

United States Sentencing Commission Public Meeting Minutes
April 15, 2016

Chair Patti B. Saris called the meeting to order at 1:30 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris welcomed the members of the public, both in person and watching via the Commission's livestream broadcast, and thanked the attendees for their continued interest in the Commission's work.

Chair Saris called for a motion to adopt the January 8, 2016, public meeting minutes. Commissioner Pryor made a motion to adopt the minutes, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris recounted that in January the Commission unanimously voted to adopt an amendment related to the definition of "crime of violence" in §4B1.1 (Career Offender) and other federal sentencing guidelines. The effective date for that amendment is August 1, 2016, and the Commission will publish a supplement to the Guidelines Manual that incorporates the new amendment at that time.

Chair Saris stated that the January amendment was not the Commission's final work related to the area of "crimes of violence." She noted that the Commission was working on a Report to Congress on career offenders and other recidivist provisions, which may include recommended statutory changes.

Chair Saris also noted that the Commission was accepting written public comment on proposed revisions to the Commission's Rules of Practice and Procedure. She added that written public comment on the proposed changes should be submitted by June 1, 2016. The proposed changes

can be found at the Commission's website at www.ussc.gov. Instructions on the submission of public comment were on the website as well as a link to sign up for the Commission's Twitter and e-mail alerts.

Chair Saris next highlighted the Commission's recent research projects and publications. She announced the release of the first in a series of publications on the Commission's multi-year recidivism study. The Chair stated that the study was groundbreaking in both its breadth and in its duration, analyzing recidivism in multiple ways, including re-arrest, re-conviction, and/or re-incarceration.

Some of the key findings of the report were:

- Nearly one-half (49.3%) of the federal offenders studied were re-arrested within 8 years of release for either a new crime or for some other violation of the conditions of their probation or release. Almost one-third (31.7%) were re-convicted, and one-quarter were re-incarcerated.
- The guideline's criminal history score remains a very good predictor of future recidivism. Age, offense type and educational level were also associated with future recidivism.
- In addition, with the exception of very short sentences (less than 6 months), the rate of recidivism varied very little by length of prison sentence imposed.

Chair Saris also noted that the Commission recently published its Fiscal Year 2015 Annual Report and Sourcebook of Federal Sentencing Statistics. She observed that one of the most interesting trends was that the federal criminal caseload continued to shrink. In past years, Chair Saris explained, the decreased caseload was largely driven by declining immigration cases, but for fiscal year 2015, the decreases were more evenly distributed across the major offense types.

Chair Saris stated that the Commission's 2016 Annual National Training Seminar will be held in Minneapolis, MN, on September 7th to the 9th. Registration information will be posted on the Commission's website. She noted that last September approximately 1,000 judges, probation officers, and practitioners attended the Commission's Annual National Training Seminar in New Orleans, LA.

Chair Saris called on Ms. Grilli to inform the Commission on possible votes to promulgate proposed amendments to the Guidelines Manual. The Chair noted that four affirmative votes were needed to promulgate an amendment.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, was a multi-part amendment that responds to recently enacted legislation and miscellaneous guideline application issues. Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. No. 114-23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and

nuclear terrorism. Part A responds to the USA FREEDOM Act of 2015 by referencing the new offenses in Appendix A (Statutory Index) to various Chapter Two guidelines and making appropriate clerical changes.

Part B of the proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 1715 (Firearms as nonmailable; regulations) to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and establishes a base offense level of 6 for such offenses.

Part C of the proposed amendment amends the Background Commentary to §2T6.1 (Failing to Collect or Truthfully Account for and Pay Over Tax) and makes corresponding changes to the Introductory Commentary to Chapter Two, Part T, and in the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, was a result of the Commission's work in reviewing 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). First, the proposed amendment revises the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release. It provides four broad categories: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons."

Second, the proposed amendment amends 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.

Third, the proposed amendment adds a new application note encouraging the Director of the Bureau of Prisons (BOP) to file a motion if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons".

Finally, the proposed amendment adds a reference to the Commission's general policy-making authority under 28 U.S.C. § 994(a)(2) to the Background Commentary at §1B1.13.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. Chair called for discussion on the motion.

Commissioner Barkow noted that the Department of Justice had requested the Commission to consider adopting criteria equivalent to the Bureau of Prison's current compassionate release criteria. Additionally, the Department of Justice emphasized that no inmate can be released without first filing a motion for compassionate release with the Bureau of Prison, signifying that it is the gatekeeper for this process.

However, Commissioner Barkow emphasized, Congress did not give the Bureau of Prison exclusive authority over the compassionate release program. Rather, Congress charged the Commission with describing in general policy statements what should be considered extraordinary and compelling reasons for a sentence reduction under 28 U.S.C. § 994(t). Thus, while the Commission takes the Bureau of Prison's views seriously, she stated that the Commission nevertheless has an independent responsibility to set out such criteria.

Commissioner Barkow explained that where the Commission made changes from Bureau of Prison criteria, it did so based on significant evidence. For example, whereas the Bureau of Prison insists that a terminal illness be considered serious only where it is accompanied by a life expectancy of 18 months or less, the Commission's record showed that this did not comport with medical practice, which instead emphasized an end-of-life trajectory. As a result, she continued, the Commission's criteria removed the 18-month requirement and reflected what the Commission learned from research. In this regard, Commissioner Barkow expressed the Commission's appreciation for the testimony of Dr. Brie Williams on this issue.¹ In the proposed amendment, she noted, there were specific examples of the kinds of serious and advanced illnesses with an end-of-life trajectory that are covered, including amyotrophic lateral sclerosis (ALS), end-stage organ disease, and metastatic solid tumor cancer.

Commissioner Barkow stated that the Commission's criteria made clear that compassionate release was available to inmates 65 years old or older, experiencing seriously deteriorating health, and who had received sentences of less than ten years. Under BOP's current policy, she explained, an individual must serve at least ten years before being considered for compassionate release, which had the perverse effect of extending this option to those who commit more serious offenses, but not to those who commit less serious offenses and are suffering from equally deteriorating health. The Commission made clear, she added, that you do not have to have a sentence of ten years, but are eligible if you serve at least 75 percent of your sentence, whichever is less, to make clear that compassion is not reserved only for those who commit crimes that are more serious.

¹ Dr. Brie Williams, Associate Professor of Medicine, Division of Geriatrics, University of California, San Francisco, testified before the Commission at its February 17, 2016, public hearing. Dr. Williams' testimony is available on the Commission's webpage at: <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/williams.pdf>.

Commissioner Barkow stated that she would have extended the criteria to include individuals as young as 60 years old based on the Commission's recidivism data and Dr. Williams' testimony on aging, but believed the proposed amendment reaching 65 year olds was amply supported by the record. She observed that the Commission in the proposed amendment encouraged the Bureau of Prison to file motions when individuals meet the criteria as that was all the statute allows the Commission to do, to encourage. She expressed her wish that the Commission could do more as the record is filled with heart-breaking cases of individuals dying in prison and their families and friends shut out from spending their last days with them because of a Bureau of Prison process that was broken, which was well-documented by a report published by Department of Justice's Inspector General and the Commission's own record.²

Commissioner Barkow emphasized that the issue is not just a question of compassion, but public safety and the rational deployment of resources. Inmates over 50 years old are the fastest growing segment at Bureau of Prison and the Department of Justice's Inspector General found that the Bureau of Prison spends about one-fifth of its budget on aging inmates who are more costly because of their medical needs. The Inspector General found that Bureau of Prison lacks specific programming to meet the needs of this growing population and has a woefully inadequate number of social workers to address their needs: There are only 36 social workers for the entire Bureau of Prison. Commissioner Barkow noted that this population also has lower recidivism rates and releasing these individuals would free up space in overcrowded prisons and the resources saved could be spent on more significant law enforcement needs. She expressed her hope that the Commission would work with Bureau of Prison to get more compassionate release motions filed in court because it was in the interest of everyone to do so.

Chair Saris thanked everyone who testified at the Commission's hearing in February or submitted public comment, including representatives from the Criminal Law Committee, the Department of Justice, the Bureau of Prisons, the Inspector General, the Federal Public Defenders, the Practitioners Advisory Group, Dr. Brie Williams, the American Civil Liberties Union, Families Against Mandatory Minimum, and the National Association of Criminal Defense Lawyers, among others.

Chair Saris stated that Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentence reduction. With the vote on the proposed amendment, she continued, the Commission was exercising its authority in this area to broaden the criteria beyond that in the Commission's current policy statement and the Bureau of Prisons' current program statement.

