

United States Sentencing Commission Public Meeting Minutes
April 5, 2023

Chair Carlton W. Reeves called the meeting to order at 2:10 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Carlton W. Reeves, Chair
- Laura E. Mate, Vice Chair
- Claire Murray, Vice Chair
- Luis Felipe Restrepo, Vice Chair
- Claria Horn Boom, Commissioner
- John Gleeson, Commissioner
- Candice C. Wong, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Patricia K. Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Chair Reeves welcomed the public to the Commission's public meeting, whether they were in-person or watching via the Commission's livestream broadcast.

Chair Reeves introduced his fellow commissioners. Sitting to his right were Vice Chair Claire Murray, Commissioner John Gleeson, and Commissioner Candice Wong. Sitting to his left were Vice Chair Luis Felipe Restrepo, Vice Chair Laura Mate, Commissioner Claria Horne Boom, and ex-officio Commissioner Jonathan Wroblewski.

Chair Reeves announced that the first order of business was a motion to adopt the January 12, 2023, public meeting minutes. Vice Chair Restrepo moved to adopt the minutes, with Commissioner Gleeson seconding. Chair Reeves called for discussion on the motion. Hearing no discussion, Chair Reeves called for a vote, and the motion was adopted by voice vote.

Chair Reeves stated that the next item of business was the Report of the Chair. The Chair observed that this meeting marked the end of the current Commission's first policymaking cycle. The policies it would potentially vote on were the products of an enormous amount of deliberation and care. He was humbled, he said, to be serving with colleagues who were willing to put so much time and effort into this work. Every commissioner, he continued, did all they

could to make sure they did the right and just thing.

Chair Reeves made clear that the Commission's work included not just the commissioners. Over 100 people worked at the agency, many were in the meeting room and many not, but each member of the Commission's team played an essential role in crafting the policies to be discussed. Whatever today's results, he added, the Commission's staff should be proud, knowing that the Commission's work was truly their work.

Chair Reeves explained that the policies to be voted on were informed by a tremendous amount of input from individuals and communities across the country. The Commission held three days of public hearings that were supplemented by extensive written testimony, and it received thousands of public comment letters. Much of this input was available to watch or read on the Commission's website at www.USSC.gov.

Chair Reeves noted that some comments came from the halls of Congress. He thanked Senators McConnell, Durbin, Grassley, Feinstein, Booker, Hirono, and Murphy for providing their views on the Commission's work. Some comments, he continued, came from the chambers of federal courts. The Chair expressed his appreciation for the dozens of current and former federal judges (magistrate judges, district judges, and appellate judges) who took the time to share their perspectives. There were also comments from prosecutors, public defenders, and probation officers.

Chair Reeves stated that most of the comments, however, came from people who did not sit in Congress or on the federal bench. They came from people who did not have titles, or power, or status. They were, he explained, from people who could be sitting at a desk in a home or a workplace or in a prison, watching this hearing, hoping that the Commission would listen to their pleas for change, for mercy, for justice.

Chair Reeves asserted that the Commission has heard these voices, in part, because of the Commission's new online comment portal, one of the many tools the Commission uses to make it easier for people to submit their views. As one commenter stated, "[T]hank you for making it easy for incarcerated people like me to tell you what we think."

Chair Reeves explained, however, that its new tools were not the only reason why the Commission has heard from so many people. The policies being considered were so important that many commenters took extraordinary steps to make sure their views were heard. In sending detailed legal analysis written from a penitentiary in West Virginia, one person wrote, "Most inmates don't have access to your proposed amendments. So, they don't even know what to comment on. My family sent me most of the 290 pages." Given the effort, time, and thoughtfulness that so many placed into their comments, the Chair stated, he felt compelled to repeat what he has said so many times: When you speak to the Commission, you will be heard.

Chair Reeves explained how America's democracy was founded on the idea that "We the People" were united "to form a more perfect union." The story of America was the story of perfecting that union by ensuring "We the People" included all people. Men and women. White

and Black. Rich and poor. Natives and immigrants. The choices our government make – questions of “Life, Liberty, and the Pursuit of Happiness” – were too important to be decided by position, power, or tradition.

In his role as Chair of the Commission, Chair Reeves emphasized that his job was to make sure the policies the Commission issued reflected the values and wisdom of all the people in “We the People” – especially the people most directly affected by those policies. As a result, when the Commission received thousands of comments, including those from victims of crime, judges, doctors, correctional employees, public health professionals, academics, scientists, and ordinary citizens, the Commission had an obligation to not just receive these views, but to listen to them.

Chair Reeves stated that this duty also applied to the views of currently and formerly incarcerated people. The Commission’s policies influence how much of a person’s life is spent in prison. As the Chair’s former colleague, Judge George J. Hazel, so aptly put it, “The difference between ten and fifteen years may determine whether a parent sees his young child graduate from high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family.” If the Commission was to select the correct policy, the fair policy, the just policy, Chair Reeves explained, the Commission must listen to those who have lived out the consequences of its choices.

Chair Reeves again emphasized that when someone speaks to the Commission, they will be heard because they must be heard. He stated that the policies under consideration reflected that if you spoke to the Commission, whether from the halls of Congress or the desk of a prison library, you were heard.

Chair Reeves observed that the policy that received the most comment is described as “compassionate release.” As many judges have said – and as the commissioners were reminded at the public hearings – this term is a “misnomer.” In explaining the nature and origin of this policy, the Chair said he hoped to make clear how important it was that this Commission adopt this commonsense proposal – and, at Congress’s urging, take a first step toward a second chance for so many deserving people.

Chair Reeves recounted how, before the 1980s, people in federal prisons regularly had their sentences reduced if they proved they had reformed themselves. When the Sentencing Commission was created in 1984, Congress ended this system of federal parole. At the same time, Congress created a tool that judges could invoke if there were “extraordinary and compelling reasons” to reduce or end an incarcerated person’s term of imprisonment. Congress tasked the Commission with describing what reasons counted as “extraordinary and compelling.”

For decades, Chair Reeves continued, this sentence-reducing tool went almost entirely unused. Originally, by statute, the provision could only be wielded upon request of the Bureau of Prisons (or BOP). And the BOP limited such requests to cases where a prisoner faced death – mirroring “compassionate release” statutes passed in states during the 1990s. In this way, the Chair stated,

the BOP transformed the “extraordinary and compelling” sentence reduction provision into a narrow “compassionate release” provision. Even when the Commission marginally expanded this provision in 2006, when it added a “catch-all” category that went beyond medical condition and age, BOP’s practices did not change, he noted.

After three decades of seeing this sentence reduction tool ignored, Chair Reeves continued, even with the “catch-all” created by the Commission, Congress acted. In 2018, Congress explicitly intended its increased use by passing the bipartisan First Step Act. To achieve this goal, Congress gave incarcerated people – rather than the Bureau of Prisons – final say in requesting a sentence reduction. In doing so, the Chair explained, Congress again tasked the Commission with the important role of describing when a judge should consider in deciding whether to use this provision. Unfortunately, he added, the agency lacked enough commissioners to immediately meet the moment, and its guideline policy statement – which continued to reference the Bureau of Prisons – went unchanged.

Chair Reeves recounted how, as the Commission sat dormant, incarcerated people facing the COVID-19 pandemic turned to the courts. Newly able to directly ask a judge to spare them from dying of this unimagined virus in crowded prisons, they persuaded judges to implement Congress’ wishes as expressed through the First Step Act and expand the flow of sentence reductions beyond a few drips. In doing so, he continued, judges not only may have saved thousands of lives during the pandemic, but found a broad range of circumstances that, alone or together, amounted to an “extraordinary and compelling” justification for a reduction in sentence.

When given the discretion the Commission had long urged to be exercised, Chair Reeves continued, judges did not unleash a flood of crime into our communities. Research instead suggested that those who received these sentence reductions had an astonishingly tiny recidivism rate of one-seventh of one percent. Research also suggested that granting release to these kinds of incarcerated people strengthened, rather than undermined, public safety – all while reuniting families and restoring communities.

Chair Reeves recounted how, in exercising their newfound discretion during the pandemic, judges often refused to interpret the sentence reduction provision as a mere “compassionate release” statute. Instead, they embraced the original intent of Congress, using the tool to ensure federal sentences – when given a second look – continued to be “sufficient, but not greater than necessary.”

In some cases, however, the Commission’s policy statement’s inability to describe extraordinary and compelling reasons led to injustices, Chair Reeves stated. He recounted a letter received from Markwann Gordon, a person serving over 1,600 months in federal prison on robbery and firearms charges, who asked the Commission to increase opportunities for second chances. When Mr. Gordon applied for a reduction in sentence, District Judge Harvey Bartle said he had “rarely seen a case as compelling as this for a defendant’s release from prison,” noting Mr. Gordon had been “totally rehabilitated” and was a “role model for all those who are incarcerated.” Despite all this, Judge Bartle denied Mr. Gordon’s motion, stating that neither a

“draconian length in sentence” nor any of the other reasons Mr. Gordon presented were “an extraordinary and compelling reason warranting reduction in sentence.” Mr. Gordon asked the Commission – as so many incarcerated people have – to give judges “the discretion to give relief to prisoners to whom they feel have earned and deserved it.”

Chair Reeves again asserted that when “We the People” speak, the Commission listens. In revising the Commission’s guidance to judges on how to use the sentence reduction provision, the Chair explained that the Commission took two simple steps. First, it endorsed some of the most common reasons judges have found to be “extraordinary and compelling.” Facing a dire threat from a public health emergency like COVID, being seriously assaulted or sexually abused by prison employees, and having served at least ten years of an unusually long sentence – these may all justify reducing a sentence. Second, the Commission reaffirmed the policy it adopted in 2006 granting broad discretion to those using the reduction provision. In doing so, the Chair continued, the Commission recognized a key lesson of the pandemic in the courts: to do justice, judges must be able to modify sentences whenever new “extraordinary and compelling” reasons arise.

Chair Reeves stated that when seen in the context of history – and Congress’s expressly stated intent – the changes the Commission proposed were common sense. But to those who may wish to ignore this context, he clarified: In enacting this policy, the Commission was not releasing a single person from prison. Nor was it forcing judges to do so. The proposed policy statement cannot be used to release anyone from prison until a judge determines that doing so adequately protects the public, provides just punishment, and reflects the seriousness of their offense. If we trust judges – and Chair Reeves emphasized that we must do so in a democracy as ours – then we can have faith this provision will be used appropriately.

However, Chair Reeves cautioned, this proposed policy statement is about much more than judicial discretion. He stated that the proposed policy statement was about taking a first step toward a second chance for incarcerated people who need it most. For the last 40 years, he believed that the light of redemption has almost been extinguished from the federal prisons. The proposed policy statement, he continued, would help rekindle that flame while enhancing public safety.

Chair Reeves stated that it was impossible to underestimate the impact the possibility of a second chance will have on the lives of incarcerated people and their families. As a formerly incarcerated father informed the Commission, the proposed policy statement was about “the ability to answer prayers of little girls and boys who want their parents released.” The mother of a young person in federal custody wrote that the proposed policy would give families like hers a “glimmer of hope” after having “lost . . . faith in our national justice system.” These benefits are, the Chair noted, the reason why a bipartisan coalition of policymakers, advocates, and nonprofits have urged the Commission to adopt the proposed policy statement.

Chair Reeves stated that the Commission cannot promise release, but it can promise hope, and he urged his fellow Commissioners to vote in favor of the proposed policy statement.

Chair Reeves reported that the Commission received comment on other proposed amendments including a longstanding feature of the federal sentencing guidelines and state sentencing guidelines across the country: the idea that having prior convictions justified additional punishment. While the Commission has often heard serious criticism of this idea in general, it has proposed addressing two discrete ways in which the sentencing guidelines punish people for having a “criminal history.”

Chair Reeves stated that the first proposal aimed to reduce or eliminate the use of “status points,” sentencing enhancements given to people who committed a crime while on parole or probation. The Commission heard from commentators that status points may often amount to a form of “double penalty.” One incarcerated person wrote that, “I should not be subject to more time because of my ‘status’ at the time of the instant offense[,] especially since I would be subject to a violation as well as time for a new offense.” Moreover, the Chair noted, Commission research has strongly suggested that status points’ ability to predict recidivism – a core justification for their use – may be extremely weak.

In light of all this, Chair Reeves explained, one of the Commission’s proposed amendments eliminated status points in the vast majority of criminal cases. For a limited category of defendants with extensive criminal histories, the proposed amendment would cut the effect of status points in half to reflect that the tool may sometimes achieve other goals beyond predicting recidivism.

Chair Reeves stated that the second “criminal history” proposal under consideration seeks to fulfill a core directive Congress gave the Commission at its inception. That directive provided that, in general, “a first offender who has not been convicted of a crime of violence or an otherwise serious offense” should not be incarcerated. The Commission’s proposed amendment seeks to define who meets this standard and what the consequences for meeting this standard should be.

Chair Reeves explained that the Commission has decided to answer both questions broadly. The final proposed amendment provided a larger reduction in sentences for a larger category of people than the status quo. While the Commission agreed to limit this reduction in a limited set of circumstances, it also agreed to give judges discretion to expand non-carceral options to more people. The commissioners hoped, the Chair continued, that this policy will, as one commenter put it, achieve Congress’s goal of not “subjecting . . . largely productive and benign citizens to lengthy periods of incarceration, which impact not only their lives but those of their families, businesses, and communities.”

