragraph (4) by striking “Program Participation” in the heading; by inserting “(A)” before “a condition requiring”; and by inserting before the period at the end the following: “; and (B) a condition specifying that the defendant shall not use or possess alcohol”;

and by inserting at the end the following new paragraph (8):

"(8) Unpaid Restitution, Fines, or Special Assessments

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.".

The Commentary to §5D1.3 captioned "Application Note" is amended by striking Note 1 as follows:

"1. Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)",

and inserting the following:

"1. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to 'answer truthfully' the questions asked by the probation

officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.".

Reason for Amendment: This amendment is a result of the Commission's multi-year review of sentencing practices relating to federal probation and supervised release. The amendment makes several changes to the guidelines and policy statements related to conditions of probation, §5B1.3 (Conditions of Probation), and supervised release, §5D1.3 (Conditions of Supervised Release).

When imposing a sentence of probation or a sentence of imprisonment that includes a period of supervised release, the court is required to impose certain conditions of supervision listed by statute. 18 U.S.C. §§ 3563(a) and 3583(d). Congress has also empowered courts to impose additional conditions of probation and supervised release that are reasonably related to statutory sentencing factors contained in 18 U.S.C. § 3553(a), so long as those conditions "involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in 3553(a)(2)." 18 U.S.C. § 3563(b); see also 18 U.S.C. § 3583(d). Additional conditions of supervised release must also be consistent with any pertinent policy statements issued by the Commission. See 18 U.S.C. § 3583(d)(3).

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release, see 28 U.S.C. § 994(a)(2)(B), and has implemented this directive in §§5B1.3 and 5D1.3. The provisions follow a parallel structure, first setting forth those conditions of supervision that are required by statute in their respective subsections (a) and (b), and then providing guidance on discretionary conditions, which are categorized as "standard" conditions, "special" conditions, and "additional" special conditions, in subsections (c), (d), and (e), respectively.

In a number of cases, defendants have raised objections (with varied degrees of success) to the conditions of supervised release and probation imposed upon them at the time of sentencing. See, e.g., United States v. Munoz, 812 F.3d 809 (10th Cir. 2016); United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014); United States v. Bahr, 730 F.3d 963 (9th Cir. 2013); United States v. Maloney, 513 F.3d 350, 357–59 (3d Cir. 2008); United States v. Saechao, 418 F.3d 1073, 1081 (9th Cir. 2005). Challenges have been made on the basis that certain conditions are vaguely worded, pose constitutional concerns, or have been categorized as "standard" conditions in a manner that has led to their improper imposition upon particular offenders.

The amendment responds to many of the concerns raised in these challenges by revising, clarifying, and rearranging the conditions contained in §§5B1.3 and 5D1.3 in order to

make them easier for defendants to understand and probation officers to enforce. Many of the challenged conditions are those laid out in the Judgment in a Criminal Case Form, AO245B, which are nearly identical to the conditions in §§5B1.3 and 5D1.3.

The amendment was supported by the Criminal Law Committee (CLC) of the Judicial Conference of the United States. The CLC has long taken an active and ongoing role in developing, monitoring and recommending revisions to the condition of supervision, which represent the core supervision practices required by the federal supervision model. The changes in the amendment are consistent with proposed changes to the national judgment form recently endorsed by the CLC and Administrative Office of the U.S. Courts, after an exhaustive review of those conditions aided by probation officers from throughout the country.

As part of this broader revision, the conditions in §§5B1.3 and 5D1.3 have been renumbered. Where the specific conditions discussed below are identified by a guidelines provision reference, that numeration is in reference to their pre-amendment order.

Court-Established Payment Schedules

First, the amendment amends §§5B1.3(a)(6) and 5D1.3(a)(6) to set forth as a "mandatory" condition that if there is a court-established payment schedule for making

restitution or paying a special assessment, the defendant shall adhere to the schedule. Previously, those conditions were classified as "standard." As a conforming change, similar language at §§5B1.3(c)(14) and 5D1.3(c)(14) is deleted. This change is made to more closely adhere to the requirements of 18 U.S.C. § 3572(d).