Chair Saris explained that the revised policy statement also encourages the Director of the Bureau of Prisons to file a motion for a sentence reduction if the defendant meets any of the circumstances set forth in the Commission's policy statement. She noted that, while the Bureau of Prisons testified at the Commission's February public hearing that the agency was trying to

² See Office of the Inspector General, Department of Justice, Review of the Impact of an Aging Inmate Population on the Federal Bureau of Prisons, Evaluation and Inspections Report 15-05 (Published May 6, 2015; Revised February 2016).

expedite consideration of compassionate release requests, the Commission was concerned that so few have been granted. The Bureau of Prisons reported that between August 2013 and December 2015, it received 3,142 requests for compassionate release based on medical- or age-related reasons. For the same time period, the Bureau of Prisons granted 261 requests based on medical- or age-related reason, and 68.2 percent of the requests granted were for terminally ill offenders.

Chair Saris expressed the Commission's hope that the proposed amendment would be a constructive step in addressing some of the concerns it heard both in public comment and at the February public hearing regarding eligibility for compassionate release for the elderly, the terminally ill, and prisoners with other extraordinary and compelling circumstances.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, revises, clarifies, and rearranges the conditions of probation and supervised release. It was a result of the Commission's multi-year review of federal sentencing practices relating to conditions of probation and supervised release. It was also informed by a series of opinions issued by the Seventh Circuit in recent years.³ In general, the changes were intended to make the conditions of supervision found in §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) easier for defendants to understand and probation officers to enforce.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote.

Chair Saris explained that, based on a series of circuit court decisions criticizing several "standard" and "special" conditions of supervision over the past two years, both the Commission and the Judicial Conference of the United States' Criminal Law Committee reviewed the conditions of supervision that appear both in the Guidelines Manual and also in the judgment form used by the Administrative Office of the United States Courts. Over the past year, she continued, Commission staff worked closely with the Criminal Law Committee's staff to obtain helpful input from all of the stakeholders in the federal criminal justice system. From this process, the proposed amendment revises many of the "standard" and commonly-imposed "special" conditions. Chair Saris observed that one goal was to make sure that the conditions are not imposed woodenly and, instead, are designed to reflect the individual characteristics of each offender.

³ See, e.g., United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014).

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, concerned animal fighting offenses. The proposed amendment revises §2E3.1 (Gambling Offenses; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and responds to two new offenses relating to attending an animal fighting venture.

The proposed amendment also revises §2E3.1 to provide a base offense level of 16 if the offense involved an animal fighting venture. It establishes a base offense level of 10 in §2E3.1 if the defendant was convicted of causing an individual under 16 to attend an animal fighting venture and a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)) for attending an animal fighting venture.

Finally, the proposed amendment revises the existing upward departure provision in §2E3.1.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote.

Chair Saris thanked Congressmen Blumenauer, Fitzpatrick, Marino, and McGovern, and Senators Feinstein and Vitter, for their public comment on the animal fighting amendment, as well as the many other stakeholders, including the American Society to Prevent Cruelty to Animals, the American Humane Society, and other animal welfare organizations. In fact, she added, the Commission received more pieces of public comment, approximately 50,000 pieces, on this amendment than any other in the Commission's history.

Chair Saris stated that the Commission heard the stakeholder's concerns and the proposed amendment would significantly increase the penalties for these offenses by increasing the base offense level from a level 10 to a level 16. The proposed change would result in a 250 percent increase in the bottom of the applicable guideline range for the typical offender prosecuted for these offenses.

Chair Saris explained that the proposed change reflected the recent increase in the statutory maximum penalty from three to five years and better accounted for the cruelty and violence inherent in animal fighting crimes. She noted that the Commission heard testimony at the Commission's March public hearing about dogs who were beaten, tortured, and killed, and found further support for an increase from Commission data evidencing a high percentage of above-range sentences in these cases. Under the proposed amendment, she added, average sentences were more likely to be within or near the new sentencing range. The proposed amendment also revised and expanded the existing departure language to address issues of extreme cruelty and

neglect and animal fighting on an exceptional scale.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, addressed circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses.

First, the proposed amendment responds to differences among the circuits in cases in which the offense involved infants or toddlers. The applicable guidelines, §§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) and 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), currently include an age enhancement for minors under the age of 12, but these two guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable, *i.e.*, infants or toddlers. Courts have differed over whether the vulnerable victim adjustment at subsection (b)(1) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim) may be applied when the victim is an infant or toddler. The proposed amendment responds to the circuit conflict by providing higher penalties for cases involving infants or toddlers. It does so by amending existing enhancements in those guideline to include infants and toddlers within the scope of those enhancements.

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancements for distribution in §2G2.2 and similar enhancements in §2G2.1 and §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). There are two related issues that typically arise these cases.

The first issue is when a participant's use of a peer-to-peer file-sharing program or network warrants at minimum a 2-level enhancement under §2G2.2(b)(3)(F). The proposed amendment amends §2G2.2(b)(3)(F) to provide that the 2-level enhancement applies if "the defendant knowingly engaged in distribution." An accompanying application note defines that term. Similar changes to the 2-level distribution enhancements at §§2G2.1(b)(3) and 2G3.1(b)(1)(F) are also made.

The second issue is when, if at all, the use of a peer-to-peer file-sharing program or network warrants a 5-level enhancement under §2G2.2(b)(3)(B) instead. The proposed amendment revises §2G2.2(b)(3)(B) and the accompanying commentary to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. The proposed amendment makes parallel changes to §2G3.1(b)(1)(B) and the accompanying commentary.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and

conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote.

Chair Saris stated that as the Supreme Court recognized in Braxton v. United States, it is the Commission's responsibility to resolve conflicting interpretation of the guidelines by circuit courts, and the Commission would be voting to resolve several long-standing circuit conflicts in the area of child pornography. In doing so, she continued, the Commission did not intend to either increase or decrease the guideline ranges or sentences for this class of offenses. Rather, the Commission intended to simplify several unnecessarily confusing issues that have arisen with great frequency in the context of the child pornography guidelines. Chair Saris emphasized that by doing so, the Commission was acting to make sure that these guidelines related to distribution of child pornography will apply if any defendant knowingly distributed, conspired, or willfully caused another person to distribute any sexually explicit material involving a minor.

Chair Saris expressed the Commission's belief that these specific improvements to the child pornography guidelines would be helpful and recognized that they are limited in scope. She urged Congress to act on the recommendations outlined in the Commission's 2012 Report to the Congress: Federal Child Pornography Offenses so that the Commission can make more comprehensive changes to the child pornography guidelines to better reflect the current spectrum of offender culpability and technological changes.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the final proposed amendment, attached hereto as Exhibit F, had two parts and was the result of the Commission's multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. Part A of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The proposed amendment amends the existing enhancement at §2L1.1(b)(4) by making it offense-based rather than defendant-based. Second, it provides that an unaccompanied minor is a minor unaccompanied by a parent, adult relative, or legal guardian. Third, it revises the definition of "minor" from an individual under the age of 16 to an individual under the age of 18. Finally, it raises the enhancement from 2 levels to 4 levels.

The proposed amendment also addresses offenses in which an alien (whether or not a minor) is sexually abused. To ensure that the existing "serious bodily injury" enhancement of 4 levels will apply in such a case, the amendment amends the commentary to §2L1.1 to clarify that the term "serious bodily injury" includes conduct constituting criminal sexual abuse.

Part B of the proposed amendment amends §2L1.2 (Unlawfully Entering or Remaining in the United States) eliminates the use of the "categorical approach" for predicate felony convictions in §2L1.2.

First, the proposed amendment provides at §2L1.2(b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses.

Second, the proposed amendment changes how §2L1.2 accounts for pre-deportation convictions — basing them not on the type of offense but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivisions (A) through (D) at §2L1.2(b)(2).

Third, to account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(3) in §2L1.2 to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more offenses after the defendant was ordered deported or ordered removed from the United States for the first time.

The proposed amendment also makes several changes to the commentary, including a revised departure provision reflecting these structural changes.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion.

Commissioner Friedrich stated that she supported the proposed amendment because, in her view, it would dramatically simplify the application of §2L1.2, a guideline applied in nearly a quarter of the cases federally prosecuted each year, in a manner that would result in more proportionate punishment for illegal re-entrants.