Chair Reeves stated that another proposed amendment attempts to address the horrors heard about in some federal prisons, including and especially Federal Correctional Institution Dublin, California. No incarcerated person, the Chair asserted, should suffer physical or sexual abuse at the hands of those tasked with safeguarding them. He recalled a mother who contacted the Commission about her son, who she wrote was the “victim of an assault” by correctional officers, “My son did not commit a violent crime,” she said. “[M]y son did not murder anyone. My world is definitely not the same without him in it and he has a long enough sentence to

where I think about if I will even be alive when he gets out, but now, most days all I can think about is if he will make it out alive.”

For this reason, Chair Reeves stated, the Commission was proposing to increase penalties on those who sexually abused their wards. At the same time, the Commission may also modify the “extraordinary and compelling” sentence reduction provision to expressly allow reductions in sentences in certain cases where incarcerated people suffer these heinous kinds of harms.

Chair Reeves stated that another policy priority reflected an obvious truth: Fentanyl is a deadly and serious problem in our country. Every Commissioner recognized the importance of the federal government acting on this issue. Several commissioners expressed concerns about doing so by continuing the longstanding practice of increasing penalties for drug crimes. Nevertheless, he continued, all agreed that it may be appropriate to adjust how penalties are assessed where fentanyl has been trafficked. Chair Reeves echoed the many, many commentators who urged the Commission and other federal policymakers to focus on “interventions based in science” to address the harms of drug use. He stated that the Commission will continue to ensure that the Commission’s policies do just that.

Similarly, Chair Reeves continued, all the commissioners recognized that Congress has spoken through the Bipartisan Safer Communities Act to increase penalties for certain firearms offenses. Every commissioner also recognized the seriousness of gun violence. Nevertheless, he stated, there were deep concerns about the possible effects of increased firearms penalties, especially on communities of color. Accordingly, the Commission has tried to promptly respond to a Congressional directive while addressing areas where disparities or injustices may arise – including, notably, by adding a downward adjustment to ensure straw purchasers without significant criminal histories receive sentences that reflect their role, culpability, and actual danger to the public.

The Commission hoped, Chair Reeves explained, that, in the words of one expert, the proposed changes ended a “mismatch between the drivers of gun violence and the people targeted for federal prosecution” that exacerbated structural racism. The Chair recognized that the abbreviated nature of the year’s policymaking cycle left many commissioners wishing they had more time to refine this policy. The Chair promised his fellow Commissioners, as well as the public, that the Commission’s schedule moving forward will include all the time necessary to consider and, if necessary, revisit this policy.

Chair Reeves noted that the Commission received an immense amount of comment on its proposals regarding acquitted conduct at sentencing. Some commentators asked to preserve judges’ ability to consider acquitted conduct while some asked to move forward with the proposal to significantly limit how judges could use such conduct. But many others wanted the Commission to be bolder, the Chair observed, either by banning any consideration of acquitted conduct when using the guidelines or addressing other forms of conduct judges can currently consider.

The public’s comments affirmed to all commissioners, Chair Reeves stated, that the question of

“What conduct judges can consider when using the guidelines” is, as sentencing expert Doug Berman has said, “of foundational and fundamental importance to the operation of the entire federal justice system.” He explained that all the commissioners agreed that we need a little more time before coming to a final decision on such an important matter and, as a result, the Commission intended to resolve questions involving acquitted conduct next year.

Chair Reeves stated that the commissioners reached a similar conclusion about proposals regarding how the guidelines define “crime of violence” and “controlled substance” in the context of penalty enhancements in the “career offender” guideline. Currently, the guidelines embrace what is known as the “categorical approach” to define these terms. While the Commission proposed using a different method, the Chair recounted, it received a great deal of feedback urging it to either preserve the categorical approach or use other alternatives, given the possibility that the Commission’s choices on this issue may – as one commenter put it – “increase incarceration, exacerbate racial disparities, and further entrench the disproportionate treatment of people charged with drug-related offenses.”

Again, Chair Reeves stated, the importance of the issue justified the Commission taking more time with it. While the Commission will further debate this issue over the next year, today, it would vote on a few changes to how the “career offender” guideline implicates offenses like Hobbs Act robbery.

Chair Reeves stated that the Commission also took a cautious approach to the implementation of other changes mandated by the First Step Act. Most notable among these changes were those to how some incarcerated people can qualify for a “safety valve” under 18 U.S.C. § 3553(f). For a number of reasons, he explained, including the Supreme Court’s recent choice to consider open questions about this “safety valve,” the Commission proposed taking a narrow, neutral approach to implementing Congress’s directives on this matter.

Chair Reeves recalled that, in 2021, Justices Sotomayor and Gorsuch identified an “important and longstanding split” among federal circuit courts that “need[s] clarification from the Commission.” See Longoria v. United States, 141 S. Ct. 978, 979 (2021). That issue was whether the guidelines reduction for acceptance of responsibility can be withheld or denied because the defendant filed a motion to suppress. In resolving this issue today, the Chair stated, the Commission was ensuring that more people had access to reductions in sentence for accepting responsibility for their actions.

Chair Reeves noted that there were additional amendments regarding a host of other Congressional directives, technical changes to the guidelines, and miscellaneous matters that the Commission would be considering today. As should be obvious by now, the Commission has done an extraordinary amount of work over the last six months. While the Chair was proud of how this work reflected the commissioners’ willingness to hear member of the public, he stated he was even prouder of how their work shows that the commissioners have heard each other.

Chair Reeves recounted how he has said many times, our strength is defined by our diversity. Everyone sees the world differently. That is a good thing. When our views diverge, he

continued, we seek to find common ground. That is an even better thing. And if we ultimately disagree, we remain united in our support for one another and the work of this Commission. And that, Chair Reeves asserted, is the best thing.

Chair Reeves stated that the next item of business was possible votes to promulgate proposed amendments. He called on the General Counsel, Kathleen Grilli, to advise the Commission on a possible vote concerning a proposed technical amendment.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, was a multi-part amendment that would make technical changes in various places throughout the Guidelines Manual to provide updated references to certain sections in the United States Code or reclassification of sentences in the United States Code, to reorganize Commentary to make it more readable and user-friendly, and to correct typographical errors in the Guidelines Manual.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Boom moved to promulgate the proposed amendment, with Commissioner Gleeson seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment addressing miscellaneous issues.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, was a miscellaneous amendment with two parts. Part A responded to a guideline application issue concerning the interaction of §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and §3D1.2 (Groups of Closely Related Counts) and would amend §3D1.2(d) by providing that those offenses covered by §2G1.3, like offenses covered by §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), are not grouped under §3D1.2(d). Part B would revise the guidelines to address the fact that the Bureau of Prisons no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)) and would amend the Commentary to reflect that fact.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to promulgate the proposed amendment, with Commissioner Wong seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on fake pills.

Ms. Grilli stated that the next proposed amendment on fake pills, attached hereto as Exhibit C, responded to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of “fake pills” (i.e., illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue. The proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. The new provision also would refer to 21 U.S.C. § 321(g)(1) for purposes of defining the term “drug.”

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Murray moved to promulgate the proposed amendment, with Commissioner Gleeson seconding. The Chair called for discussion on the motion.

Vice Chair Murray stated that she was pleased the Commission was able to promulgate this amendment. She noted that the Centers for Disease Control and Prevention’s data submitted to the Commission report that overdose deaths in the last year have gone up 15 percent. Eighty percent of that increase was driven by fentanyl, and 60 percent of fentanyl overdoses were driven by the mismarketing of pills.

Vice Chair Murray explained that the proposed amendment was an attempt to address a very narrow, tailored set of particularly reckless and dangerous conduct, which are people who knew, or in this case had willful blindness about the fact, that the pills that they were selling, which look like legitimately manufactured pills, such as 30 milligram Oxycodone pills, are actually laced with fentanyl. Those pills can cause immediate death, and have done so throughout our communities. Such sellers have seen, perhaps, an adverse reaction in one victim but continued to sell these pills, which she believed was particularly vile and dangerous behavior.

Hearing no further discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs

Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on sexual abuse offenses.

Ms. Grilli stated that the next proposed amendment concerning sexual abuse offenses, attached hereto as Exhibit D, contained two parts. Part A responded to recently enacted legislation and would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. § 250 (Penalties for civil rights offenses involving sexual misconduct) to §2H1.1 (Offenses Involving Individual Rights), and offenses under subsection (c) of 18 U.S.C. § 2243 (Sexual abuse of a minor, a ward, or an individual in Federal custody) to §2A3.3 (Criminal Sexual Abuse of a Ward).

Part B responded to concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. Part B of the proposed amendment would amend §2A3.3 to address these concerns. First, it would increase the base offense level of 14 to 18 levels. Second, it would address the presence of aggravating factors in sexual abuse offenses in the same way that §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) does by providing a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to promulgate the proposed amendment, with Commissioner Boom seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed criminal history amendment.

Ms. Grilli stated that the proposed criminal history amendment, attached hereto as Exhibit E, contained three parts (Parts A through C). Part A of the proposed amendment addresses the impact of “status points” under the guidelines. First, it would amend §4A1.1 (Criminal History Category) by redesignating current subsection (d) as subsection (e) and current subsection (e) as subsection (d). Second, it would reduce the impact of “status points” by revising redesignated subsection (e) to provide that one criminal history point is added if the defendant (1) receives seven or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Third, Part A of the proposed amendment would

also make conforming changes to the Commentary to §4A1.1, §2P1.1 (Escape, Instigating or Assisting Escape) and §4A1.2 (Definitions and Instructions for Computing Criminal History).

Part B of the proposed amendment sets forth a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 would provide a decrease of two levels from the offense level determined under Chapters Two and Three if the defendant meets all of the ten listed criteria. New §4C1.1 would also include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) as part of the Commission's implementation of 28 U.S.C. § 994(j). Two new provisions would be added. New Application Note 4(A) would provide that if the defendant received an adjustment under new §4C1.1 and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 4(B) would provide that a departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under new §4C1.1 and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense.

In addition, Part B of the proposed amendment would amend subsection (b)(2)(A) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, "unless otherwise specified." Part B of the proposed amendment would also amend Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences) to provide an explanatory note addressing amendments to the Guidelines Manual related to the implementation of 28 U.S.C. § 994(j), first offenders, and "zero-point" offenders.

Part C of the proposed amendment would amend the Commentary to §4A1.3 to include sentences resulting from possession of marijuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to promulgate the proposed amendment, with Commissioner Gleeson seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed career offender amendment.

Ms. Grilli stated that the proposed career offender amendment, attached hereto as Exhibit F, contained three parts. Part A of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under §4B1.2 (Definitions of Terms Used in Section 4B1.1), as amended in 2016. It would amend §4B1.2 to add a definition of “robbery” that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1).

Part A of the proposed amendment would also add a provision defining the phrase “actual or threatened force,” for purposes of the new “robbery” definition, as “force sufficient to overcome a victim’s resistance,” informed by the Supreme Court’s holding in Stokeling v. United States, 139 S. Ct. 544, 550 (2019). Finally, Part A of the proposed amendment would make conforming changes to the definition of “crime of violence” in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Part B of the proposed amendment would amend §4B1.2 to address a circuit conflict regarding the commentary provision stating that the terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a “crime of violence” and a “controlled substance offense.” Part B of the proposed amendment would address this circuit conflicts by moving the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c).

Part C of the proposed amendment would amend the definition of “controlled substance offense” in §4B1.2(b) to include offenses described in 46 U.S.C. §§ 70503(a) and 70506(b).

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Boom moved to promulgate the proposed amendment, with Vice Chair Murray seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed crime legislation amendment.

Ms. Grilli stated that the proposed crime legislation amendment, attached hereto as Exhibit G, contained eleven parts, Parts A through K.

Part A responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), by amending Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product).

Part B responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), by amending Appendix A, §2G1.1 and §2G1.3

Part C responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), by amending Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Part D responds to the SUPPORT for Patients and Communities Act, Pub. L. 115–271 (2018), by amending Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud)) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery).

Part E responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018), by amending Appendix A and the Commentary to §2X5.2.

Part F responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019), by amending Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part G responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019), by amending Appendix A and the Commentary to §2X5.2.

Part H responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part I responds to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part J responds to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021, Pub. L. 116–260 (2020), by amending Appendix A.

Part K responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), by amending Appendix A and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts).

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Wong moved to promulgate the proposed amendment, with Vice Chair Restrepo seconding. The Chair called for

discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed circuit conflicts amendment.

Ms. Grilli stated that the proposed circuit conflict amendment, attached hereto as Exhibit H, addressed circuit conflicts involving §3E1.1 (Acceptance of Responsibility). Two circuit conflicts have arisen relating to §3E1.1(b). The first conflict concerned whether a §3E1.1(b) reduction may be withheld or denied because a defendant moved to suppress evidence. The second conflict concerned whether the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges.