Sex Offender Registration and Notification Act

Second, the amendment amends §§5B1.3(a)(9) and 5D1.3(a)(7) to clarify that, if the defendant is required to register under the Sex Offender Registration and Notification Act (SORNA), the defendant shall comply with the requirements of the SORNA. Language in the guideline provisions and the accompanying commentary indicating that the Act applies in some states and not in others is correspondingly deleted. After receiving testimony from the Department of Justice suggesting the current condition could be misread, the Commission determined that the condition's language should be simplified and updated to unambiguously reflect that federal sex offender registration requirements apply in all states.

Reporting to the Probation Officer

Third, the amendment divides the initial and regular reporting requirements, §§5B1.3(a)(2) and 5D1.3(a)(2), into two more definite provisions. The amendment also amends the conditions to require that the defendant report to the probation office in the

jurisdiction where he or she is authorized to reside, within 72 hours of release unless otherwise directed, and that the defendant must thereafter report to the probation officer as instructed by the court or the probation officer.

Leaving the Jurisdiction

Fourth, the amendment revises §§5B1.3(c)(1) and 5D1.3(c)(1), which prohibit defendants from leaving the judicial district without permission, for clarity and to insert a mental state (mens rea) requirement that a defendant must not leave the district "knowingly." Testimony received by the Commission has observed that a rule prohibiting a defendant from leaving the district without permission of the court or probation officer may be unfairly applied to a defendant who unknowingly moves between districts. The Commission concluded that this change appropriately responds to that concern.

Answering Truthfully; Following Instructions

Fifth, the amendment divides §§5B1.3(c)(3) and 5D1.3(c)(3) into separate conditions which individually require the defendant to "answer truthfully" the questions of the probation officer and to follow the instructions of the probation officer "related to the conditions of supervision."

The amendment also adds commentary to clarify that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of the "answer truthfully" condition. The Commission determined that this approach adequately addresses Fifth Amendment concerns raised by some courts, see, e.g., United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015) and United States v. Saechao, 418 F.3d 1073, 1081 (9th Cir. 2005), while preserving the probation officer's ability to adequately supervise the defendant.

Residence and Employment

Sixth, the amendment clarifies the standard conditions relating to a defendant's residence, §§5B1.3(c)(6) and 5D1.3(c)(6), and the requirement that the defendant work full time, §§5B1.3(c)(5) and 5D1.3(c)(5). The revised conditions spell out in plain language that the defendant must live at a place "approved by the probation officer," and that the defendant must work full time (at least 30 hours per week) at a lawful type of employment — or seek to do so — unless excused by the probation officer. The defendant must also notify the probation officer of changes in residence or employment at least 10 days in advance of the change or, if this is not possible, within 72 hours of becoming aware of a change. The Commission determined that these changes are appropriate to ensure that defendants are made aware of what will be required of them while under supervision. These requirements and associated benchmarks (e.g., 30 hours

per week) are supported by testimony from the CLC as appropriate to meet supervision needs.

Visits by Probation Officer

Seventh, the amendment amends the conditions requiring the defendant to permit the probation officer to visit the defendant at any time, at home or elsewhere, and to permit the probation officer to confiscate items prohibited by the defendant's terms of release, §§5B1.3(c)(10) and 5D1.3(c)(10). The revision provides plain language notice to defendants and guidance to probation officers.

The Seventh Circuit has criticized this condition as intrusive and not necessarily connected to the offense of conviction, see United States v. Kappes, 782 F.3d 828, 850–51 (7th Cir. 2015) and United States v. Thompson, 777 F.3d 368, 379–80 (7th Cir. 2015), but the Commission has determined that, in some circumstance, adequate supervision of defendants may require probation officers to have the flexibility to visit defendants at off-hours, at their workplaces, and without advance notice to the supervisee. For example, some supervisees work overnight shifts and, in order to verify that they are in compliance with the condition of supervision requiring employment, a probation officer might have to visit them at their workplace very late in the evening.