Commissioner Friedrich noted that during her nearly ten years of service on the Commission, the Supreme Court has decided every term one or more cases involving the categorical approach, which applies to §2L1.2, the re-entry guideline. As four appellate judges opined in a recent case addressing the categorical approach in a different context, she continued, “[a]lmost every Term, the Supreme Court issues a ‘new’ decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again.”⁴ In the view of these judges, “[a] better mouse trap is long overdue,” one that uses “a more objective standard, such as the length of the underlying sentence.”⁵

Commissioner Friedrich stated that this is exactly what the proposed amendment does. It abandons the categorical approach in favor of a simpler model that bases key enhancements on the length of an offender’s prior sentence rather than on the nature of the offender’s prior

⁴ See Almanza-Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016).

⁵ Id.

offense. Case after case, she recalled, as well as the testimony of numerous stakeholders who have appeared before the Commission over the past ten years, has demonstrated the difficulty in applying the categorical approach to state statutes that vary tremendously across jurisdictions. Not only does this process raise complex legal issues, Commissioner Friedrich observed, it also requires probation officers and litigants to track down dated state criminal records, often without success.

Commissioner Friedrich emphasized that the proposed changes to §2L1.2 would simplify the work of federal courts, probation officers, and litigants, and ensure that additional aggravating factors, such as recent criminal conduct and prior illegal entry convictions, would be taken into account in calculating an offender's offense level. These additions, she noted, as well as mitigating aspects of the proposed amendment, would better account for the culpability of individual offenders.

Commissioner Friedrich acknowledged that there was little doubt that in some cases the newly restructured amendment would over- or understate the seriousness of an offender's prior criminal conduct. However, the proposed amendment's revised departure language also grants judges explicit authority to depart upward and downward as warranted by the facts of the offender's prior criminal record.

In closing, Commissioner Friedrich noted that the proposed amendment was supported by, among others, the vast majority of border judges who provided testimony to the Commission, the Department of Justice, the Practitioners Advisory Group, and the Probation Officers Advisory Group.

Commissioner Barkow noted that the Department of Justice had asked for an increase in the base offense level at §2L1.1, which would have been effectively an across the board increase in all alien smuggling cases. In the Department of Justice's view, all such cases were increasingly dangerous and were tied to criminal organizations. She stated that while the Commission looked very closely at the issue, its data did not justify such an across the board increase. Critically, Commissioner Barkow continued, the Department of Justice itself seeks a sentence below the current base offense level in 37.2 percent of all cases as part of its fast-track disposition program, which undercuts its view that all cases are equally serious.

Commissioner Barkow stated that the Commission also found that the majority of alien smuggling offenders perform low level functions in the smuggling operation, making it inappropriate to raise the base offense level for all offenders. Instead, she explained, the proper course of action would be to address the cases with higher risk with special offense characteristics, which is what the guidelines do. If an alien smuggling offense involved the intentional or reckless creation of a substantial risk of death or serious bodily injury to another person, the offense level is increased to level 18, a level higher than the level 16 requested by the Department of Justice. If a person is actually seriously injured during the offense, 4 levels are added; if the injury is permanent or life threatening, 6 levels are added; if death results, 10 levels are added; if a dangerous weapon is possessed, the offense level will be 18.

Commissioner Barkow observed that the proposed amendment addressed the increasing instances of cases involving unaccompanied minors by increasing the specific offense characteristic from 2 levels to 4 levels. She explained that the guidelines link the offender's offense level with his or her culpability. If the offense creates a risk to human life or causes injury, the guidelines account for that conduct. But, Commissioner Barkow emphasized, it makes no sense to change the base offense level for everyone on this record when the cases themselves are not uniform, which is what the Commission's record and the Department of Justice's own practices reflect.

Commissioner Morales thanked the Commission on behalf of the Attorney General of the United States for its work during the amendment cycle as the Commission and Department of Justice worked together to improve the sentencing guidelines. She also personally thanked the commissioners and staff for welcoming her when she joined as an ex officio commissioner in the middle of the amendment cycle.

Commissioner Morales stated that the Department of Justice was grateful to the Commission for eliminating the categorical approach from the illegal re-entry guideline, an approach, she added, that resulted in vastly different results in cases across the country and consumed many prosecutorial and judicial resources. While not a perfect solution, and the Department does not believe there is a perfect solution, Commissioner Morales acknowledged, the Commission's action will have an immediate and substantial positive impact. She stated that it was especially appreciated that the Commission also amended the guideline to account for the defendant's recent criminal conduct, not just the defendant's pre-deportation conduct, and to account for multiple previous convictions.

However, Commissioner Morales expressed the Department of Justice's frustration concerning the Commission's failure to raise penalties across the board for smuggling offenses. The Department of Justice did not believe the penalties properly reflect the seriousness of the offense. She recounted how the Director of United States Immigration and Customs Enforcement, Sarah R. Saldaña, noted in a letter to the Commission that alien smuggling offenses exposed migrants to a wide-variety of dangers at every stage of the process regardless of the roles the defendants appearing before the courts performed. She also noted that these offenses resulted in countless injuries and deaths, most of which are not accounted for in the enhancements.

On the other hand, Commissioner Morales continued, the Department of Justice thanked the Commission for increasing the enhancement for smuggling minors and expanding the scope of the enhancement to include victims under the age of 18 years. She stated that the Department of Justice intends to leverage these and other applicable sentencing enhancements to get sentences that correlate more closely to the seriousness of aliening smuggling offenses

Commissioner Morales thanked the Commission for raising the penalties for animal fighting offenses. Deputy Attorney General Jean Williams noted in her testimony at the March public hearing that trends point to an increase in both unlawful animal fighting activity and law enforcement's response to it. Commissioner Morales indicated that the Department of Justice is working to reverse this trend and the increased guideline penalties will serve as a very useful tool

in combating this offense.

Regarding the child pornography circuit conflict amendment, Commission Morales stated that the Department of Justice supported the Commission's decision to add a mens rea element to address the circuit conflict, and while the language does not track the Department's recommendations, it was encouraged that the Commission clarified that the enhancement for distribution will apply to those who engage in a conspiracy to distribute, that it will specifically reference distribution in exchange for valuable consideration, and the sexual abuse of infants and toddlers was specifically referenced. She emphasized that these victims were the most vulnerable and defendants targeted them because they are the least able to communicate their victimization.

Concerning compassionate release, Commissioner Morales stated that the Bureau of Prisons engages in a rigorous analysis of the defendant's circumstances to include the nature of the underlying offense, public safety concerns, victims' comments, and institutional adjustment, among many other factors, before determining whether to file a motion pursuant to its statutory authority.

Nevertheless, Commissioner Morales continued, the Department of Justice was re-examining its policies to determine whether, and to what extent, changes to current sentence reduction policies were necessary and advisable. In light of this review, Commissioner Morales expressed the Department of Justice's disappointment that the Commission decided not to work more closely with it in developing guidelines so that all the criteria could be more closely aligned. Additionally, she expressed concern that the Commission's new criteria were too broad and too vague, and would seem to make eligible inmates that, in the Department of Justice's view, should not benefit from an early release.

Commissioner Morales concluded by stating that she and the Department of Justice looked forward to working with the Commission in the next year.

Vice Chair Breyer agreed with Commissioner Morales' statement that the Bureau of Prisons had its own set of considerations regarding the compassionate release process, but noted that the Commission's organic statutes empowers and directs the Commission to set forward a set of criteria that judges can follow in exercising their judgment.

Vice Chair Breyer stated that, normally, the Commission would not have to consider a set of guidelines or criteria different than the Bureau of Prisons, but in his view the Bureau of Prisons has not rigorously analyzed the compassionate release petitions filed by inmates. He noted that the Inspector General's report indicated that the Bureau of Prisons has not been vigorous in carrying out the congressional directive with respect to compassionate release. And because of that inactivity, he asserted, and because the Commission believed it has a responsibility to carry out congressional directives, the Commission developed its own set of criteria.

Vice Chair Breyer stated that while there are differences between the Commission and Bureau of Prisons' criteria, that is not really the problem. In his view, the real problem was that the Bureau

of Prisons has not been responsive to this congressional directive. Vice Chair Breyer recounted Chair Saris' earlier remarks that numerous prisoners have died pending consideration by the Bureau of Prisons of their request for compassionate release, and it was that inactivity, in his view, that prompted the Commission to respond to the concerns raised by a number of witnesses at the March hearing.

Vice Chair Breyer expressed his delight that the Department of Justice and the Bureau of Prisons wanted to work with the Commission as he believed they should all work together. But, he continued, working together was not a substitute for inaction and therefore the Commission's role in establishing a set of criteria demonstrated the urgency and the necessity for the Bureau of Prisons to respond to congressional directive. He closed by asserting that the Commission has responded and he trusts that the Bureau of Prisons will do so as well.