The proposed amendment would amend §3E1.1(b) to provide a definition of the term “preparing for trial” that provides more clarity on what actions ordinarily constitute preparing for trial for purposes of §3E1.1(b). It would also delete the following sentence in Application Note 6 of the Commentary to §3E1.1: “The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to promulgate the proposed amendment, with Commissioner Boom seconding. The Chair called for discussion on the motion.

Vice Chair Murray stated that the proposed amendment provides guidance as to what “preparing for trial” means and resolves a circuit conflict on that point. She noted, however, that there is an additional split with, for example, United States v. Adair, 38 F.4th 341, 361 (3d Cir. 2022), on the question of whether the Commission has the legal authority to impose conditions on the government’s discretionary authority to file a motion for the third level reduction for acceptance of responsibility that the Commission’s proposed amendment does not intend to, and maybe cannot legally, touch.

Hearing no further discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed firearms amendment.

Ms. Grilli stated that the proposed firearms amendment, attached hereto as Exhibit I, contained

two parts. Part A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to respond to the Bipartisan Safer Communities Act. Specifically, the Act created two new offenses at 18 U.S.C. §§ 932 and 933 and Part A of the proposed amendment would amend Appendix A to reference the new offenses to §2K2.1.

Second, Part A of the proposed amendment would amend §2K2.1 to address the new offenses and increase penalties for offenses applicable to straw purchases and trafficking of firearms, as required by the directive.

Part A of the proposed amendment addresses the new offenses at 18 U.S.C. §§ 932 and 933 and increased penalties for offenses applicable to straw purchases and trafficking of firearms. It would accomplish this by adding references to the new offenses in §2K2.1(a) and revising the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses. Specifically, Part A of the proposed amendment would add references to 18 U.S.C. §§ 932 and 933 in subsections (a)(4)(B)(ii)(II) and (a)(6)(B).

Additionally, it would revise the 4-level enhancement for firearms trafficking at §2K2.1(b)(5) to make it a tiered-enhancement, with the greater of 2-level and 5 level increases triggered by specified criteria. Part A would amend Application Note 13 to conform its content with the revised version of §2K2.1(b)(5) and would amend the departure provision in Application Note 13.

Part A of the proposed amendment also addressed the part of the directive that required the Commission to “consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” See Pub. L. 117–159, §12004(a)(5) (2022). It would add a new 2-level reduction based on certain mitigating factors.

In relation to this part of the directive, Part A of the proposed amendment would delete the departure provision at Application Note 15 of §2K2.1.

Part A of the proposed amendment addressed the part of the directive that required the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under 18 U.S.C. §§ 932 and 933 who was affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.” See Pub. L. 117–159, §12004(a)(5) (2022). It would provide a new 2-level enhancement in response to this part of the directive.

Part B of the proposed amendment addressed concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, “ghost guns”). Part B of the proposed amendment would revise §2K2.1(b)(4)(B) to add that the 4-level enhancement applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial

number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to promulgate the proposed amendment, with Vice Chair Murray seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on First Step Act drug offenses.

Ms. Grilli stated that the proposed amendment on First Step Act drug offenses, attached hereto as Exhibit J, contained two parts (Parts A and B). Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also revise §5C1.2(b) in relation to the minimum offense level required for certain offenders.

In addition, Part A of the proposed amendment would make changes to the Commentary to §5C1.2.

Part A of the proposed amendment would also make conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by §5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make non-substantive changes to §2D1.1 and §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), the 2-level reductions in both guidelines that are tethered to the eligibility criteria of paragraphs (1)–(5) of §5C1.2(a) and changes to the Commentary to §§2D1.1 and 2D1.11 that correspond to the applicable provisions of the revised Commentary to §5C1.2.

Part B of the proposed amendment would revise subsection (a) of §2D1.1 to make the guideline's base offense levels consistent with the First Step Act's changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term "similar offense" used in these guideline provisions with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Boom moved to promulgate the proposed amendment, with Commissioner Gleeson seconding. The Chair called for discussion on the motion.

Vice Chair Murray expressed her agreement with Chair Reeves' earlier statements about the proposed amendment being a matter of deference to the Supreme Court and a stop-gap measure while Pulsifer v. United States, 39 F.4th 1018, 1022 (8th Cir. 2022), cert. granted, No. 22-340, 2023 WL 2227657 (U.S. Feb. 27, 2023), was being decided, rather than an affirmative policy choice made by the Commission. In her view it was very clear that when Congress expanded the safety valve in the First Step Act it intended that the expanded safety valve factors were to be read disjunctively.

Vice Chair Murray explained that part of her reasoning was that if the factors were read conjunctively, then of the 17,000 offenders last year who could have been eligible for a safety valve, only 320 are not eligible. In her view, this would make it a sentencing reduction, rather than a safety valve. Whether that's what Congress actually did in the First Step Act when it was passed was a question before the Court and was not a question for the Commission. But, she continued, if the Court decides the factors should be read conjunctively, then the safety valve will have been turned into a reduction, rather than a safety valve.

Vice Chair Murray recognized the value in a real safety valve. While the Commission had no control over §5C1.2 as that was a statutory matter, she continued, the Commission does have policy control over §2D1.1, which has always been linked to §5C1.2 but does not have to be so as a matter of law or policy. She stated that if Pulsifer v. United States came down in a conjunctive way, she would strongly encourage the Commission to think hard about what a safety valve is intended to do. That is, she explained, separate incarcerated persons who merit a reduction because of reduced criminal history, lack of violence of their offense, or other relevant factors, from people who are less meritorious, rather than just being a sentence reduction. A reduction, Vice Chair Murray believed, should be considered on other terms.

Hearing no further discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed First Step Act reduction in term of imprisonment 18 U.S.C. § 3582(c)(1)(A) amendment.

Ms. Grilli stated that the proposed First Step Act reduction in term of imprisonment 18 U.S.C. § 3582(c)(1)(A) amendment, attached hereto as Exhibit K, would implement the First Step Act's relevant provisions by amending §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C.

§ 3582(c)(1)(A) (Policy Statement)) and its accompanying Commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, authorized a defendant to file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of “extraordinary and compelling reasons” in §1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with revisions), add two new categories, and revise the “Other Reasons” category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.

The proposed amendment would move current Application Note 3 (stating that, pursuant to 28 U.S.C. § 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of §1B1.13) into the guideline as a new subsection (d). It would also add new language providing that rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant’s term of imprisonment is warranted.

The proposed amendment would move Application Note 2 (concerning the foreseeability of extraordinary and compelling reasons) into the guideline as a new subsection (e).

Finally, as conforming changes, the proposed amendment would delete existing Application Notes 4 and 5 and make a minor technical change to the Background Commentary. The proposed amendment would add two new application notes to the Commentary to §1B1.13.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to promulgate the proposed amendment, with Vice Chair Mate seconding. The Chair called for discussion on the motion.

Commissioner Wong stated that she, Vice Chair Murray, and Commissioner Boom had prepared a joint statement to explain why they were not able to support the motion to promulgate the revised policy statement on compassionate release. She would deliver the first part of their joint statement followed by Vice Chair Murray and Commissioner Boom.

Commissioner Wong stated that the proposed amendment would dramatically expand the grounds justifying compassionate release for federal criminal defendants. She expressed her,

Vice Chair Murray, and Commissioner Boom's enormous respect for their friends and colleagues on the Commission and for their good faith efforts to enact improvements to the criminal justice system. During the Commission's public hearings, it heard testimony from stakeholders, including formerly incarcerated recipients of compassionate release, and victims of crime and their families. To say they were moved by the import and magnitude of these issues the commissioners grappled with, she said, would be an understatement.

Commissioner Wong stated that all three commissioners were supportive throughout the amendment process of proposals that would have allowed courts to grant relief in exceptional circumstances based on legally permissible factors subject to careful guardrails.

Unfortunately, Commissioner Wong continued, in their view, today's policy statement goes further than the Commission's legal authority extends. In effectively promulgating a form of second look legislation through the vehicle of compassionate release, she along with Vice Chair Murray and Commissioner Boom were concerned that the Commission was about to make a seismic structural change to the criminal justice system without congressional authorization or directive. She, Vice Chair Murray, and Commissioner Boom could not be party to that effort.

Commissioner Wong stated that they feared that subsection (b)(6) of the new policy statement at §1B1.13, which makes nonretroactive changes in law a basis for compassionate release in some cases, supplanted Congress's legislative role. In layman's terms, she explained, a nonretroactive law is, as relevant here, a change Congress made to the sentence for a given crime. It is a change that Congress has explicitly stated should be applied only prospectively, not to defendants who have already been sentenced.

Commissioner Wong stated that the proposed amendment allowed compassionate release to be the vehicle for retroactively applying the very reductions that Congress has said by statute should not apply retroactively. To be sure, she clarified, the amendment does not do so automatically, but it makes any nonretroactive change in law potential grounds for re-sentencing once the defendant has served ten years. In practical effect, she continued, it provided a second look to revisit duly imposed criminal sentences at the ten-year mark based on intervening legal developments that Congress did not wish to make retroactive.

Commissioner Wong stated that the separation of powers problem should be apparent. In the American system, it was the political branches, Congress and the President, who were accountable to the people and who make the criminal laws. It is not, she explained, the Commission's role to countermand Congress's legislative judgments. For that reason, Commissioner Wong asserted, it should come as no surprise that the weight of legal authority was against the Commission on this issue.

Commissioner Wong reported that of the ten Courts of Appeals to have considered the issue, six made clear by their holdings that the Commission's proposed actions were unlawful. Likewise, she added, the Department of Justice testified before the Commission that sentence reductions based on nonretroactive changes in sentencing law were unlawful under the statute governing compassionate release.

As the Supreme Court has held, Commissioner Wong stated, the strong presumption against statutory retroactivity is deeply rooted in the United States' jurisprudence and embodied a legal doctrine older than the republic. In the Supreme Court's words, she recounted, "in federal sentencing, the ordinary practice is to apply new penalties," -- in context, lower penalties, Commissioner Wong explained -- "to defendants not yet sentenced while withholding that change from defendants already sentenced." See Dorsey v. United States, 567 U.S. 260, 280 (2012).

Respectfully, Commissioner Wong stated, she, Vice Chair Murray, and Commissioner Boom shared the view, to quote the Sixth Circuit, that "what the Supreme Court views as the 'ordinary practice' cannot also be an 'extraordinary and compelling reason' to deviate from that practice." See United States v. Wills, 991 F.3d 720, 724 (6th Cir. 2021). But, she concluded, extraordinary and compelling reasons were precisely what the compassionate release statute requires.

Vice Chair Murray thanked Commissioner Wong for her statement and Chair Reeves for the opportunity to speak. She echoed Commissioner Wong's remarks about the deep respect she and Commissioner Boom had for their colleagues, who they also counted as friends, and for their efforts to improve the legal system. It was an honor, she added, to serve with all of them and she expressed her pride in arriving at consensus on ten of the Commission's eleven amendments today.

Vice Chair Murray reiterated Commissioner Wong's statements about the gravity of the Commission's undertaking regarding compassionate release. She noted that everyone understands the enormous impact that any amendment to the policy statement would have on the lives of the incarcerated and their families, on victims and their families, and on the public. The Vice Chair expressed the Commission's gratitude for the testimony and public comment it received throughout the amendment process. All of the commissioners took seriously the importance of crafting a policy statement that was data driven, compassionate, and legal.

Vice Chair Murray stated, however, that the commissioners differed in good faith in their views of what the law requires in this case. Her part of the joint statement would address the First Step Act, the legislation that was the impetus for the proposed amendment. In her and Commissioners Wong and Boom's view, nothing in the First Step Act authorized or even encouraged the Commission's inclusion of nonretroactive changes in law in the policy statement.

Vice Chair Murray explained that for decades, the Commission's policy statements set forth the extraordinary and compelling reasons justifying compassionate release. The enumerated reasons have been limited to rare cases of advanced age, serious, often terminal, illness, and extraordinary family circumstances or the death or incapacitation of the caretaker of a defendant's minor child. That was the backdrop, she continued, against which Congress legislated when it passed the First Step Act, and in that Act, the only change Congress made to the compassionate release statute was a narrow procedural one. The change allowed prisoners to file compassionate release missions on their own, rather than being forced to rely on the Bureau of Prisons to file on their behalf. Congress made that procedural expansion, she explained, as a

direct response to a discrete problem: the Bureau of Prisons' longstanding, scandalous dereliction in failing to move for compassionate release on behalf of prisoners who clearly qualified for it, including those with advanced terminal illnesses, often with tragic results.

But nothing in the First Step Act, Vice Chair Murray emphasized, not text or legislative history, indicated any intention on Congress's part to expand the substantive criteria for granting compassionate release. Much less, she added, to fundamentally change the nature of compassionate release to encompass for the first time factors other than the defendant's personal or family circumstances.

Vice Chair Murray recounted how the Supreme Court has stated that Congress does not "hide elephants in mouseholes," and she believed that it had not done so here. See *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). That point is underlined, she noted, by the only change the First Step Act made to any of the legal provisions related in even an ancillary way to the compassionate release statute.