Association with Criminals

Eighth, the amendment revises and clarifies the conditions mandating that the defendant not associate with persons engaged in criminal activity or persons convicted of a felony unless granted permission to do so by the probation officer, §§5B1.3(c)(9) and 5D1.3(c)(9). As amended, the condition requires that the defendant must not "communicate or interact with" any person whom the defendant "knows" to be engaged in "criminal activity" and prohibits the defendant from communicating or interacting with those whom the defendant "knows" to have been "convicted of a felony" without advance permission of the probation officer.

These revisions address concerns expressed by the Seventh Circuit that the condition is vague and lacks a mens rea requirement. See United States v. Kappes, 782 F.3d 828, 848–49 (7th Cir. 2015); see also United States v. King, 608 F.3d 1122, 1128 (9th Cir. 2010) (upholding the condition by interpreting it to have an implicit mens rea requirement). The revision adds an express mental state requirement and replaces the term "associate" with more definite language.

Arrested or Questioned by a Law Enforcement Officer

Ninth, the amendment makes clerical changes to the "standard" conditions requiring that the defendant notify the probation officer after being arrested or questioned by a law enforcement officer. See §§5B1.3(11) and 5D1.3(11).

Firearms and Dangerous Weapons

Tenth, the amendment reclassifies the "special" conditions which require that the defendant not possess a firearm or other dangerous weapon, §§5B1.3(d)(1) and 5D1.3(d)(1), as "standard" conditions and clarifies those conditions. As amended, the defendant must not "own, possess, or have access to" a firearm, ammunition, destructive device, or dangerous weapon. After reviewing the testimony from the CLC and others, the Commission determined that reclassifying this condition as a "standard" condition will promote public safety and reduce safety risks to probation officers. The amendment also defines "dangerous weapon" as "anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers."

Acting as an Informant

Eleventh, the amendment rewords the "standard" condition at §§5B1.3(c)(12) and 5D1.3(c)(12) requiring that the defendant not enter into an agreement to act as an informant without permission of the court. The condition is revised to improve clarity.

Duty to Notify of Risks Posed by the Defendant

Twelfth, the amendment revises the conditions requiring the defendant, at the direction of the probation officer, to notify others of risks the defendant may pose based on his or her personal history or characteristics, §§5B1.3(c)(13) and 5D1.3(c)(13). As amended, the condition provides that, if the probation officer determines that the defendant poses a risk to another person, the probation officer may require the defendant to tell the person about the risk and permits the probation officer to confirm that the defendant has done so. The Commission determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased. See United States v. Thompson, 777 F.3d 368, 379 (7th Cir. 2015).

Support of Dependents

Thirteenth, the amendment clarifies and moves the dependent support requirement from the list of "standard" conditions, §§5B1.3(c)(4) and 5D1.3(c)(4), to the list of "special" conditions in subsection (d). As amended, the conditions require that, if the defendant has dependents, he or she must support those dependents; and if the defendant is ordered to make child support payments, he or she must make the payments and comply with the other terms of the order.

These changes address concerns expressed by the Seventh Circuit that the current condition — which requires a defendant to "support his or her dependents and meet other family responsibilities" — is vague and does apply to defendants who have no

dependents. See United States v. Kappes, 782 F.3d 828, 849 (7th Cir. 2015) and United States v. Thompson, 777 F.3d 368, 379–80 (7th Cir. 2015). The amendment uses plainer language to provide better notice to the defendant about what is required. The Commission determined that this condition need not apply to all defendants but only to those with dependents.