Chair Saris stated that the Commission was voting to amend the guidelines for the two most common immigration offenses, alien smuggling (§2L1.1) and illegal reentry (§2L1.2). In recent years, immigration offenses have been either the most common federal offense type or a close second to drug offenses. Approximately 18,000 federal offenders were sentenced under §2L1.1 or §2L1.2 in Fiscal Year 2015.

Regarding the alien smuggling guideline, Chair Saris noted that in fall 2014, former Deputy Attorney General James Cole wrote to the Commission that, in the Department of Justice's view, the guideline penalties for alien smuggling were inadequate, particularly for those offenders who smuggle unaccompanied minors. Mr. Cole observed that unaccompanied minors are the most vulnerable of all persons being smuggled and that they are sometimes subject to "unspeakable abuses," including sexual abuse.

Chair Saris stated that in recent years our country has experienced an unprecedented migration of children from Central America. More than 100,000 children have come in the last two years alone, far outpacing previous years and seriously straining the United States system designed to provide care and custody for these particularly vulnerable refugees. Beginning in the fall of 2011 and every year forward, she continued, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011. Unaccompanied minors are being smuggled into the United States in record numbers, particular minors from Central American countries. Chair Saris recalled how, at the Commission's public hearing in March, the Commission received testimony from expert witnesses that these vulnerable minors are often subject to abuse – sexual and otherwise – during the course of smuggling offenses.

Chair Saris stated that the proposed amendment addressed the smuggling of unaccompanied minors in two important ways. First, it would increase the enhancement for smuggling unaccompanied minors from a 2-level increase to a 4-level increase. Second, the amendment will clarify that any sexual abuse, not just limited to minors, results in a 4-level increase in smuggling cases. The two proposed changes, she added, better reflect the increased culpability of offenders who engage in some of the most serious types of alien smuggling offenses.

Turning to the proposed amendment to the illegal reentry guideline, §2L1.2, Chair Saris noted that, based on the Commission's most current data, the amendment was particularly important because illegal reentry comprises approximately 22 percent of the federal caseload, concentrated along the southwest border. In April of 2015, she continued, the Commission issued a report, Illegal Reentry Offenses, which can be found on the Commission's website.

Chair Saris highlighted two main points about the proposed amendment. First, the amendment would greatly simplify the operation of §2L1.2, which has been the source of a great deal of litigation, uncertainty, and criticism. The amendment would do so by abandoning the so-called "categorical approach" to determine whether illegal reentry offenders' prior felony convictions warranted an enhancement.

Chair Saris recounted how the courts and stakeholders, for many years, have complained that the categorical approach is too complex and resource-intensive. For example, because every state defines its crimes differently and state records are hard to obtain, it is often difficult to determine if a crime falls within the definition of a "crime of violence."

Currently, Chair Saris noted, courts, probation officers, and practitioners devote enormous resources to applying the categorical approach to determine whether prior convictions should receive an enhancement as a "crime of violence," a "drug trafficking" offense, or an "aggravated felony." The categorical approach also has proven to be an ineffective way of identifying the most severe offense types for enhancement.

Chair Saris explained that, instead of the categorical approach, the proposed amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. In other words, she added, the level of the sentencing enhancement will be determined by the length of the sentence imposed by the sentencing judge.

Chair Saris stated that the Commission believes the proposed change was appropriate because the length of sentence imposed by a sentencing judge is a good indicator of how serious the court viewed the offense at the time and also avoids the complications of the categorical approach.

Chair Saris recalled how the vast majority of the witnesses at the Commission's March hearing favored the sentence-imposed model. She noted that four of the five districts with the highest illegal reentry caseload supported the proposed approach. Additionally, the Department of Justice, and the Commission's Probation Officers Advisory Group and Practitioners Advisory Group supported the proposed amendment. Witnesses for both advisory groups testified that the sentence-imposed model would be much easier to apply than the categorical approach and would result in savings of judicial resources, at both the trial court and appellate levels.

Alternatively, Chair Saris noted, some witnesses suggested that the sentence-imposed model could be problematic because different counties punish crimes differently, particularly if a judge believes that a defendant will be deported. She observed that the Commission addressed those concerns by clarifying that a departure is available in cases where the sentence imposed either overstated or understated the seriousness of the prior offense.

Chair Saris also reported that the Commission received a great deal of public comment in favor of a “sentence served” model. While the Commission reviewed and considered these views carefully and seriously, ultimately, this approach was not feasible given the limits of state recordkeeping. She added that the sentence-imposed approach was also consistent with how the guidelines scored criminal history generally.

The second point Chair Saris wished to address was that the proposed amendment accounted for the past criminal conduct of these offenders in a broader – and more proportionate – manner. Specifically, the amendment addressed concerns raised about the severity of the current 16-level enhancement for prior felonies based solely on a defendant’s single most serious conviction prior to his or her first deportation. Depending on the nature of that conviction, an enhancement of as much as 16 levels can occur.

Chair Saris explained that, even when an offender’s predicate conviction is so old that it does not receive criminal history points under the guidelines, a defendant still can receive as much as a 12-level enhancement. For this reason alone, she continued, the Commission has received repeated complaints about the guideline, particularly about the 16- and 12-level enhancements, which apply to nearly one-third of all illegal reentry cases. The Commission’s sentencing data is consistent with these concerns. Indeed, the Chair observed, only 27.4 percent of defendants who currently receive the enhancement are sentenced within the recommended guideline range. Accordingly, the pending amendment reduces the level of enhancement for a single pre-deportation conviction to a maximum of 10 levels.

But at the same time, Chair Saris continued, the proposed change addressed concerns that the existing guideline only captured criminal conduct occurring prior to the offender’s first deportation. In its recent report, the Commission concluded that 48 percent of illegal reentry offenders in the study sample were convicted of at least one offense after their first deportation other than a prior illegal reentry conviction.

Additionally, the Chair noted, immigrants convicted of illegal reentry have reentered the country an average of 3.2 times. However, the current guideline does not account for any criminal conduct that may be committed after the offender illegally reentered the United States. The proposed amendment adds a new tiered enhancement specifically aimed at criminal conduct occurring after the defendant has reentered the country illegally. It also adds an enhancement to account for the number of times an offender has been convicted of illegal reentry.

Chair Saris pointed out that the proposed amendment differs from the proposal published in January in that it does not increase the base offense level in the illegal reentry guideline. The Commission received a great deal of public comment on this particular issue and citing statistics from the Commission’s April 2015 Illegal Reentry Offenses Report. The report found that:

- one-half of these offenders had at least one child living in the United States;
- these offenders had an average age of 17 at the time of their initial entry into the United States; and
- nearly three-quarters had worked in the United States for more than one year at

some point prior to their arrest for the instant offense.

Many unlawful immigrants return to work and/or to be with their family, or out of fear of drug traffickers, not to commit crimes. The Chair stated that the Commission was persuaded by the majority of public comment and its own sentencing data that the current base offense level of 8 should remain unchanged.

Chair Saris noted that the Commission was unable to conduct its typical impact analysis for the proposed change because it was impossible to predict how the various fast-track programs, which expedite deportation, may be revised after its implementation, and fast-track programs play a large role in illegal reentry cases, particularly along the southwest border. She did state, however, that the Commission estimated that the average guideline minimum would decrease from 21 months to 18 months as a result of the new amendment. The Chair cautioned that this did not mean that the average sentence would decrease and there may be some sentences that will increase.

In sum, Chair Saris concluded, the Commission believed that the proposed amendment would be easier to apply, reduce litigation and uncertainty, mitigate areas of over-severity, and properly account for criminal conduct that currently is not reflected in the illegal reentry guideline.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli advised the Commission that the immigration and child pornography circuit conflict amendments the Commission just promulgated may have the effect of reducing the term of imprisonment recommended in the guidelines applicable to a particular offense or categories of offenses. As such, she continued, the Commission has the statutory authority under 28 U.S.C. § 994(u) to make the amendment retroactive. Ms. Grilli asked whether there was a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis for either of these amendments.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, Ms. Grilli indicated that the proposal failed for lack of a motion.

Chair Saris explained that the Commission has statutory authority to make any amendment retroactive if it will have the effect of lowering penalties for a category of offenses or offenders. In deciding whether to make an amendment retroactive, she continued, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.