Vice Chair Murray explained that in section 603(b)3 of the First Step Act, Congress established a notification requirement that for the first time required the Bureau of Prisons to notify a defendant's attorney, partner, and family if the defendant was diagnosed with a terminal illness. It also required the Bureau of Prisons as necessary to assist that terminally ill defendant with the preparation and filing of a compassionate release motion. It was very clear, she stated, that Congress felt strongly about removing obstacles that prevented defendants who qualified for compassionate release under the existing criteria, most notably those with terminal illnesses, from filing for compassionate release.

Vice Chair Murray stated that the legislative history did say that compassionate release should be expanded. It did not specify substantively or procedurally, but it did say it should be expanded, so it was clear that Congress wanted at least this expansion. By contrast, she continued, Congress's silence with regards to expanding the substantive criteria for granting compassionate release, let alone expanding those substantive criteria to encompass much broader and categorically different kinds of factors, was deafening.

Vice Chair Murray recounted how Senator Chuck Grassley, the Chair of the Senate Judiciary Committee during the passage of the First Step Act, provided public comment on the Commission's proposal. She read from Senator Grassley's letter because she and Commissioners Boom and Wong found it very illuminating. Senator Grassley wrote:

[A]s lead author of the First Step Act, I can tell that Congress didn't intend to make the entire Act retroactive. Instead, Congress made careful retroactive determinations with regard to specific provisions within the First Step Act itself. Congress determined that some provisions are retroactive, while others are not. Yet, this proposal would, contrary to well established law, set aside Congress's specific determinations.

Vice Chair Murray also recounted that the Commission received public comment from Senator

Mitch McConnell, the majority leader of the Senate during passage of the First Step Act. Senator McConnell wrote that the Commission's proposal was, "nothing short of an extra-legislative attempt to apply new sentences retroactively." Both Senators Grassley and McConnell warned the Commission that taking it upon itself to apply nonretroactive laws retroactively would slow the prospect of future bipartisan legislation on criminal justice reform.

Vice Chair Murray expressed her appreciation for the public comment provided by the current Chairman of the Senate Judiciary, Senator Dick Durbin, as well as by Senators Mazie Hirono and Cory Booker, which address compassionate release and several other issues. She noted that while she and Commissioners Boom and Wong found the legal arguments put forth by President Biden's Department of Justice, and by Senator Grassley and Leader McConnell, to be more persuasive on this point, Senators Durbin, Hirono, and Booker's letter was very helpful to all members of the Commission on both this and a number of other issues.

Commissioner Boom thanked Chair Reeves for the opportunity to speak. She echoed Vice Chair Murray's and Commissioner's Wong's sentiments about their talented and earnest colleagues. She likewise echoed her support for proposals to allow courts to grant, in truly exceptional cases, relief when consistent with the law and subject to clear, careful guardrails. Indeed, she has granted such important motions where the law permitted, and the facts were truly extraordinary and warranted compassionate release.

Commissioner Boom stated that as part of her, Vice Chair Murray, and Commissioner Wong's collective statement, she would address the expansive catch-all provision, §1B1.13(b)(5) of the proposed amendment, that they respectfully submit failed to fulfil the Commission's statutory mandate. The Sentencing Reform Act (or SRA), the Commission's governing statute, set forth specific directives to the agency. Three provisions of the SRA, 28 U.S.C. §§ 994(a), 994(t), and 18 U.S.C. § 3582(c)(1)(A), operate together to delegate to the Commission the responsibility for establishing criteria and specific examples of what factors warrant consideration under the compassionate release statute.

Commissioner Boom recounted how the Commission heard during its public comment period from the Criminal Law Committee (CLC) of the Judicial Conference of the United States, the body charged with speaking on behalf of the Judiciary. On the issue of clear standards for compassionate relief, she quoted from the CLC's public comment letter:

The Criminal Law Committee urges the Commission to adopt clear standards and where possible, to avoid open-ended standards that will invite excessive litigation, inconsistent application, circuit splits, and uncertainty. Indeed, when proposing these changes, Judge Reeves, Chair of the Commission, indicated his hope that they would bring, greater clarity to the federal courts and more uniform application of compassionate release across the country.

The Committee joins in that hope and notes for the Commission's consideration some instances in which the proposed changes may instead result in confusion or inconsistent application of the guidelines.

Commissioner Boom stated that the proposed amendment the Commission was about to adopt contained a sweeping catch-all that, in her, Vice Chair Murray, and Commissioner Wong's view, abdicated the Commission's responsibility to articulate clear criteria by effectively delegating the Commission's authority to the courts and it realizes the CLC's concerns.

Commissioner Boom explained that subsection (b)(5) of the proposed policy statement at §1B1.13 defined extraordinary and compelling grounds for compassionate release to include situations where, "the defendant presents any other circumstance or combination of circumstances that when considered by themselves are similar in gravity to those described in Paragraphs 1 through 4."

This unbounded provision, Commissioner Boom continued, provided no criteria to applying any other circumstance other than it must be "similar in gravity" in the view of the court to other enumerated reasons. The new standard, she continued, effectively offered no substantive guidance and risked swallowing the whole. The Sentencing Reform Act abolished parole. The SRA's goal, she stated, was for defendants to be sentenced in accordance with clear, rationale rules that reduced disparities and for sentences to be final, subject only to potential reduction by good time credit or a reduction in sentence in what the Act's legislative history termed such a "relatively small number of cases that the apparatus of the Parole Commission could safely be abolished as unneeded."

Commissioner Boom asserted that the policy statement the Commission was about to promulgate threatened to unwind these efforts. It provided a second look system but lacked the procedural protections and infrastructure of the old parole system. Under the proposed policy statement, she continued, once a sentence has been imposed, there was no finality and judges had virtually unfettered discretion to reduce a sentence for any reason or combination of reasons that they viewed as sufficiently grave. The lack of finality, Commissioner Boom emphasized, was also visited on crime victims. She recounted how the Commission heard compelling testimony from a panel of victims of the trauma they experienced each and every time a defendant moved for compassionate release.

Finally, Commissioner Boom stated, as a practical matter, she, along with Vice Chair Murray and Commissioner Wong, feared that today's amendment would inundate the federal courts and other stakeholders. The CLC warned that an expansive catch-all provision will "provide courts with little guidance and could invite a deluge of compassionate release motions." The CLC urged the Commission to consider the "complexity of the kind of litigation" it could impose on the courts in light of "scarce judicial resources." The seismic expansion of compassionate release promulgated today, she added, not only saddles judges with the task of interpreting a freewheeling catch-all provision but also ensured a flood of motions that would repeat any time there was a nonretroactive change in the law.

Commissioner Boom noted that for the past several years while the Commission lacked a quorum to implement the First Step Act and the country has experienced a natural experiment in what happens when judges had no operative guidance as to the criteria they should apply in

deciding compassionate release motions. The result has been widespread disparities. In fiscal year 2022 for example, the most generous circuit granted 35 percent of compassionate release motions. The most cautious granted only 2.5 percent. The disparities within circuits and even within courthouses were often just as stark. Commissioner Boom, Vice Chair Murray, Commissioner Wong feared that with today's dramatic, vague, and ultimately unlawful expansion of compassionate release, they expect far more of the same.

Commissioner Boom stated that she, Vice Chair Murray, and Commissioner Wong appreciated the Commission's work today and were proud that the seven commissioners were able to come to so much consensus on so many important proposals. She explained that they had the utmost respect for their colleagues and stated she could not stress enough how much they liked and esteemed them. But, Commissioner Boom concluded, they could not join them in promulgating the proposed amendment.

Chair Reeves thanked Commissioner Boom. He asked if there was any further discussion on the motion.

Vice Chair Murray stated that her and Commissioners Boom and Wong's collective statement did not discuss all of the provisions of the proposed policy statement. She cautioned that no one should take an inference either way on their views on any of the other provisions they did not discuss. She explained that it was not that they disagreed with all of the proposed provisions, but just focused on the two that they thought had legal infirmities that stopped them from joining.

Chair Reeves stated that the other commissioners knew of their concerns and respected those concerns on those issues.

Commissioner Gleeson echoed Commissioner Boom's sentiments that he was proud of the work that the new group of commissioners have done in the eight short months since they were all confirmed by the United States Senate. He noted that the proposed amendments announced today, both individually and collectively, amounted to important steps to a more equitable sentencing system and safer communities as well. This was in light of the fact that the new Commission's first amendment cycle together was truncated by the timing of their confirmations. He stated that the Commission did a lot, and he could hardly be more grateful to his six colleagues on the Commission and to the staff of the Commission, which has done excellent work under very difficult circumstances.

Commissioner Gleeson stated that he did want to say a few words, not in rebuttal to Vice Chair Murray and Commissioners Boom and Wong's statements, but by way of observations about the proposed amendment to policy statement §1B1.13, which provided the necessary guidance to district judges exercising the limited authority to reduce sentences granted in 18 U.S.C. § 3582(c)(1)(A). As already stated, the Commission received enormous and valuable feedback across the entire range of issues on which it sought feedback, and the proposed compassionate release amendment was no exception.

Commissioner Gleeson recounted how the Commission heard from judges who had exercised

their authority in the more than four years since the enactment of the First Step Act in which Congress, for the express purpose of increasing the use of such sentence reductions, first allowed defendants to make such motions under the law. It heard from people who received those reductions and who were returned to their families and communities. It heard from the Department of Justice, members of the legal academy, and many other groups and individuals who were genuinely concerned, as everyone was, without a doubt, with interest with issues such as finality, administrability, families of victims, as well as to sentenced defendants, and of course the safety of our communities.

Commissioner Gleeson noted how Chair Reeves was fond of saying -- and Commissioner Gleeson loved hearing him say it -- "When people speak to this Commission, they were heard." He stated that the commissioners did their level best to revise §1B1.13 in a way that reconciled as best they can all the relevant considerations, some of which were admittedly in tension with others. The result, he continued, was a policy statement that provided needed modification to the specified extraordinary and compelling reasons, particularly medical and family circumstances. It also added a much needed one for inmates subjected to certain forms of abuse by those responsible for their custody.

Commissioner Gleeson stated that the proposed amendment also maintained the so-called "other reasons catch-all" that has been in the current policy statement for years to reflect the fact that by their nature, as the past few years have demonstrated, reasons judges found extraordinary and compelling and worthy of consideration in deciding whether to reduce the sentence were by their nature difficult to specify and enumerate in advance.

Additionally, Commissioner Gleeson emphasized, and most controversially, the proposed amendment allowed for consideration of changes in the law as extraordinary and compelling reasons warranting a reduction in sentence, but only in narrow circumstances. Only when a defendant is serving an unusually long sentence and only when he or she was at least ten years into that sentence may a change in the law be considered for this purpose. And even then, he explained, under the proposed amendment, this reason can only be considered in the rare circumstance where that change in law would result in a "gross disparity" between the sentence the moving defendant was serving and the sentence likely to be imposed at the time the motion is made. That commonsense guidance, Commissioner Gleeson stated, was fully consistent with separation of powers principles, the authority of the Sentencing Commission, and with the First Step Act.

Most importantly, Commissioner Gleeson stated, it will ensure that section 3582(c)(1)(A) of Title 18, of the United States Code, served one of the purposes Congress explicitly intended it to serve, and that law was enacted almost 40 years ago: To provide a needed, transparent, and judicial second look at unusually long sentences that in fairness should be reduced.

Hearing no further discussion, Chair Reeves called on the Staff Director, Kenneth Cohen, to make a roll call vote.

Mr. Cohen: Commissioner Wong?

Commissioner Wong: Nay.

Mr. Cohen: Judge Boom?

Commissioner Boom: Nay.

Mr. Cohen: Judge Gleeson?

Commissioner Gleeson: Aye.

Mr. Cohen: Vice Chair Mate?

Vice Chair Mate: Aye.

Mr. Cohen: Vice Chair Murray?

Vice Chair Murray: Nay.

Mr. Cohen: Judge Restrepo?

Vice Chair Restrepo: Yes.

Mr. Cohen: Chair Reeves?

Chair Reeves: Aye.

Mr. Cohen reported that he heard four ayes.

Chair Reeves, Vice Chairs Mate and Restrepo, and Commissioner Gleeson voted in favor of adopting the motion. Vice Chair Murray and Commissioners Boom and Wong voted against adopting the motion. The motion was adopted with at least four commissioners voting in favor of adopting it.

Chair Reeves call on the General Counsel to advise the Commission on the next matter of business.

Ms. Grilli advised that Parts A and B of the just promulgated Criminal History Amendment may have the effect of lowering the term of imprisonment recommended in the guidelines applicable to particular offenses or category of offenses. In light of that, she asked whether there was a motion pursuant to Rules 2.2 and 4.1(A) of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis of the Criminal History Amendment.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to instruct staff to prepare a retroactivity impact analysis of the Criminal History Amendment, with

Vice Chair Mate seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate and Restrepo, and Commissioner Gleeson voted in favor of adopting the motion and Vice Chair Murray and Commissioners Boom and Wong abstained. The motion was adopted with at least four commissioners voting in favor of adopting it.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote to publish in the Federal Register an issue for comment on whether to make retroactive any part of the Criminal History Amendment that may have the effect of reducing the guideline range for a category of offenses or offenders.