Alcohol; Controlled Substances; Frequenting Places Where Controlled Substances are Sold

Fourteenth, the standard conditions requiring that the defendant refrain from excessive use of alcohol, not possess or distribute controlled substances or paraphernalia, and not frequent places where controlled substances are illegally sold, §§5B1.3(c)(7)–(8) and 5D1.3(c)(7)–(8), have been deleted. The Commission determined that these conditions are either best dealt with as special conditions or are redundant with other conditions. Specifically, to account for the supervision needs of defendants with alcohol abuse problems, a new special condition that the defendant "must not use or possess alcohol" has been added. The requirement that the defendant abstain from the illegal use of controlled substances is covered by the "mandatory" conditions prohibiting commission of additional crimes and requiring substance abuse testing. Finally, the prohibition on frequenting places where controlled substances are illegally sold is encompassed by the "standard" condition that defendants not associate with those they know to be criminals or who are engaged in criminal activity.

Material Change in Economic Circumstances (§5D1.3 Only)

Finally, with respect to supervised release only, the "standard" condition requiring that the defendant notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments, §5D1.3(c)(15), is reclassified as a "special" condition in subsection (d). Testimony from the CLC and others indicated that defendants on supervised release often have no outstanding restitution, fines, or special assessments remaining at the time of their release, rendering the condition superfluous in those cases. No change has been made to the parallel "mandatory" condition of probation at §5B1.3(a)(7).

6. Amendment: Section 2K2.1 is amended in subsection (a)(8) by inserting ", or 18 U.S.C. § 1715" before the period at the end.

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

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

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

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking "Because these offenses are no longer a major enforcement priority, no effort" and inserting "No effort".

Section 2T2.1 is amended by striking the Commentary captioned "Background" as follows:

"Background: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).".

Section 2T2.2 is amended by striking the Commentary captioned "Background" as follows:

"Background: Prosecutions of this type are infrequent.".

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

“18 U.S.C. § 1715 2K2.1”;

by inserting after the line referenced to 18 U.S.C. § 2280 the following:

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

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

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

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

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

Reason for Amendment: This amendment responds to recently enacted legislation and miscellaneous guideline application issues.

USA FREEDOM Act

The Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act ("USA FREEDOM Act") of 2015, Pub. L. 114–23 (June 2, 2015), set forth changes to statutes related to maritime navigation and nuclear terrorism and provided new and expanded criminal offenses to implement the United States' obligations under certain provisions of four international conventions. The USA FREEDOM Act also specified that the new crimes constitute "federal crimes of terrorism." See 18 U.S.C. § 2332b(g)(5). The amendment responds to the USA FREEDOM Act by referencing the new offenses in Appendix A (Statutory Index) to various Chapter Two guidelines covering murder and assault, weapons, national security, and environmental offenses.

First, the USA FREEDOM Act enacted 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction). Subsections 2280a(a)(1)(A) and (a)(1)(B)(i) prohibit certain acts against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Subsections 2280a(a)(1)(B)(ii)–(vi) prohibit certain other acts against maritime navigation. Subsection 2280a(a)(1)(C) prohibits transporting another person on board a ship knowing the person has committed a violation under 18 U.S.C. § 2280 (Violence against maritime navigation) or certain subsections of section 2280a, or an offense under a listed counterterrorism treaty. Subsection 2280a(a)(1)(D) prohibits injuring or killing a person

in connection with the commission of certain offenses under section 2280a. Subsection 2280a(a)(1)(E) prohibits attempts and conspiracies under the statute. The penalty for a violation of these subsections is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2280a(a)(2) prohibits threats to commit offenses under subsection 2280a(a)(1)(A), with a penalty of imprisonment of up to five years.

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

Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

Second, the USA FREEDOM Act enacted 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms). Subsection 2281a(a)(1) prohibits certain acts that occur either on a fixed platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The penalty for a violation of subsection 2281a(a)(1) is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2281a(a)(2) prohibits threats to commit offenses under subsection 2281a(a)(1), and the penalty for a violation of subsection 2281a(a)(2) is imprisonment of up to five years.