Chair Saris stated, first, with respect to the immigration amendment, the purpose of that amendment in great part was to simplify its operation, reduce litigation and uncertainty, and to more broadly and proportionately account for criminal conduct. The amendment was expected to decrease guideline ranges for some offenders but increase them for others. Furthermore, she continued, it would be extremely difficult to identify offenders who might benefit from retroactivity because the Commission does not routinely collect data about deportation dates or

about which prior conviction or the type of prior offense that resulted in an enhancement under the current illegal reentry guideline.

Similarly, the purpose of the amendment to the child pornography guidelines was not to effectuate an overall reduction in guideline penalties, although it may have the effect of reducing the guideline range for some offenders, Chair Saris added. The amendment was intended to simplify guideline application and resolve the litigation surrounding certain aspects of its operation. Like the immigration amendment, she explained, the Commission does not routinely collect the information concerning the intent of the distributor necessary to identify and characterize the offenders who might benefit from retroactivity. Ascertaining the overall effect of the amendment would be difficult because that determination depends on data that the Commission does not routinely collect.

For these reasons, Chair Saris stated, the Commission decided against retroactivity.

Chair Saris addressed the recently enacted Bipartisan Budget Act of 2015, which was signed into law in November 2015, after the Commission's amendment cycle had commenced. The Chair explained that when new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

In this particular instance, Chair Saris continued, the Commission voted in January to publish a proposed amendment that would provide a guideline reference for the new conspiracy offenses created by that Act but did not publish any specific offense characteristics or other guideline changes to specifically address the increased statutory maximum for certain types of offenders, such as third-party facilitators. The Commission received written comment from Members of Congress, the Justice Department, and the Inspector General of the Social Security Administration suggesting that the change, as initially proposed, did not adequately address the type of cases and offenders covered by the new 10-year statutory maximum penalty.

Chair Saris acknowledged the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee, as well as the Senate and House Judiciary Committees, to ensure aggressive implementation of these new penalties relating to Social Security fraud. Specifically, Chair Saris acknowledged the thoughtful letter from Chairmen Goodlatte, Brady, and Hatch expressing their views on the proposed amendment. She stated that the Commission continued to take into consideration this feedback as well as the public comment in support of specific sentencing enhancements.

At this juncture, Chair Saris noted, the Commission was persuaded that this issue merited additional study before making a final policy decision. Accordingly, the Commission has decided to defer action on the Act until the next amendment cycle. This issue will remain a priority for the Commission for next year and the Commission looks forward to working with the Congress, the relevant agencies and the stakeholders as we move forward into the next amendment cycle.

Chair Saris concluded by again thanking the public for its interest in these important issues, and noting how the Commission looked forward as always to the comments and feedback it receives.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Friedrich made a motion to adjourn, with Vice Chair Breyer seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:25 p.m.

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PROPOSED AMENDMENT: MISCELLANEOUS

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

A. USA FREEDOM Act of 2015

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

New Offense at 18 U.S.C. § 2280a

The USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction) to prohibit certain terrorism acts and threats against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The prohibited acts include (i) the use against or on a ship, or discharge from a ship, of any explosive or radioactive material, biological, chemical, or nuclear weapon or other nuclear explosive device; (ii) the discharge from a ship of oil, liquefied natural gas, or other hazardous or noxious substance; (iii) any use of a ship that causes death or serious injury or damage; and (iv) the transportation aboard a ship of any explosive or radioactive material. Section 2280a also prohibits the transportation on board a ship of any biological, chemical or nuclear weapon or other nuclear explosive device, and any components, delivery means, or materials for a nuclear weapon or other nuclear explosive device, under specified circumstances, but this conduct does not have to be committed with the above purpose of intimidating a population or compelling a government or international organization to do or abstain from doing any act. Further, section 2280a prohibits the transportation onboard a ship of a person who committed an offense under section 2280 or 2280a or an offense set forth in an applicable treaty (as defined in section 2280(d)(1)), with the intent of assisting that person evade criminal prosecution. The penalties for violations of section 2280a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2280a also prohibits threats to commit the offenses not related to transportation on board a ship and provides a penalty of imprisonment of up to five years.

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

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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*).

New Offense at 18 U.S.C. § 2281a

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

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

New Offense at 18 U.S.C. § 2332i

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

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

Clerical Changes

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

B. 18 U.S.C. § 1715 (Firearms as nonmailable; regulations)

Section 1715 of title 18, 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 declared nonmailable (as prescribed by Postal Service regulations). For

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any violation of section 1715, the statutory maximum term of imprisonment is two years. The current Guidelines Manual does not provide a guideline reference in Appendix A for offenses under section 1715.

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

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

C. Technical Amendment to §2T1.6

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

Section 7202 is referenced in Appendix A (Statutory Index) to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax). The Background commentary to §2T1.6 states that "[t]he offense is a felony that is infrequently prosecuted." The Department of Justice in its annual letter to the Commission has proposed that the "infrequently prosecuted" statement should be deleted. The Department points out that while that statement may have been accurate when the relevant commentary was originally written (in 1987), the number of prosecutions under section 7202 have since increased substantially. The use of §2T1.6 increased from three cases in 2002 to 46 cases in 2014. See United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2002), at <http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2002>; United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2014), at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf.

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

Consistent with the changes to §2T6.1, Part C of the proposed amendment deletes similar language found in the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), and in the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses).

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Proposed Amendment:

(A) USA FREEDOM Act of 2015

§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

“Nuclear byproduct material” has the meaning given that term in 18 U.S.C. § 831~~(f)~~(g)(2).

“Nuclear material” has the meaning given that term in 18 U.S.C. § 831~~(f)~~(g)(1).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A6.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1
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
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1
18 U.S.C. § 2281a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2,

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2A2.3, 2A6.1, 2B1.1,
2B3.2, 2K1.4, 2M6.1,
2Q1.1, 2Q1.2, 2X1.1

18 U.S.C. § 2282A 2A1.1, 2A1.2, 2B1.1,
2K1.4, 2X1.1

* * *

18 U.S.C. § 2332h 2M6.1

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

18 U.S.C. § 2339 2M5.3, 2X2.1, 2X3.1

* * *

(B) 18 U.S.C. § 1715 (Firearms as nonmailable; regulations)

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition;
Prohibited Transactions Involving Firearms or Ammunition**

(a) Base Offense Level (Apply the Greatest):

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if—
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time

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the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or § 1715.

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10 .

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.
- (3) If the offense involved—
 - (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or
 - (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

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- (5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.
- (6) If the defendant—
 - (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
 - (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

- (7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), **1715**, 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1711	2B1.1
18 U.S.C. § 1712	2B1.1

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18 U.S.C. § 1715 2K2.1

18 U.S.C. §
1716 (felony
provisions only) 2K1.3, 2K3.2

18 U.S.C. § 1716C 2B1.1

* * *

(C) Technical Amendment to §2T1.6

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

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.
- (b) Cross Reference
 - (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 26 U.S.C. § 7202.

Application Note:

1. *In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.*

Background: ~~The offense is a felony that is infrequently prosecuted.~~ *The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.*

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. ~~Because these offenses are no longer a major enforcement~~

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~~priority, n~~ No effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

* * *

§2T2.1. Non-Payment of Taxes

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the “tax loss” is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.
2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

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

* * *

§2T2.2. Regulatory Offenses

- (a) Base Offense Level: 4

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

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

* * *

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PROPOSED AMENDMENT: COMPASSIONATE RELEASE

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s work in reviewing 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), including the possible consideration of amending the relevant provisions in the Guidelines Manual. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015).*

Background

Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant in certain circumstances, *i.e.*, if “extraordinary and compelling reasons” warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3582(c)(1); *see also* 28 U.S.C. §§ 994(a)(2) (stating that the Commission shall promulgate general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing, including, among other things, “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”).

The Commission’s policy statement, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), provides that “extraordinary and compelling reasons” exist if:

- (1) the defendant is suffering from a terminal illness;
- (2) the defendant is suffering from certain permanent physical or medical conditions, or experiencing deteriorating physical or mental health because of the aging process; or
- (3) the defendant has a minor child and the defendant’s only family member capable of caring for the child has died or is incapacitated.

See §1B1.13, comment. (n.1(A)(i)–(iii)). In addition, the policy statement provides that extraordinary and compelling reasons exist if, as determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described above. See §1B1.13, comment. (n.1(A)(iv)). The policy statement was last amended in 2007 to provide the current criteria to be applied and a list of the specific circumstances which constitute “extraordinary and compelling reasons” for compassionate release consideration.