Ms. Grilli advised that, because the Criminal History Amendment may have the effect of lowering guideline ranges for certain offenses or category of offenses, under the Commission's Rules of Practices and Procedures, if the Commission may consider retroactivity, it is required to publish a notice seeking public comment on the issue of whether to apply this guideline retroactively by amending §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).

Therefore, an issue for comment is before the Commission asking whether to list Parts A and B of the amendment addressing the impact of status points at §4A1.1 and offenders with zero criminal history points at the new §4C1.1 in subsection (d) of §1B1.10 as changes that may be applied retroactively to previously sentenced defendants. The Commission has the authority to make this change under 28 U.S.C. § 994(u).

Ms. Grilli advised that a motion to publish the issue for comment with a public comment period closing on June 23rd, 2023, and technical conforming amendment authority to staff would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to adopt the proposed motion to publish, with Vice Chair Restrepo seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate and Restrepo, and Commissioner Gleeson voted in favor of adopting the motion and Vice Chair Murray and Commissioners Boom and Wong abstained. The motion was adopted with at least three commissioners voting in favor of it.

Chair Reeves asked if there was any further business before the Commission.

Commissioner Wroblewski expressed the Department of Justice's sincere gratitude to the Commission for taking up several of the DOJ's priorities this amendment cycle. He stated that the fentanyl crisis across the country, firearms violence plaguing our cities and rural areas alike, and sexual abuse in our federal prisons, were all critical public safety issues. The amendments enacted today will help address each of them. They will not solve these problems on their own, Commissioner Wroblewski acknowledged, but they were necessary and appropriate. On these and the other amendments, there were specific provisions that the DOJ agrees with and others that it did not, and the DOJ appreciated the Commission considering its views on all of them.

Commissioner Wroblewski thanked the Commission staff for its work and its patience with the commissioners over the course of the last six months. The issues they faced together over that time were complex and controversial. The Commission's staff was genuinely the true experts on the Sentencing Reform Act, the Guidelines Manual, and federal sentencing data, he observed, and its search for sensible sentencing policy has been remarkable to see.

Commissioner Wroblewski also recognized the men and women who work in our federal courts around the country every day. He sent a special "shout-out" to his Justice Department colleagues and to all who work in the courts, public defenders, private counsel, probation officers, appellate district and magistrate judges, clerks, marshals, and any others. They are, he emphasized, the front lines of our criminal justice process. He thanked them for their service and for all they did to try to make justice a reality every day. The commissioners knew each of them cared deeply about justice and about the work of the Commission.

Commissioner Wroblewski expressed his concern to Chair Reeves about many of the amendments the Commission had promulgated today and how they would impact their colleagues in the courts for those amendments were indeed quite complex. He recounted that there were new aggravating factors, new mitigating factors, all new sentencing concepts, fine gradations, a whole new criminal history category, lists of limitations, exceptions, provisos, and much more. If there was one theme that ran through most of the amendments, Commissioner Wroblewski observed, it was the burden and uncertainty of litigation that will be sure to be a byproduct of the Commission's work.

If he believed this litigation and complexity would lead to more safety for the public and more justice for victims and those convicted of crime, Commissioner Wroblewski continued, that would be one thing. But he was not so sure. He expressed hope that the Commission could find time in the coming year to examine the guideline system as a whole and how that system has, he believed, led to a tangle of litigation and, sometimes, to policy making. The same for the sentencing ranges, some sensible and some not so sensible in the guidelines, and to the ever-growing complexity of federal sentencing and corrections law and the implications it has for the many dimensions of justice.

Commissioner Wroblewski noted that 2023 marked the 50th anniversary of the publication of Judge Marvin Frankel's book, Criminal Sentences: Law Without Order, from which the guidelines movement began. Next year will mark the 40th anniversary of the Sentencing Reform Act of 1984. He noted that the basic architecture of the federal guidelines has not changed since the guidelines were first promulgated despite major and structural Supreme Court decisions, a bipartisan national movement for reform of federal sentencing, dramatic changes to federal corrections law and policy, including the introduction of a new earned time credit system, unprecedented technological change that opens up great possibilities for sentencing and corrections, calls for systemic review from the American Law Institute, the Counsel on Criminal Justice, and the advancement of knowledge in human behavior.

Commissioner Wroblewski stated that first Commission made some good choices and some not so good when it built the framework of the current federal sentencing guidelines system, and the DOJ thinks some engagement on that framework was past due.

Commissioner Wroblewski once again thanked Chair Reeves for his leadership over the last eight months and thanked his Commission colleagues. It was, he said, a genuine privilege to work with all of them.

Chair Reeves thanked Commissioner Wroblewski for his comments and that his input was valuable to the Commission during all of its deliberations and that the commissioners certainly appreciated it.

Vice Chair Mate expressed her gratitude for the opportunity to serve on the Commission and that it was an honor to work with this group of commissioners and with the truly dedicated staff. She agreed, as the Supreme Court has recognized, that the Commission filled an important institutional role. The Commission has the capacity to base its determinations on empirical data and national experience, and the many amendments announced today reflected that role. In formulating the guidance on modification of sentences where individuals in prison face critical, medical, or family situations, unusually long sentences, and other extraordinary and compelling circumstances, she stated, the commissioners looked to the decisions and experiences of the courts charged with making those modifications.

Vice Chair Mate stated that the Commission's considered decision to not further penalize someone for being under a criminal justice sentence and to adjust sentences for people facing their first conviction was based on empirical evidence. On these amendments, she had little more to add to the Chair's remarks other than that this evidence-based guidance will improve the lives of thousands of people each year, strengthen communities, and serve public safety.

Going forward, Vice Chair Mate looked forward to working with her wonderful colleagues to ensure all their decisions were based on the best possible empirical data and a wide range of national experiences. In closing, she thanked Chair Reeves for the opportunity to make her remarks.

Vice Chair Restrepo thanked the Chair for the opportunity to speak. He agreed with the Chair's remarks that the amendments the Commission promulgated were the product of extensive deliberations on behalf of himself and his colleagues. He underscored how hard all eight commissioners had worked on the amendments in a collaborative spirit and an understanding that they would all have to compromise.

In several instances, Vice Chair Restrepo recounted, he found himself persuaded by his colleagues to change his position on a given issue. He was grateful to all of his colleagues for fostering an environment of collegiality and an open and robust exchange of ideas. The Vice Chair echoed the thanks to the staff of the United States Sentencing Commission for their support and expertise. None of this work, he recognized, would be possible without their support.

Finally, Vice Chair Restrepo gave a very special thanks to Chair Reeves for his leadership, patience, willingness to listen, and consider everybody's views, his wonderful sense of humor, and his inherent good nature. The Vice Chair stated that President Biden had choose wisely by appointing Judge Reeves to be the Chair of the Commission. He concluded by stating that he looked forward to working with his colleagues and the staff over the next many months and years to come.

Chair Reeves thanked Vice Chair Restrepo for his remarks. The Chair thanked staff for its work, thanked the public for its interest in the Commission's work, and thanked his fellow commissioners for their work. Chair Reeves acknowledged that the Commission has more work to do, but it would get it done. He closed by expressing his appreciation for everyone as the Commission continues its work.

Chair Reeves asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Murray moved to adjourn, with Vice Chair Restrepo seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 3:49 p.m.

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual*.

Part A of the proposed amendment would make technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. 115–282 (2018) (hereinafter “the Act”), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. §§ 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. §§ 70001–70036. Appendix A (Statutory Index) includes references to Chapter Two guidelines for both former 33 U.S.C. §§ 1227(b) and 1232(b). Specifically, former section 1227(b) is referenced to §§2J1.1 (Contempt) and 2J1.5 (Failure to Appear by Defendant), while former section 1232(b) is referenced to §2A2.4 (Obstructing or Impeding Officers). Part A of the proposed amendment would amend Appendix A to delete the references to 33 U.S.C. §§ 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. §§ 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

Part B of the proposed amendment would make technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of title 50 and to other titles of the United States Code. To reflect the new section numbers of the reclassified provisions, Part B of the proposed amendment would make changes to §2M4.1 (Failure to Register and Evasion of Military Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A. Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of title 25 to four new chapters in title 25 in order to improve the organization of the title. To reflect these changes, Part B of the proposed amendment would make further changes to Appendix A.

Part C of the proposed amendment would make certain technical changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part C of the proposed amendment would amend the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9 to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It would also make minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheses, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to “Phencyclidine (actual) /PCP (actual)” to “Phencyclidine (PCP) (actual).” Second, Part C of the proposed amendment would make clerical changes throughout the Commentary to correct some typographical errors. Finally, Part C of the proposed amendment would amend the Background Commentary to add a

specific reference to Amendment 808, which replaced the term “marihuana equivalency” with the new term “converted drug weight” and changed the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” *See* USSG App. C, amend. 808 (effective Nov. 1, 2018).

Part D of the proposed amendment would make technical changes to the Commentary to §§2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. § 876.

Part E of the proposed amendment would make technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). First, the proposed amendment would replace the term “prior criminal adjudication,” as found and defined in Application Note 3(G) of §8A1.2 (Application Instructions – Organizations), with “criminal adjudication” to better reflect how that term is used throughout Chapter Eight. In addition, the proposed amendment would make conforming changes to the Commentary to §8C2.5 (Culpability Score) to account for the new term. Part E of the proposed amendment would also make changes to the Commentary to §8C3.2 (Payment of the Fine – Organizations). Section 207 of the Mandatory Victims Restitution Act of 1996, Pub. L. 104–132 (1996), amended 18 U.S.C. § 3572(d) to eliminate the requirement that if the court permits something other than the immediate payment of a fine or other monetary payment, the period for payment shall not exceed five years. Part E of the proposed amendment would revise Application Note 1 of §8C3.2 to reflect the current language of 18 U.S.C. § 3572(d) by providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

Part F of the proposed amendment would make clerical changes to correct typographical errors in: §1B1.1 (Application Instructions); §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); §2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); §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); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); §2M1.1 (Treason); §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); §3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); §3D1.1 (Procedure for Determining Offense Level on Multiple Counts); §3D1.2 (Groups of Closely Related Counts); §3D1.3 (Offense Level Applicable to Each Group of Closely Related

Counts); §3D1.4 (Determining the Combined Offense Level); §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); §4B1.1 (Career Offender); §5C1.1 (Imposition of a Term of Imprisonment); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); §8B1.1 (Restitution — Organizations); §8B2.1 (Effective Compliance and Ethics Program); §8C3.3 (Reduction of Fine Based on Inability to Pay); and §8E1.1 (Special Assessments — Organizations).

Part G of the proposed amendments would also make clerical changes to the Commentary to §§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of Supreme Court cases. In addition, Part G of the proposed amendment would amend (1) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to add a missing reference to 18 U.S.C. § 844(o); (2) the Commentary to §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), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to §3A1.2 (Official Victim), to add missing content in Application Note 3.

Proposed Amendment:

(A) Frank LoBiondo Coast Guard Authorization Act of 2018

APPENDIX A

STATUTORY INDEX

	* * *
33 U.S.C. § 1227(b)	2J1.1, 2J1.5
33 U.S.C. § 1232(b)(2)	2A2.4
	* * *
46 U.S.C. § 3718(b)	2Q1.2
46 U.S.C. § 70035(b)	2J1.1, 2J1.5
46 U.S.C. § 70036(b)	2A2.4
46 U.S.C. App. § 1707a(f)(2)	2B1.1
	* * *

(B) Reclassification of Sections of United States Code

§2M4.1. Failure to Register and Evasion of Military Service

* * *

Commentary

Statutory Provision: ~~50 U.S.C. App. § 462~~ 50 U.S.C. § 3811.

* * *

§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 22 U.S.C. § 8512; 50 U.S.C. § 1705; ~~50 U.S.C. App. §§ 2401–2420~~ 50 U.S.C. §§ 4601–4623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

3. In addition to the provisions for imprisonment, ~~50 U.S.C. App. § 2410~~ 50 U.S.C. § 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.
4. For purposes of subsection (a)(1)(B), “*a country supporting international terrorism*” means a country designated under section 6(j) of the Export Administration Act (~~50 U.S.C. App. 2405~~ 50 U.S.C. § 4605).

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APPENDIX A

STATUTORY INDEX

* * *

22 U.S.C. § 8512

2M5.1, 2M5.2, 2M5.3

25 U.S.C. § 450a § 5306	2B1.1
26 U.S.C. § 5148(1)	2T2.1
	* * *
50 U.S.C. § 3121	2M3.9
50 U.S.C. App. § 462 50 U.S.C. § 3811	2M4.1
50 U.S.C. App. § 527(e) 50 U.S.C. § 3937(e)	2X5.2
50 U.S.C. App. § 2410 50 U.S.C. § 4610	2M5.1
52 U.S.C. § 10307(c)	2H2.1
	* * *

(C) Technical Changes to Commentary to §2D1.1

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

* * *

8. Use of Drug Conversion Tables.—

(A) **Controlled Substances Not Referenced in Drug Quantity Table.**—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), ~~as~~ **as** the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, ~~LSD~~ **LSD**, and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (i) Use the Drug Conversion Tables to find the converted drug weight of the controlled substance involved in the offense.
- (ii) Find the corresponding converted drug weight in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the converted drug weight determined above as the base offense level for the controlled substance involved in the offense.