The new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

Third, the USA FREEDOM Act enacted 18 U.S.C. § 2332i (Acts of nuclear terrorism). Section 2332i prohibits the possession or use of certain radioactive materials or devices with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment, as well as threats to commit any such acts. The penalty for a violation of section 2332i is imprisonment for any term of years or for life.

The new offenses at 18 U.S.C. § 2332i are referenced to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

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

The three new statutes provide a wide range of elements – meaning that the statutes can be violated in a large number of alternative ways. The Commission performed a section-by-section analysis of the elements of the new statutes and identified the Chapter Two offense guidelines that appear most analogous. As a result, the Commission determined that referencing the new statutes in Appendix A (Statutory Index) to a range of guidelines will allow the courts to select the most appropriate guideline in light of the nature of the conviction. For example, a reference to §2K1.4 (Arson; Property Damage by Use of Explosives) is provided to account for when the defendant is convicted under section 2280a(a)(1)(A)(i) for the use of an explosive device on a ship in a manner that causes or is likely to cause death or serious injury. See USSG App. A, Introduction (Where the statute is referenced to more than one guideline section, the court is to "use the guideline most appropriate for the offense conduct charged in the count of which the defendant was

convicted."). The Commission also found it persuasive that other similar statutes are referenced in Appendix A to a similar list of Chapter Two guidelines. Referencing these three new statutes in a manner consistent with the treatment of existing related statutes is reasonable to achieve parity, and will lead to consistent application of the guidelines.

Firearms As Nonmailable Items under 18 U.S.C. § 1715

Section 1715 of title 18 of the United States Code (Firearms as nonmailable; regulations) makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person, and the penalty for a violation of this statute is a term of imprisonment up to two years. Section 1715 is not referenced in Appendix A (Statutory Index). The amendment amends Appendix A to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The amendment also amends §2K2.1 to provide a base offense level of 6 under §2K2.1(a)(8) for convictions under section 1715.

The Commission received public comment suggesting that the lack of specific guidance for section 1715 offenses caused unwarranted sentencing disparity. Commission data provided further support for the need for an amendment to address this issue. Although the data indicated that courts routinely applied §2K2.1 to violations of section 1715, it also evidenced that courts were reaching different results in the base offense level

applied. The Commission was persuaded by the data and public comment that an Appendix A reference and corresponding changes to §2K2.1 would reduce those unwarranted sentencing disparities. The Commission determined that §2K2.1 is the most analogous guideline for these types of firearms offenses. By providing an Appendix A reference for section 1715, the amendment ensures that §2K2.1 will be consistently applied to these offenses. Moreover, the Commission decided that the accompanying changes to §2K2.1 will eliminate the disparate application of the base offense levels in that guideline. The Commission selected the base offense level of 6 for these offenses because similar statutory provisions with similar penalties are referenced to §2K2.1(a)(8). The Commission concluded that referencing section 1715 will promote consistency in application and avoid unwarranted sentencing disparities.

Background Commentary to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax)

The Background Commentary in §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax) states that "[t]he offense is a felony that is infrequently prosecuted." Section 2T1.6 applies to violations of 26 U.S.C. § 7202 (Willful failure to collect or pay over tax) which requires employers to withhold from an employee's paychecks money representing the employee's personal income and Social Security taxes. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. The amendment makes a clerical change to

the Background Commentary to §2T1.6 to delete the statement that section 7202 offenses are infrequently prosecuted. The amendment makes additional clerical changes in the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), and the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses) which has similar language.

The amendment reflects public comment received by the Commission that indicated while the statement in the Background Commentary to §2T1.6 may have been accurate when the commentary was originally written in 1987, the number of prosecutions under section 7202 have since increased. Additionally, the Commission decided that removing language characterizing the frequency of prosecutions for the tax offenses sentenced under §§2T1.6, 2T2.1, and 2T2.2 will remove the perception that the Commission has taken a position regarding the relative frequency of prosecution of such offenses.