On August 12, 2013, the Bureau of Prisons issued a new program statement, 5050.49, that changes how the Bureau implements section 3582(c)(1)(A). 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)*, available at http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. Among other things, the new program statement expands and details the range of circumstances that the Bureau may consider “extraordinary and compelling reasons” warranting such a reduction. Under the program statement, a sentence reduction may be based on the defendant’s medical circumstances (*e.g.*, a terminal or debilitating medical condition; *see* 5050.49(3)(a)–(b)) or on certain non-medical circumstances (*e.g.*, an elderly defendant, the death or incapacitation of the family member caregiver, or the incapacitation of the defendant’s spouse or registered partner; *see* 5050.49(4),(5),(6)).

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

The Proposed Changes to the Policy Statement at §1B1.13

First, the proposed amendment revises the Commission’s guidance on what should be considered “extraordinary and compelling reasons” for compassionate release. It provides four broad categories: “Medical Condition of the Defendant,” “Age of the Defendant,” “Family Circumstances,” and “Other Reasons.” “Medical Condition of the Defendant” applies if the defendant: (i) has a “terminal illness” (including a definition of the term and examples), or (ii) is (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, that 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. “Age of the Defendant” applies if 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). “Family Circumstances” applies to circumstances related 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. “Other Reasons” permit the Bureau of Prisons to determine that, in any particular defendant’s case, an extraordinary and compelling reason other than (or in combination with) a reason identified by the Commission exists.

Second, the proposed amendment amends 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.

Third, the proposed amendment adds a new application note to provide that the Commission 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 note states that, in such cases, “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.”

Finally, the proposed amendment adds to the Background Commentary to §1B1.13 a reference to the Commission’s general policy-making authority under 28 U.S.C. § 994(a)(2).

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Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
 - (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subdivision (1)(A).

~~(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: 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 permanent serious physical or medical condition, or~~

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

~~(III) 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 from which he or she is not expected to recover.~~

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(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.—

(iii)(i) The death or incapacitation of the defendant's only family member caregiver of capable of caring for 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) (iv) 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 (i), (ii), and (iii) (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.

3. (B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A) this policy statement.

4. Motion by the Director of the Bureau of Prisons.—A reduction under this policy statement may only be granted 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.

5. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: 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).

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PROPOSED AMENDMENT: CONDITIONS OF PROBATION AND SUPERVISED RELEASE

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

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

The Statutory and Guidelines Framework

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

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

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

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mandatory conditions of supervised release and providing guidance on discretionary conditions of supervised release.

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

The changes made by the proposed amendment would revise, clarify, and rearrange the provisions in the Guidelines Manual on conditions of probation and supervised release. These changes would not necessarily affect the conditions of probation and supervised release as set forth in the Judgment in a Criminal Case Form, AO 245B. However, in light of the responsibilities of the Judicial Conference of the United States and the Administrative Office of the United States Courts in this area, the Commission works with the Criminal Law Committee and the Probation and Pretrial Services Office on these issues and anticipates that the Commission's work on this proposed amendment may inform their consideration of possible changes to the judgment form.

In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce.

Court-Established Payment Schedules

First, the requirement that the defendant shall adhere to any payment schedule established by the court is changed from a "standard" condition to a "mandatory" condition. Specifically, the proposed 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. See 18 U.S.C. § 3572(d). As a conforming change, similar language at §§5B1.3(c)(14) and 5D1.3(c)(14) is deleted.

Sex Offender Registration and Notification Act

Second, the requirement that the defendant shall comply with the Sex Offender Registration and Notification Act (a "mandatory" condition) is updated and simplified to reflect that federal sex offender requirements apply in all states. Specifically, the proposed amendment amends §§5B1.3(a)(9) and 5D1.3(a)(7) to clarify that, if the defendant is required to register under the Act, the defendant shall comply with the requirements of the Act. Language indicating that the Act applies in some states and not in others — in the guideline provisions and the accompanying Commentary — is deleted as obsolete.

Reporting to the Probation Officer

Third, the requirement that the defendant shall initially report to the probation officer and submit a written report each month (a "standard" condition) is divided into two provisions and made more definite. Specifically, the proposed amendment amends §§5B1.3(a)(2) and 5D1.3(a)(2) to require the defendant to report to the probation office in the jurisdiction where he or she is authorized to reside, and to do so within 72 hours, unless otherwise directed. Thereafter, the defendant shall report to the probation officer as instructed by the court or probation officer.

Leaving the Jurisdiction

Fourth, the requirement that the defendant not leave the federal judicial district without the permission of the court or probation officer (a "standard" condition in §§5B1.3(c)(1) and 5D1.3(c)(1)) is revised for clarity and to insert a mental state (mens rea) requirement — the defendant shall not leave the jurisdiction "knowingly."

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Answering Truthfully; Following Instructions

Fifth, the requirement that the defendant answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer (a “standard” condition in §§5B1.3(c)(3) and 5D1.3(c)(3)) is divided into two separate requirements and revised for clarity.

With respect to the requirement that the defendant “answer truthfully,” Commentary is added to both guidelines 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 this condition.

The requirement that the defendant “follow instructions” is revised to reflect that the defendant shall follow the instructions “related to the conditions of supervision.”

Residence; Employment

Sixth, the proposed amendment revises the requirements relating to the defendant’s residence and employment, including a requirement that the defendant notify the probation officer of any change of residence or employment (a “standard” condition in §§5B1.3(c)(6) and 5D1.3(c)(6)) and a requirement that the defendant “work regularly” unless excused for specified reasons (a “standard” condition in §§5B1.3(c)(5) and 5D1.3(c)(5)).

As amended, the residence requirement affirmatively states that the defendant shall live at a place “approved by the probation officer.” Furthermore, the defendant shall notify the probation officer at least 10 days before changing his or her living arrangements or, if this is not possible, within 72 hours of becoming aware of a change.

As amended, the employment requirement affirmatively states that the defendant shall 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. Furthermore, the defendant shall notify the probation officer at least 10 days before changing his employment arrangements or, if this is not possible, within 72 hours of becoming aware of a change.

Visits by Probation Officer

Seventh, the requirement that the defendant permit the probation officer to visit at any time at home or elsewhere and to “permit confiscation of any contraband” in plain view (a “standard” condition in §§5B1.3(c)(10) and 5D1.3(c)(10)) is revised to provide more clear and specific guidance. As amended, the defendant shall permit the probation officer “to take any items prohibited by the conditions of the defendant’s supervision” that are in plain view.

Association with Criminals

Eighth, the requirement that the defendant not associate with persons engaged in criminal activity or persons convicted of a felony unless granted permission to do so (a “standard” condition in §§5B1.3(c)(9) and 5D1.3(c)(9)) is revised and clarified and a mental state (mens rea) requirement is added. As amended, the defendant shall not “communicate or interact with” such a person if the defendant knows the person is engaged in such activity or has such a conviction.

Arrested or Questioned by a Law Enforcement Officer

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Ninth, stylistic changes are made to the requirement that the defendant notify the probation officer after being arrested or questioned by a law enforcement officer (a “standard” condition in §§5B1.3(c)(11) and 5D1.3(c)(11). The changes are clerical.

Firearms and Dangerous Weapons

Tenth, the requirement that the defendant not possess a firearm or other dangerous weapon is moved from the list of “special” conditions (see §§5B1.3(d)(1), 5D1.3(d)(1)) to the list of “standard” conditions and is revised and clarified. As amended, the defendant shall not “own, possess, or have access to” a firearm, ammunition, destructive device, or dangerous weapon. The term “dangerous weapon” is defined to mean “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 requirement that the defendant not enter into an agreement to act as an informer without permission of the court is revised and clarified. As amended, the defendant shall not act, or make any agreement to act, “as a confidential human source or informant,” without first getting the permission of the court.

Duty to Notify of Risks Posed by the Defendant

Twelfth, the requirement that the defendant “notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics” (a “standard” condition in §§5B1.3(c)(13) and 5D1.3(c)(13)) is revised to be made more clear and definite as to when and how it applies. 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 confirm that the defendant has done so.

Support of Dependents

Thirteenth, the requirement that the defendant support his or her dependents (a “standard” condition in §§5B1.3(c)(4) and 5D1.3(c)(4)) is moved to the list of “special” conditions in subsection (d) and revised and clarified. As amended, the condition requires that, if the defendant has dependents, he or she shall support the dependents; and if the defendant is ordered to make child support payments, he or she shall make the payments and comply with the other terms of the order.