(See also Application Note 6.) For example, in the Drug Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to 5 kilograms of converted drug weight. In a case involving 100 grams of oxymorphone, the converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

* * *

(D) Drug Conversion Tables.—

SCHEDULE I OR II OPIATES*	CONVERTED DRUG WEIGHT
1 gm of Heroin =	1 kg
1 gm of Dextromoramide =	670 gm
1 gm of Dipipanone =	250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm
1 gm of Alphaprodine =	100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg

1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Morphine =	500 gm
1 gm of Oxycodone (actual) =	6700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm
1 gm of Codeine =	80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Hydrocodone (actual) =	6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Opium =	50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) =	700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) =	700 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Alphaprodine =	100 gm
1 gm of Codeine =	80 gm
1 gm of Dextromoramide =	670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Dipipanone =	250 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Heroin =	1 kg
1 gm of Hydrocodone (actual) =	6,700 gm
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm
1 gm of Oxycodone (actual) =	6,700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of Cocaine =	200 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of Fenethylamine =	40 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (Actual) =	20 kg
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (Actual) =	20 kg
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of Phenmetrazine =	80 gm
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm
1 gm Cocaine Base ("Crack") =	3,571 gm
1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm

1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base (“Crack”) =	3,571 gm
1 gm of Fenethylamine =	40 gm
1 gm of “Ice” =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P ₂ P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P ₂ P) (in any other case) =	75 gm

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a Synthetic Cathinone (except a Schedule III, IV, or V substance) =	380 gm

**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.*

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg
1 gm of Diethyltryptamine/DET =	80 gm
1 gm of Dimethyltryptamine/DM =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm
1 gm of Peyote (Dry) =	0.5 gm
1 gm of Peyote (Wet) =	0.05 gm
1 gm of Phencyclidine/PCP =	1 kg
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm
1 gm of Paramethoxymethamphetamine/PMA =	500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm
1 gm of N-ethyl-1-phenylethylamine (PCE) =	1 kg
1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg

1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

SCHEDULE I MARIHUANA	CONVERTED DRUG WEIGHT
1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm
1 gm of Hashish Oil =	50 gm
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Hashish Oil =	50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) =	1 gm
1 gm of Tetrahydrocannabinol, Organic (organic) =	167 gm
1 gm of Tetrahydrocannabinol, Synthetic (synthetic) =	167 gm

SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT	DRUG WEIGHT
1 gm of a Synthetic Cannabinoid (except a Schedule III, IV, or V substance) =	167 gm	

**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.*

“Synthetic Cannabinoid,” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).

FLUNITRAZEPAM **	CONVERTED DRUG WEIGHT
1 unit of Flunitrazepam =	16 gm

***Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.*

SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)	CONVERTED DRUG WEIGHT
1 unit of a Schedule I or II Depressant (except Gamma-hydroxybutyric acid) =	1 gm

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of g Gamma-hydroxybutyric a Acid =	8.8 gm

SCHEDULE III SUBSTANCES (EXCEPT k KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance =	1 gm

****Provided*, that the combined converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of converted drug weight.

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of k Ketamine =	1 gm

SCHEDULE IV SUBSTANCES (EXCEPT f FLUNITRAZEPAM)****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm

*****Provided*, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm

******Provided*, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF A MPHETAMINE OR M METHAMPHETAMINE)*****	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg
1 gm of Phenylpropanolamine =	10 kg
1 gm of Pseudoephedrine =	10 kg

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

DATE RAPE DRUGS (EXCEPT f FLUNITRAZEPAM, GHB, OR k KETAMINE)	CONVERTED DRUG WEIGHT
1 ml of 1,4- b Butanediol =	8.8 gm
1 ml of g Gamma b Butyrolactone =	8.8 gm

To facilitate conversions to converted drug weight, the following table is provided:

MEASUREMENT CONVERSION TABLE	
	1 oz = 28.35 gm
	1 lb = 453.6 gm
	1 lb = 0.4536 kg
	1 gal = 3.785 liters
	1 qt = 0.946 liters
	1 gm = 1 ml (liquid)

1 liter = 1,000 ml
 1 kg = 1,000 gm
 1 gm = 1,000 mg
 1 grain = 64.8 mg.

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

HALLUCINOGENS	
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MARIHUANA	
1 marihuana cigarette	0.5 gm
STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

* * *

21. **Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section ~~5C1.2(b)~~ **5C1.2(b)**, which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(18) applies.

* * *

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant’s criminal history, and whether death or serious bodily injury resulted from the offense.

* * *

Subsection (b)(14)(A) implements the instruction to the Commission in section 303 of Public Law ~~103~~¹⁰⁴–237.

* * *

The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or “equivalents”) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. *See* USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term “converted drug weight” and to change the title of the Drug Equivalency Tables to the “Drug Conversion Tables.” *See* USSG App. C, Amendment 808 (effective November 1, 2018).

(D) References to 18 U.S.C. § 876

§2A4.2. Demanding or Receiving Ransom Money

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 876(a), 877, 1202. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876(c), 877, 878(a), 879, 1038, 1521, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)–(E); 49 U.S.C. § 46507. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), (d), 876(b), (d), 877, 1030(a)(7), 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 875(a)	2A4.2, 2B3.2
18 U.S.C. § 875(b)	2B3.2
18 U.S.C. § 875(c)	2A6.1

18 U.S.C. § 875(d)	2B3.2, 2B3.3
18 U.S.C. § 876	2A4.2, 2A6.1, 2B3.2, 2B3.3
18 U.S.C. § 876(a)	2A4.2, 2B3.2
18 U.S.C. § 876(b)	2B3.2
18 U.S.C. § 876(c)	2A6.1
18 U.S.C. § 876(d)	2B3.2, 2B3.3
18 U.S.C. § 877	2A4.2, 2A6.1, 2B3.2, 2B3.3

* * *

(E) Technical Changes to Commentary in Chapter Eight

§8A1.2. Application Instructions – Organizations

* * *

Commentary

Application Notes:

3. The following are definitions of terms used frequently in this chapter:

- (G) “~~Prior criminal~~**Criminal** adjudication” means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.

* * *

§8C2.5. Culpability Score

* * *

Commentary

Application Notes:

- 1. **Definitions.**—For purposes of this guideline, “*condoned*”, “~~prior criminal~~ *adjudication*”, “*similar misconduct*”, “*substantial authority personnel*”, and “*willfully ignorant of the offense*” have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions – Organizations).

* * *

§8C3.2. Payment of the Fine – Organizations

* * *

Commentary

Application Note:

- 1. When the court permits other than immediate payment, the period provided for payment ~~shall in no event exceed five years~~ shall be the shortest time in which full payment can reasonably be made. 18 U.S.C. § 3572(d).

* * *

(F) Clerical Changes to Correct Typographical Errors

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

- (E) “*Dangerous weapon*” means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g., e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

* * *

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

* * *

Commentary

* * *

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those ~~Chapters~~ **chapters** are explicit as to the specific factors to be considered.

* * *

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

* * *

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).

* * *

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

Commentary

* * *

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

* * *

§2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

* * *

Commentary

* * *

Background: This section implements the direction to the Commission in ~~Section~~ **section** 6482 of the Anti-Drug Abuse Act of 1988. Offenses covered by this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, *e.g.*, a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.

* * *

§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

* * *

(b) Specific Offense Characteristics

* * *

- (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 **in** 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.

* * *

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

* * *

Commentary

* * *

Application Notes:

* * *

5. **Upward Departure.**—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. The following are examples of cases in which an upward departure may be warranted:

* * *

- (B) The offense caused or risked substantial non-monetary harm (~~e.g.~~ **e.g.**, physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

8. **Application of Subsection (b)(4).**—

- (A) **Interaction with Subsection (a)(7).**—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, **if** the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

* * *

§2M1.1. Treason

* * *

Commentary

* * *

Background: Treason is a rarely prosecuted offense that could encompass a relatively broad range of conduct, including many of the more specific offenses in this Part. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous offense guideline in lesser cases.

* * *

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

* * *

Commentary

* * *

Application Notes:

* * *

7. **Aggregation of Individual and Corporate Tax Loss.**—If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant’s individual tax return and the defendant’s corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation’s income in the amount of \$100,000 on the corporation’s tax return, diverts the funds to the defendant’s own use, and does not report these funds on the defendant’s individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant’s corporate tax return is \$34,000 (\$100,000 multiplied by 34%). The tax loss attributable to the defendant’s individual tax return is \$28,000 (\$100,000 multiplied by 28%). The tax loss for the offenses are added together to equal \$62,000 (\$34,000 + \$28,000).

* * *

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the Treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

* * *

PART T — OFFENSES INVOLVING TAXATION

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in Parts parts I–IV of Subchapter subchapter J of Chapter chapter 51 of Subtitle subtitle E of Title title 26, United States Code, 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. 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.

* * *

3. CUSTOMS TAXES

Introductory Commentary

This Subpart subpart deals with violations of 18 U.S.C. §§ 496, 541–545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3907, and is designed to address violations involving revenue collection or trade regulation. It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this Subpart subpart would be a reason for referring to another, more specific guideline, if applicable, or for departing upward if there is not another more specific applicable guideline.

* * *

CHAPTER THREE

ADJUSTMENTS

PART A — VICTIM-RELATED ADJUSTMENTS

Introductory Commentary

The following adjustments are included in this Part part because they may apply to a wide variety of offenses.

* * *

§3A1.1. Hate Crime Motivation or Vulnerable Victim

* * *

Commentary

* * *

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation. To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines are hate crimes. In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.

* * *

PART B — ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant’s role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)–(4), and not solely on the basis of elements and acts cited in the count of conviction.

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

4. **Examples of Covered Conduct.**—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

* * *

- (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511);

* * *

PART D — MULTIPLE COUNTS

Introductory Commentary

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or

informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, “combined” offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

* * *

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

* * *

Some offenses, *e.g.*, racketeering and conspiracy, may be “composite” in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (*e.g.*, many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (*e.g.*, independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

Commentary

Application Notes:

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2. Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However,

a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this **Part** do apply to a count of conviction under this type of statute.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter **Three**, Part E (Acceptance of Responsibility) and Chapter **Four**, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the “offense level” should be treated as referring to the combined offense level after all subsequent adjustments have been made.

* * *

§3D1.2. Groups of Closely Related Counts

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Commentary

Application Notes:

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Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts (“Group”). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

* * *

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this **Part** and

resolving ambiguities, the court should look to the underlying policy of this Partpart as stated in the Introductory Commentary.

* * *

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

* * *

Commentary

* * *

Background: This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Partpart.

* * *

§3D1.4. Determining the Combined Offense Level

* * *

Commentary

* * *

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Partpart could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense

level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

* * *

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

* * *

Commentary

Application Notes:

* * *

2. Upward Departures.—

* * *

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

* * *

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this ~~Chapter~~ **chapter**.

* * *

§4B1.1. Career Offender

* * *

Commentary

* * *

Background: Section 994(h) of ~~Title~~ **title** 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee’s view that

substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

* * *

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapterchapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

* * *

§5E1.1. Restitution

* * *

Commentary

Application Note:

1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapterchapter 46 or 96 of Titletitle 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). See 18 U.S.C. § 3663(c)(4).

Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under Subchaptersubchapter C of Chapterchapter 227 of Titletitle 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See 18 U.S.C. § 3663(c)(5).

Background: Section 3553(a)(7) of Titletitle 18, United States Code, requires the court, “in determining the particular sentence to be imposed,” to consider “the need to provide restitution to any victims of the offense.” Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A, and 21 U.S.C. § 853(q). For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

* * *

§5E1.3. Special Assessments

* * *

Commentary

* * *

Background: Section 3013 of Title 18, United States Code, added by the Victims of Crimes Act of 1984, Pub. L. No. 98–473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

* * *

§5E1.4. Forfeiture

* * *

Commentary

Background: Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

* * *

PART H — SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the “Act”) contains several provisions regarding specific offender characteristics:

* * *

Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help “secure nationwide consistency,” *see Gall v. United States*, 552 U.S. 38, 49 (2007), “avoid unwarranted sentencing disparities,” *see* 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), “provide certainty and fairness,” *see* 28 U.S.C. § 991(b)(1)(B), and “promote respect for the law,” *see* 18 U.S.C. § 3553(a)(2)(A).

This Part allocates specific offender characteristics into three general categories.

* * *

CHAPTER SIX

SENTENCING PROCEDURES, PLEA AGREEMENTS, AND CRIME VICTIMS' RIGHTS

* * *

PART A — SENTENCING PROCEDURES

Introductory Commentary

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or *nolo contendere* pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

* * *

CHAPTER SEVEN

VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A — INTRODUCTION TO CHAPTER SEVEN

* * *

3. Resolution of Major Issues

(b) Choice Between Theories.

* * *

Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain Title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

* * *

§8B1.1. Restitution – Organizations

* * *

Commentary

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, “in determining the particular sentence to be imposed,” to consider “the need to provide restitution to any victims of the offense.” Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.