Alcohol; Controlled Substances

Fourteenth, the requirement that the defendant refrain from excessive use of alcohol and not possess or distribute controlled substances or paraphernalia (a “standard” condition in §§5B1.3(c)(7) and 5D1.3(c)(7)) is replaced with a new special condition that the defendant “shall not use or possess alcohol.” The portion of this requirement relating to controlled substances is redundant with other prohibitions on engaging in criminal activity and is deleted for that reason. A related requirement that the defendant not frequent places where controlled substances are illegally sold or used (a “standard” condition in §§5B1.3(c)(8) and 5D1.3(c)(8)) is redundant with other provisions and is vague, and is deleted for those reasons.

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

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Finally, the requirement 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 is both a "mandatory" condition of probation (see §5B1.3(a)(7)) and a "standard" condition of supervised release (see §5D1.3(c)(15)). With respect to supervised release only, the proposed amendment moves this requirement to the list of "special" conditions in subsection (d).

Proposed Amendment:

§5B1.3. Conditions of Probation

(a) Mandatory Conditions—

- (1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));
- (2) for a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));
- (3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));
- (4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));
- (5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. 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;
- (7) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));

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- (8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));
- (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(e)(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; 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));~~
- (10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- (b) Discretionary Conditions ~~The~~
- The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).
- (c) “Standard” Conditions (Policy Statement) ~~The~~
- The following “standard” conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of

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the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

- ~~(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;~~
- (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.
- ~~(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;~~
- (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.
- ~~(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;~~
- (4) The defendant shall answer truthfully the questions asked by the probation officer.
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (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.
- ~~(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;~~
- (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.
- ~~(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;~~

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- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (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.
- ~~(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;~~
- (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.
- ~~(11) the defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement 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).
- ~~(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;~~
- (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.
- ~~(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;~~
- (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

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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.

~~(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);~~

~~(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;~~

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

(d) “Special” Conditions (Policy Statement) The

The following “special” conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(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.~~

(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.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening

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additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse ~~Program Participation~~

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

* So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media,

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and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. See §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

- ~~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~~

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Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

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.*

* * *

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions—

- (1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));
- (2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));
- (3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));
- (4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));
- (5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. *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;*
- (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~~

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~~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; 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));~~

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions ~~The~~

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) “Standard” Conditions (Policy Statement) ~~The~~

The following “standard” conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

~~(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;~~

(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,

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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.
- ~~(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;~~
- (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.
- ~~(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;~~
- (4) The defendant shall answer truthfully the questions asked by the probation officer.
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (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.
- ~~(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;~~
- (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.
- ~~(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 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

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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.

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

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

(d) “Special” Conditions (Policy Statement) The

The following “special” conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(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.~~

(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.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

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If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(8) Unpaid Restitution, Fines, or Special Assessments

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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.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

Commentary

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Application Note:

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.)*~~
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.*

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PROPOSED AMENDMENT: ANIMAL FIGHTING

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

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

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

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

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

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

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

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

Higher Penalties for Animal Fighting Offenses

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

In addition, the proposed amendment revises the existing upward departure provision in two ways. First, it clarifies that animal fighting offenses are assumed to involve violent fights between animals and the severe injury or death of defeated animals, but, nonetheless, there may be cases in which an upward

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departure may be warranted. Second, it expands the provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

New Offenses Relating to Attending an Animal Fighting Venture

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

Proposed Amendment:

§2E3.1. Gambling Offenses; Animal Fighting Offenses

(a) Base Offense Level: (Apply the greatest)

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

(2) **12**, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or

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

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

(4) **6**, otherwise.

Commentary

Statutory Provisions: 7 U.S.C. § 2156 (felony provisions only); 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955; 31 U.S.C. § 5363. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

- Definition.—For purposes of this guideline, “~~Animal~~ **animal** fighting venture” has the meaning given that term in 7 U.S.C. § 2156(g).
- Upward Departure Provision.—**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**

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warranted if (A) ~~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 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

* * *

7 U.S.C. § 2156 (felony provisions only) 2E3.1

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PROPOSED AMENDMENT: CHILD PORNOGRAPHY CIRCUIT CONFLICTS

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

Offenses Involving Infants and Toddlers

First, the proposed amendment responds to differences among the circuits in cases in which the offense involves infants or toddlers. The production guideline, §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). The non-production guideline, §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).

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

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

See §3A1.1, comment. (n.2).

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

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

The proposed amendment responds to the circuit conflict by providing higher penalties for cases involving infants or toddlers. Specifically, it provides in §2G2.2 that, if the offense involved material portraying the sexual abuse or exploitation of an infant or toddler, the 4-level enhancement for depictions of sadistic or masochistic conduct or other depictions of violence in subsection (b)(4) applies. Similarly, it provides in §2G2.1 that, if the offense involved material portraying an infant or toddler, the 4-level enhancement for depictions of sadistic or masochistic conduct or other depictions of violence in subsection (b)(4) applies. It also amends the Commentary to §§2G2.1 and 2G2.2 to specify that if this enhancement applies, do not apply the vulnerable victim adjustment.

Two Issues Relating to the Tiered Enhancement for Distribution in §2G2.2 and Similar Enhancements in §2G2.1 and §2G3.1

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution in §2G2.2(b)(3), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors. Relatedly, section §2G2.1(b)(3) contains a simple 2-level distribution enhancement and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), contains a similar tiered enhancement ranging from 2 levels to 7 levels.

There are two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant’s use of a peer-to-peer file-sharing program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file-sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.

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

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

The Second, Fourth, and Seventh Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file-sharing properties of the program. *See, e.g., United States v. Baldwin*, 743 F.3d 357, 361 (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).

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Other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent “concrete evidence” of ignorance. *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a “presumption” that “users of file-sharing software understand others can access their files.” *United States v. Conner*, 521 Fed. App’x 493, 499 (6th Cir. 2013); *see also United States v. Abbring*, 788 F.3d 565 (6th Cir. 2015).

The proposed amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends subsection (b)(3)(F) to provide that the 2-level enhancement applies if “the defendant knowingly engaged in distribution.” An accompanying application note makes clear that this provision applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly. Similar changes to the 2-level distribution enhancements at §§2G2.1(b)(3) and 2G3.1(b)(1)(F) are also made.

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

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

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

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

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

The proposed amendment makes parallel changes to §2G3.1(b)(1)(B) and the accompanying commentary.

Proposed Amendment:

§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

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- (a) Base Offense Level: **32**
- (b) Specific Offense Characteristics
 - (1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.
 - (2) (Apply the greater) If the offense involved—
 - (A) the commission of a sexual act or sexual contact, increase by **2** levels; or
 - (B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.
 - (3) If the offense involved distribution defendant knowingly engaged in distribution, increase by **2** levels.
 - (4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by **4** levels.
 - (5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - (6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.
- (c) Cross Reference
 - (1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (d) Special Instruction
 - (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

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Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a). *For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

“Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

“Sexual act” has the meaning given that term in 18 U.S.C. § 2246(2).

“Sexual contact” has the meaning given that term in 18 U.S.C. § 2246(3).

3. Application of Subsection (b)(3).—Subsection (b)(3) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.

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).

5. Application of Subsection (b)(5).—

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- (A) *In General.*—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.
- (B) *Inapplicability of Chapter Three Adjustment.*—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

46. *Application of Subsection (b)(6).*—

- (A) *Misrepresentation of Participant’s Identity.*—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

- (B) *Use of a Computer or an Interactive Computer Service.*—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

57. *Application of Subsection (d)(1).*—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

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68. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

* * *

§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

- (a) Base Offense Level:
- (1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
 - (2) **22**, otherwise.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) applies; (B) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.
 - (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.
 - (3) (Apply the greatest) ~~If the offense involved:~~
 - (A) ~~If the offense involved distribution~~ ~~Distribution~~ for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) ~~Distribution for the receipt, or expectation of receipt, of a thing of value,~~ ~~If the defendant distributed in exchange for any valuable consideration,~~ but not for pecuniary gain, increase by **5** levels.
 - (C) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor, increase by **5** levels.
 - (D) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
 - (E) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

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- (F) If the defendant knowingly engaged in distribution, Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.
- (4) 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, increase by 4 levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.
- (7) If the offense involved—
- (A) at least 10 images, but fewer than 150, increase by 2 levels;
 - (B) at least 150 images, but fewer than 300, increase by 3 levels;
 - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
 - (D) 600 or more images, increase by 5 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §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), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the

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sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

~~*“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. “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.*~~

“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Pattern of activity involving the sexual abuse or exploitation of a minor” means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“Sexual abuse or exploitation” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). “Sexual abuse or exploitation” does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