* * *

§8B2.1. Effective Compliance and Ethics Program

* * *

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline:

* * *

“**Governing authority**” means ~~the~~ (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

* * *

§8C3.3. Reduction of Fine Based on Inability to Pay

- (a) The court shall reduce the fine below that otherwise required by §8C1.1 (Determining the Fine – Criminal Purpose Organizations), or §8C2.7 (Guideline Fine Range – Organizations) and §8C2.9 (Disgorgement), to the extent that imposition of such fine would impair its ability ~~its ability~~ the ability of the organization to make restitution to victims.

* * *

§8E1.1. Special Assessments – Organizations

* * *

Commentary

* * *

Background: Section 3013 of ~~Title~~ **title** 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

(G) Additional Clerical Changes to Guideline Commentary

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

* * *

Commentary

* * *

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. See *Peugh v. United States*, ~~133 S. Ct. 2072~~, 2078 ~~569~~ U.S. 530, 533 (2013) (holding that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense”).

* * *

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), (o), 924(c), 929(a).

* * *

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline:

* * *

“*Specially designated global terrorist*” has the meaning given that term in 31 C.F.R. § ~~594.513~~594.310.

* * *

§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

- (a) Base Offense Level (Apply the Greatest):
- (1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;
 - (2) **28**, if subsections (a)(1), (a)(3), and (a)(4) do not apply;
 - (3) **22**, if the defendant is convicted under 18 U.S.C. § 175b; or
 - (4) **20**, if (A) the defendant is convicted under 18 U.S.C. § 175(b); or (B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) or (a)(4)(A) applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by **2** levels.
 - (2) If (A) subsection (a)(2), (a)(3), or (a)(4)(A) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by **4** levels; (ii) any victim sustained serious bodily injury, increase by **2** levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by **3** levels.
 - (3) If (A) subsection (a)(2), (a)(3), or (a)(4) applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) conduct that resulted in the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if such conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 175c, 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1992(a)(2), (a)(3), (a)(4), (b)(2), 2283, 2291, 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“Biological agent” has the meaning given that term in 18 U.S.C. § 178(1).

“Chemical weapon” has the meaning given that term in 18 U.S.C. § 229F(1).

“Foreign terrorist organization” (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1189). “National of the United States” has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

“Listed precursor or a listed toxic chemical” means a precursor or a toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. See 18 U.S.C. § 229F(6)(B), (8)(B). “Precursor” has the meaning given that term in 18 U.S.C. § 229F(6)(A). “Toxic chemical” has the meaning given that term in 18 U.S.C. § 229F(8)(A).

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

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

~~“*Restricted person*” has the meaning given that term in 18 U.S.C. § 175b(d)(2).~~

“*Select biological agent*” means a biological agent or toxin identified (A) by the Secretary of Health and Human Services on the select agent list established and maintained pursuant to section 351A of the Public Health Service Act (42 U.S.C. § 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).

“*Toxin*” has the meaning given that term in 18 U.S.C. § 178(2).

~~“*Vector*” has the meaning given that term in 18 U.S.C. § 178(4).~~

“*Weapon of mass destruction*” has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).

2. **Threat Cases.**—Subsection (a)(4)(B) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct evidencing an intent or ability to carry out the threat. For example, subsection (a)(4)(B) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant’s part to carry out the threat. In contrast, subsection (a)(4)(B) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant’s belief that the talcum powder was anthrax.

Subsection (a)(4)(B) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

3. **Application of Special Instruction.**—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

* * *

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

* * *

Commentary

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Application Notes:

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6. **Other Definitions.**—For purposes of this section:

* * *

“*Gross income*” has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § ~~1.61-1~~ 1.61-1.

* * *

§3A1.2. Official Victim

(Apply the greatest):

- (a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by **3** levels.
- (b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by **6** levels.
- (c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—
 - (1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or
 - (2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by **6** levels.

Commentary

Application Notes:

* * *

3. **Application of Subsections (a) and (b).**—“*Motivated by such status*”, for purposes of subsections (a) and (b), means that the offense of conviction was motivated by the fact that the

victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute. This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(b)(1)) that takes such conduct into account.

* * *

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

* * *

Commentary

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Background: Federal courts generally “have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.” *See Setser v. United States*, ~~132 S. Ct. 1463~~, 1468566 U.S. 231, 236 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, ~~132 S. Ct. at 1468~~566 U.S. at 236. Exercise of that discretion, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

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PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s consideration of miscellaneous guidelines application issues. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[c]onsideration of other miscellaneous issues, including possible amendments to . . . (B) section 3D1.2 (Grouping of Closely Related Counts) to address the interaction between section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and section 3D1.2(d); and (C) section 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program.”). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A responds to a guideline application issue concerning the interaction of §2G1.3 and §3D1.2 (Grouping of Closely Related Counts). Although subsection (d) of §3D1.2 specifies that offenses covered by §2G1.1 are not grouped under the subsection, it does not specify whether or not offenses covered by §2G1.3 are so grouped. Part A would amend §3D1.2(d) to provide that offenses covered by §2G1.3, like offenses covered by §2G1.1, are not grouped under subsection (d).

Part B revises the guidelines to address the fact that the Bureau of Prisons (“BOP”) no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)). Part B would amend the Commentary to §5F1.7 to reflect the fact that BOP no longer operates the program.

(A) Grouping of Offenses Covered by §2G1.3

Synopsis of Proposed Amendment: Part A of the proposed amendment revises §3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) are not grouped under §3D1.2(d).

Section 3D1.2 addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (d) states that counts are grouped together “[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.” Subsection (d) also contains lists of (1) guidelines for which the offenses covered by the guideline are to be grouped under the subsection and (2) guidelines for which the covered offenses are specifically excluded from grouping under the subsection.

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered offenses are excluded from grouping under §3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to §2G1.3 when the offense involves a minor are referenced to §2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to §2G1.1 before §2G1.3 was promulgated are now referenced to §2G1.3. *See* USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to §2G1.3 states that multiple counts under §2G1.3 are not to be grouped.

Section 2G1.3 is also not included on the list of guidelines for which the covered offenses are to be grouped under §3D1.2(d). Because §2G1.3 is included on neither list, §3D1.2(d) provides that “grouping under [the] subsection may or may not be appropriate and a “case-by-case determination must be made based upon the facts of the case and the applicable guideline (including specific offense characteristics and other adjustments) used to determine the offense level.”

Part A of the proposed amendment would amend §3D1.2(d) to add §2G1.3 to the list of guidelines for which the covered offenses are specifically excluded from grouping.

Proposed Amendment:

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
 §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
 §§2C1.1, 2C1.2, 2C1.8;
 §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
 §§2E4.1, 2E5.1;
 §§2G2.2, 2G3.1;
 §2K2.1;
 §§2L1.1, 2L2.1;
 §2N3.1;
 §2Q2.1;
 §2R1.1;
 §§2S1.1, 2S1.3;
 §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
 §§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
 §2C1.5;
 §§2D2.1, 2D2.2, 2D2.3;
 §§2E1.3, 2E1.4, 2E2.1;
 §§2G1.1, 2G1.3, 2G2.1;
 §§2H1.1, 2H2.1, 2H4.1;
 §§2L2.2, 2L2.5;
 §§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
 §§2P1.1, 2P1.2, 2P1.3;
 §2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

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(B) Policy Statement on Shock Incarceration Programs

Synopsis of Proposed Amendment: Part B of the proposed amendment revises the guidelines to address the fact that the Bureau of Prisons (“BOP”) no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)) and the corresponding commentary.

Section 4046 of title 18, United States Code, authorizes BOP to place any person who has been sentenced to a term of imprisonment of more than 12 but not more than 30 months in a shock incarceration program if the person consents to that placement. Sections 3582(a) and 3621(b)(4) of title 18 authorize a court, in imposing sentence, to make a recommendation regarding the type of prison facility that would be appropriate for the defendant. In making such a recommendation, the court “shall consider any pertinent policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(a).

Section 5F1.7 provides that, pursuant to sections 3582(a) and 3621(b)(4), a sentencing court may recommend that a defendant who meets the criteria set forth in section 4046 participate in a shock incarceration program. The Commentary to §5F1.7 describes the authority for BOP to operate a shock incarceration program and the procedures that the BOP established in 1990 regarding operation of such a program.

In 2008, BOP terminated its shock incarceration program and removed the rules governing its operation. Part B of the proposed amendment would amend the Commentary to §5F1.7 to reflect those developments. It would also correct two typographical errors in the commentary.

Proposed Amendment:

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background: Section 4046 of title 18, United States Code, provides—

- “(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.
- (b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed ~~six~~ 6 months, an inmate in the shock incarceration program shall be required to—
 - (1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and

- (2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.

- (c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate.” 18 U.S.C. § 4046.”

In 1990, the Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines outlined eligibility criteria and procedures for the implementation of this a shock incarceration program (which the Bureau of Prisons has titled the “intensive confinement program”). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the “intensive confinement” portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases. In 2008, however, the Bureau of Prisons terminated the program and removed the rules governing its operation. See 73 Fed. Reg. 39863 (July 11, 2008).

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PROPOSED AMENDMENT: FAKE PILLS

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s consideration of miscellaneous guidelines application issues. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[c]onsideration of other miscellaneous issues, including possible amendments to (A) section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address offenses involving misrepresentation or marketing of a controlled substance as another substance . . .”).

The proposed amendment responds to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of “fake pills” (*i.e.*, illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue.

According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

The DEA reported that it seized over 50.6 million fentanyl-laced, fake prescription pills in calendar year 2022. *See* Drug Enforcement Administration, Press Release: Drug Enforcement Administration Announces the Seizure of Over 379 million Deadly Doses of Fentanyl in 2022 (Dec. 20, 2022), <https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly>. DEA laboratory testing indicates that the number of fake pills laced with fentanyl have sharply increased in recent years and that six out of ten fentanyl-laced faked pills have been found to contain a potentially fatal dose of fentanyl. *See* Drug Enforcement Administration, Public Safety Alert: DEA Laboratory Testing Reveals that 6 out of 10 Fentanyl-Laced Fake Prescription Pills Now Contain a Potentially Lethal Dose of Fentanyl (2022), <https://www.dea.gov/alert/dea-laboratory-testing-reveals-6-out-10-fentanyl-laced-fake-prescription-pills-now-contain>.

According to the Centers for Disease Control and Prevention (CDC), overdose deaths from synthetic opioids containing fentanyl, including pills purporting to be legitimate pharmaceuticals, have sharply increased in recent years. *See* Christine L. Mattson et al., *Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths — United States, 2013–2019*, 70 Morb Mortal Wkly Rep 6 (Feb. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm>.

In order to address this issue, the DEA recommended that the Commission review the 4-level enhancement for knowingly distributing or marketing as another substance a mixture or substance containing fentanyl or fentanyl analogue as a different substance at subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). Specifically, the DEA suggested that the Commission consider changing the *mens rea* requirement to expand the application of the enhancement to offenders who may not have known fentanyl or fentanyl analogue was in the substance but distributed or

marketed a substance without regard to whether such dangerous substances could have been present.

The proposed amendment would amend §2D1.1(b)(13) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. The new provision would refer to 21 U.S.C. § 321(g)(1) for purposes of defining the term “drug.”

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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

- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If

the resulting offense level is greater than level **32** and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) If the defendant **(A)** knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or **(B)** represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **[2]** levels. The term “*drug*,” as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).
- (14) (Apply the greatest):
- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (C) If—
- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial

risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (15) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.
- (16) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:
 - (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;
 - (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
 - (C) the defendant was directly involved in the importation of a controlled substance;
 - (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;
 - (E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,increase by **2** levels.

- (17) If the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a) and the offense involved all of the following factors:
- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;
 - (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and
 - (C) the defendant had minimal knowledge of the scope and structure of the enterprise,
- decrease by **2** levels.
- (18) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth after subsection (e) (Special Instruction).]

(d) Cross References

- (1) If a victim was killed under 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) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual’s knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
<p>(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of <i>Converted Drug Weight</i>.</p>	Level 38
<p>(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; ● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam; ● At least 30,000 KG but less than 90,000 KG of <i>Converted Drug Weight</i>.</p>	Level 36
<p>(3) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 2.8 KG but less than 8.4 KG of Cocaine Base;</p>	Level 34

- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of **Converted Drug Weight**.

- (4) **Level 32**
- At least 3 KG but less than 10 KG of Heroin;
 - At least 15 KG but less than 50 KG of Cocaine;
 - At least 840 G but less than 2.8 KG of Cocaine Base;
 - At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
 - At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of “Ice”;
 - At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
 - At least 30 G but less than 100 G of LSD;
 - At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 300 G but less than 1 KG of a Fentanyl Analogue;
 - At least 3,000 KG but less than 10,000 KG of Marihuana;
 - At least 600 KG but less than 2,000 KG of Hashish;
 - At least 60 KG but less than 200 KG of Hashish Oil;
 - At least 3,000,000 but less than 10,000,000 units of Ketamine;
 - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
 - At least 187,500 but less than 625,000 units of Flunitrazepam;
 - At least 3,000 KG but less than 10,000 KG of **Converted Drug Weight**.

- (5) **Level 30**
- At least 1 KG but less than 3 KG of Heroin;
 - At least 5 KG but less than 15 KG of Cocaine;
 - At least 280 G but less than 840 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
 - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of “Ice”;
 - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]

Propanamide);

- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of **Converted Drug Weight**.