- 2. Application of Subsection (b)(3)(F).—Subsection (b)(3)(F) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.*

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23. Application of Subsection (b)(4)(A).—Subsection (b)(4)(A) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.
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).
35. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
46. Application of Subsection (b)(7).—
- (A) Definition of “Images”.—“Images” means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).
- (B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):
- (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
- (ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.
57. Application of Subsection (c)(1).—
- (A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.
- (B) Definition.—“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).
68. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.
79. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the

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defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

* * *

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
 - (1) (Apply the Greatest) ~~If the offense involved:~~
 - (A) ~~If the offense involved distribution~~ ~~Distribution~~ for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) ~~Distribution for the receipt, or expectation of receipt, of a thing of value,~~ ~~If the defendant distributed in exchange for any valuable consideration,~~ but not for pecuniary gain, increase by **5** levels.
 - (C) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor, increase by **5** levels.
 - (D) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
 - (E) ~~If the offense involved distribution~~ ~~Distribution~~ to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
 - (F) ~~If the defendant knowingly engaged in distribution,~~ ~~Distribution~~ other than distribution described in subdivisions (A) through (E), increase by **2** levels.
 - (2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a website, increase by **2** levels.
 - (3) If the offense involved the use of a computer or an interactive computer service, increase by **2** levels.
 - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
- (c) Cross Reference

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- (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §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).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

~~*“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.*~~

“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.

“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material that is harmful to minors” has the meaning given that term in 18 U.S.C. § 2252B(d).

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(1)(F).—Subsection (b)(1)(F) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.
23. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B or § 2252C, subsection (b)(3) shall not apply.
34. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.

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PROPOSED AMENDMENT:

IMMIGRATION

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015).*

The proposed amendment contains two parts. They are as follows—

Part A *revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).*

Part B *revises the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States).*

(A) Alien Smuggling

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

Unaccompanied Minors

The proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. Section 2L1.1(b)(4) currently provides a 2-level enhancement if the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent. The proposed amendment amends §2L1.1(b)(4) in several ways. First, it makes the enhancement offense-based rather than defendant-based. Second, it provides that an unaccompanied minor is a minor unaccompanied by a parent, adult relative, or legal guardian. Third, it revises the definition of “minor” from an individual under the age of 16 to an individual under the age of 18. Finally, it raises the enhancement from 2 levels to 4 levels.

Sexual Abuse of Aliens

The proposed amendment also 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 to that term in the Commentary to §1B1.1 (Application Instructions), which states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Proposed Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

- (a) Base Offense Level:

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- (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);
- (2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.
- (2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

	<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
(A)	6-24	add 3
(B)	25-99	add 6
(C)	100 or more	add 9 .

- (3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (4) ~~If the defendant smuggled, transported, or harbored~~ If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor’s parent ~~or grandparent~~, adult relative, or legal guardian, increase by ~~24~~ **24** levels.
- (5) (Apply the Greatest):
 - (A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.
 - (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.
 - (C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

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- (6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Death or Degree of Injury</u>	<u>Increase in Level</u>
(A) Bodily Injury	add 2 levels
(B) Serious Bodily Injury	add 4 levels
(C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(D) Death	add 10 levels.

- (8) (Apply the greater):
- (A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.
- (B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.
- (9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

- (1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

“The offense was committed other than for profit” means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

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“Number of unlawful aliens smuggled, transported, or harbored” does not include the defendant.

“Aggravated felony” is defined in the ~~Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States)~~ 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.

“Child” has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

“Spouse” has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

“Immigration and naturalization offense” means any offense covered by Chapter Two, Part L.

“Minor” means an individual who had not attained the age of ~~16~~18 years.

“Parent” means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

“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).

42. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
53. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).
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.
65. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).
26. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.

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37. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

- (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.
- (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
- (C) The offense involved substantially more than 100 aliens.

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

(B) Illegal Reentry

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

The key findings from the report include—

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

The statutory penalty structure for illegal reentry offenses is based on whether the defendant had a criminal conviction before he or she was deported. The offense of illegal reentry, set forth in 8 U.S.C.

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§ 1326, applies to defendants who previously were deported from, or unlawfully remained in, the United States. Specifically, the statutory maximum term of imprisonment is—

- **two years**, in general (see 8 U.S.C. § 1326(a)); but
- **10 years**, if the defendant was deported after sustaining (A) three misdemeanor convictions involving drugs or crimes against the person, or both, or (B) one felony conviction (see 8 U.S.C. § 1326(b)(1)); or
- **20 years**, if the defendant was deported after sustaining an “aggravated felony” — a term that covers a range of offense types, listed in 8 U.S.C. § 1101(a)(43), that includes such different offense types as murder and tax evasion (see 8 U.S.C. § 1326(b)(2)).

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

- **4 levels**, for (A) three misdemeanor convictions for crimes of violence or drug trafficking offenses, or (B) any felony (see §2L1.2(b)(1)(D),(E));
- **8 levels**, for an “aggravated felony” (see §2L1.2(b)(1)(C));
- **12 levels**, for a felony drug trafficking offense for which the sentence imposed was 13 months or less (see §2L1.2(b)(1)(B)); and
- **16 levels**, for specific types of felonies: a drug trafficking offense for which the sentence imposed was more than 13 months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense (see §2L1.2(b)(1)(A)).

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

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

First, the proposed amendment 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. It provides that if there is a conviction for a felony that is an illegal reentry offense, the enhancement is 4 levels. If there are two or more convictions for misdemeanors under §1325(a), the enhancement is 2 levels. The proposed amendment permits prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.

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Second, the proposed amendment changes how §2L1.2 accounts for pre-deportation convictions (other than an illegal reentry offense) — basing them not on the type of offense (e.g., “crime of violence”) but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivisions (A) through (D) at subsection (b)(2). Specifically, if the defendant had a felony conviction and the sentence imposed was five years or more, an enhancement of 10 levels would apply. If the defendant had a felony conviction and the sentence imposed was two years or more, an enhancement of 8 levels would apply. If the defendant had a felony conviction and the sentence imposed exceeded one year and one month, an enhancement of 6 levels would apply. If the defendant had a conviction for any other felony offense, an enhancement of 4 levels would apply. Finally, an enhancement of 2 levels would apply if the defendant had three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses. If more than one of these enhancements apply, the court is instructed to apply the greatest. The proposed amendment permits prior convictions to be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Third, to account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(3) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more offenses after the defendant was ordered deported or ordered removed from the United States for the first time. The structure of the new subsection (b)(3) parallels the proposed changes to subsection (b)(2), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(2), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Fourth, the proposed amendment revises the definition of “crime of violence” to bring it into parallel with the definition of “crime of violence” provided in the recently amended 4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016. See United States Sentencing Commission, Notice of Submission to Congress Of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4741 (Jan. 27, 2016).

Fifth, the proposed amendment revises the definition of “sentence imposed” to provide that revocations of probation, parole, or supervised release count towards the initial sentence length, regardless of when the revocation occurred.

Sixth, the proposed amendment adds a new provision clarifying the use of predicate offenses for cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time. The new Application Note instructs the court to use both offenses: the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), and the other felony offense in determining the appropriate enhancement under subsection (b)(3).

Finally, the proposed amendment revises the departure provision based on seriousness of a prior conviction.

Proposed Amendment:

§2L1.2. — Unlawfully Entering or Remaining in the United States

(a) — ~~Base Offense Level: 8~~

(b) — ~~Specific Offense Characteristic~~

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(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.~~

Commentary

~~Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).~~

Application Notes:

~~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.~~

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~~(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(e).~~

~~(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(e).~~

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

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

~~(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~~

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~~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,~~

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~~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.~~

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

~~Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity; (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.~~

- ~~9. Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.~~

~~In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.~~

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

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- (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.

Commentary

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Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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, forcible sex offenses, 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.**

* The provision marked with an asterisk (*) currently appears in note 1(A)(iv). The proposed amendment only renumbers the provision without making substantive changes to the text.

** The definitions marked with double asterisks (**) currently appear in the commentary scattered throughout the application notes. The proposed amendment places these definitions without substantive changes as part of new application note 2.

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“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.

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

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

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*seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.****

7. *Departure Based on Cultural Assimilation.*—*There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.*

*In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.****

*** The application notes marked with three asterisks (***) appear in the current guideline at the end of the commentary. The proposed amendment only renumbers these notes without making substantive changes to the text.

*** The application notes marked with three asterisks (***) appear in the current guideline at the end of the commentary. The proposed amendment only renumbers these notes without making substantive changes to the text.