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of **Converted Drug Weight**.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of **Converted Drug Weight**.

- (8) **Level 24**
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least 28 G but less than 112 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of “Ice”;
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 6,250 but less than 25,000 units of Flunitrazepam;
 - At least 100 KG but less than 400 KG of *Converted Drug Weight*.

- (9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
 - At least 400 G but less than 500 G of Cocaine;
 - At least 22.4 G but less than 28 G of Cocaine Base;
 - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of “Ice”;
 - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 8 G but less than 10 G of a Fentanyl Analogue;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;
 - At least 1.6 KG but less than 2 KG of Hashish Oil;
 - At least 80,000 but less than 100,000 units of Ketamine;
 - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 6,250 units of Flunitrazepam;
 - At least 80 KG but less than 100 KG of *Converted Drug Weight*.

- (10) **Level 20**
- At least 60 G but less than 80 G of Heroin;
 - At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of “Ice”;

- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of **Converted Drug Weight**.

- (11) **Level 18**
- At least 40 G but less than 60 G of Heroin;
 - At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam;
 - At least 40 KG but less than 60 KG of **Converted Drug Weight**.

- (12) **Level 16**
- At least 20 G but less than 40 G of Heroin;
 - At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of “Ice”;
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;

- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of **Converted Drug Weight**.

- (13) **Level 14**
- At least 10 G but less than 20 G of Heroin;
 - At least 50 G but less than 100 G of Cocaine;
 - At least 2.8 G but less than 5.6 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or
at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or
at least 500 MG but less than 1 G of Methamphetamine (actual), or
at least 500 MG but less than 1 G of “Ice”;
 - At least 5 G but less than 10 G of Amphetamine, or
at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
 - At least 625 but less than 1,250 units of Flunitrazepam;
 - At least 10 KG but less than 20 KG of **Converted Drug Weight**.

- (14) **Level 12**
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or
less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual), or
less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - Less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
 - At least 312 but less than 625 units of Flunitrazepam;
 - 80,000 units or more of Schedule IV substances (except Flunitrazepam);
 - At least 5 KG but less than 10 KG of **Converted Drug Weight**.

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| (15) | <ul style="list-style-type: none"> ● At least 2.5 KG but less than 5 KG of Marihuana; ● At least 500 G but less than 1 KG of Hashish; ● At least 50 G but less than 100 G of Hashish Oil; ● At least 2,500 but less than 5,000 units of Ketamine; ● At least 2,500 but less than 5,000 units of Schedule I or II Depressants; ● At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine); ● At least 156 but less than 312 units of Flunitrazepam; ● At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam); ● At least 2.5 KG but less than 5 KG of <i>Converted Drug Weight</i>. | Level 10 |
| (16) | <ul style="list-style-type: none"> ● At least 1 KG but less than 2.5 KG of Marihuana; ● At least 200 G but less than 500 G of Hashish; ● At least 20 G but less than 50 G of Hashish Oil; ● At least 1,000 but less than 2,500 units of Ketamine; ● At least 1,000 but less than 2,500 units of Schedule I or II Depressants; ● At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine); ● Less than 156 units of Flunitrazepam; ● At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam); ● 160,000 units or more of Schedule V substances; ● At least 1 KG but less than 2.5 KG of <i>Converted Drug Weight</i>. | Level 8 |
| (17) | <ul style="list-style-type: none"> ● Less than 1 KG of Marihuana; ● Less than 200 G of Hashish; ● Less than 20 G of Hashish Oil; ● Less than 1,000 units of Ketamine; ● Less than 1,000 units of Schedule I or II Depressants; ● Less than 1,000 units of Schedule III substances (except Ketamine); ● Less than 16,000 units of Schedule IV substances (except Flunitrazepam); ● Less than 160,000 units of Schedule V substances; ● Less than 1 KG of <i>Converted Drug Weight</i>. | Level 6 |
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***Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms “*PCP (actual)*”, “*Amphetamine (actual)*”, and “*Methamphetamine (actual)*” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level

determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “**Hydrocodone (actual)**” and “**Oxycodone (actual)**” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) “**Ice**,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “**Cocaine base**,” for the purposes of this guideline, means “crack.” “**Crack**” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “**unit**” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “**unit**” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.
- (H) **Hashish**, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabidiol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) **Hashish oil**, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabidiol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

- (J) ***Fentanyl analogue***, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).
- (K) The term “***Converted Drug Weight***,” for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

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PROPOSED AMENDMENT: SEXUAL ABUSE OFFENSES

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. Part A of the proposed amendment responds to recently enacted legislation. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[i]mplementation of any legislation warranting Commission action”). Part B of the proposed amendment is a result of the Commission’s “[c]onsideration of possible amendments to the *Guidelines Manual* to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel.” *Id.*

(A) Violence Against Women Act Reauthorization Act of 2022

Part A of the proposed amendment responds to title XII of the Violence Against Women Act Reauthorization Act of 2022 (“the Act”). The Act is part of the Consolidated Appropriations Act, 2022, Pub. L. 117–103 (2022). It created two new offenses concerning sexual misconduct while committing civil rights offenses and sexual abuse of an individual in federal custody.

First, the Act created a new offense at 18 U.S.C. § 250 (Penalties for civil rights offenses involving sexual misconduct). New section 250(a) prohibits any person from engaging in, or causing another to engage in, sexual misconduct while committing a civil rights offense under chapter 13 (Civil Rights) of part I (Crimes) of title 18, United States Code, or an offense under section 901 of the Fair Housing Act (42 U.S.C. § 3631). The statute does not define “sexual misconduct,” but new section 250(b) delineates different maximum statutory terms of imprisonment for different degrees of sexual misconduct, ranging from two years to any term of years or life. The maximum penalties are: (1) any term of years or life if the offense involved aggravated sexual abuse, as defined in 18 U.S.C. § 2241, or sexual abuse, as defined in 18 U.S.C. § 2242, or any attempts to commit such conduct; (2) any term of years or life if the offense involved abusive sexual contact of a child who has not attained the age of 16, of the type prohibited by 18 U.S.C. § 2244(a)(5); (3) 40 years if the offense involved a sexual act, as defined in 18 U.S.C. § 2246, without the other person’s permission and the sexual act does not amount to sexual abuse or aggravated sexual abuse; (4) 10 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(1) or (b) (excluding abusive sexual contact through the clothing), with an enhanced maximum penalty of 30 years if such abusive sexual contact involved a child under the age of 12; (5) 3 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(2), with an enhanced maximum penalty of 20 years if such abusive sexual contact involved a child under the age of 12; (6) 2 years if the offense involved abusive sexual contact through the clothing of the type prohibited by 18 U.S.C. § 2244(a)(3), (a)(4), or (b), with an enhanced maximum penalty of 10 years if such abusive sexual contact through the clothing involved a child under the age of 12.

Second, the Act amended 18 U.S.C. § 2243 and created a new offense at subsection (c). The new section 2243(c) prohibits an individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. The statutory

maximum term of imprisonment for the offense is 15 years, which is the same maximum penalty for offenses under sections 2243(a) (prohibiting knowingly engaging in a sexual act with a minor who had attained the age of twelve but not the age of sixteen and is at least four years younger than the person so engaging) and 2243(b) (prohibiting knowingly engaging in a sexual act with a ward in official detention (including in a federal prison or any prison, institution, or facility where people are held in custody by the direction of, or pursuant to a contract or agreement with, any federal department or agency) and under the custodial, supervisory, or disciplinary authority of the person so engaging).

The Act also included a provision defining “federal law enforcement officer” at 18 U.S.C. § 2246(7) as having the meaning given the term in 18 U.S.C. § 115 (*i.e.*, “any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law.”). In addition, the Act amended 18 U.S.C. § 2244 (Abusive sexual contact) to add a new penalty provision at subsection (a)(6) stating any person that knowingly engages in or causes sexual contact with or by another person, if doing so would violate new section 2243(c), would face a maximum statutory term of imprisonment of two years.

Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference offenses under 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights), and offenses under 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). Part A of the proposed amendment would also amend the Commentary to §§2A3.3 and 2H1.1 to reflect that these statutes are referenced to these guidelines. In addition, it would amend the title of §2A3.3 to add “Criminal Sexual Abuse of an Individual in Federal Custody.”

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Part B of the proposed amendment addresses concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. In its annual letter to the Commission, the Department of Justice urged the Commission to consider amending the *Guidelines Manual* to better account for such sexual abuse offenses, including offenses under 18 U.S.C. § 2243(b) and the offense conduct covered by the new statute at 18 U.S.C. § 2243(c) (discussed in Part A of the proposed amendment). According to the Department of Justice, the provisions of the guideline applicable to such offenses, §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), do not sufficiently account for the severity of the conduct in such offenses, nor provide adequate penalties in accordance with the statutory maximum terms of imprisonment provided for these offenses.

Part B of the proposed amendment would amend §2A3.3 in several ways to address these concerns. First, it would increase the base offense level of the guideline from 14 to 18. Second, Part B of the proposed amendment would address the presence of aggravating factors in sexual abuse offenses, such as causing serious bodily injury and the use or threat of force, in the same way §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of

Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) currently does, by providing a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242).

Proposed Amendment:

(A) Violence Against Women Act Reauthorization Act of 2022

APPENDIX A

STATUTORY INDEX

		* * *
18 U.S.C. § 249	2H1.1	
18 U.S.C. § 250	2H1.1	
18 U.S.C. § 281	2C1.3	
		* * *
18 U.S.C. § 2243(b)	2A3.3	
18 U.S.C. § 2243(c)	2A3.3	
18 U.S.C. § 2244	2A3.4	
		* * *

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
 - (1) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
 - (2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2243(b), 2243(c). 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).

“**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)).

“**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.

“**Participant**” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“**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).

“**Ward**” means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. **Application of Subsection (b)(1).**—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) 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.

The misrepresentation to which the enhancement in subsection (b)(1) 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, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. **Application of Subsection (b)(2).**—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) 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.
4. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

§2H1.1. Offenses Involving Individual Rights

- (a) Base Offense Level (Apply the Greatest):
- (1) the offense level from the offense guideline applicable to any underlying offense;
 - (2) **12**, if the offense involved two or more participants;
 - (3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
 - (4) **6**, otherwise.
- (b) Specific Offense Characteristic
- (1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b), ~~246, 247, 248, 249, 246–250~~, 1091; 42 U.S.C. § 3631.

Application Notes:

1. “**Offense guideline applicable to any underlying offense**” means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (*e.g.*, two instances of assault, or one instance of assault and one instance of arson). In such cases, use the following comparative procedure to determine the applicable base offense level: (i) determine the underlying offenses encompassed within the count of conviction as if the defendant had been charged with a conspiracy to commit multiple offenses. *See* Application Note 4 of §1B1.2 (Applicable Guidelines); (ii) determine the Chapter Two offense level (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions) for each such underlying offense; and (iii) compare each of the Chapter Two offense levels determined above with the alternative base offense level under subsection (a)(2), (3), or (4). The determination of the applicable alternative base offense level is to be based on the entire conduct underlying the count of conviction (*i.e.*, the conduct taken as a whole). Use the alternative base offense level only if it is greater than each of the Chapter Two offense levels determined above. Otherwise, use the Chapter Two offense levels for each of the underlying offenses (with each underlying offense treated as if contained in a separate count of conviction). Then apply subsection (b) to the alternative base offense level, or to the Chapter Two offense levels for each of the underlying offenses, as appropriate.

2. “**Participant**” is defined in the Commentary to §3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).
4. If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. See §3A1.1(c).
5. If subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

(B) **Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel**

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: ~~14~~**18**

(b) Specific Offense Characteristics

(1) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(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).

“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)).

“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.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“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).

“Ward” means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. **Application of Subsection (b)(1).**—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) 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.

The misrepresentation to which the enhancement in subsection (b)(1) 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, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. **Application of Subsection (b)(2).**—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) 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.
4. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

PROPOSED AMENDMENT: CRIMINAL HISTORY

Synopsis of Proposed Amendment: The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. Parts A through C of the proposed amendment all address the Commission’s priority on criminal history. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (“In light of Commission studies, consideration of possible amendments to the *Guidelines Manual* relating to criminal history to address (A) the impact of ‘status’ points under subsection (d) of section 4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of marihuana offenses.”). Part B of the proposed amendment also addresses the Commission’s priority on 28 U.S.C. § 994(j). *Id.* (“Consideration of possible amendments to the *Guidelines Manual* addressing 28 U.S.C. § 994(j).”).

A defendant’s criminal history score is calculated pursuant to Chapter Four, Part A (Criminal History). To calculate a criminal history score, courts are instructed to assign one, two, or three points to qualifying prior sentences under subsections (a) through (c) of §4A1.1 (Criminal History Category). One point is also added under §4A1.1(e) for any prior sentence resulting from a crime of violence that was not otherwise already assigned points. Finally, two criminal history points are added under §4A1.1(d) if the defendant committed the instant offense “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” USSG §4A1.1(e). A “criminal justice sentence” refers to a “sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required.” USSG §4A1.1, comment. (n.4).

(A) Status Points under §4A1.1

“Status points” are relatively common in cases with at least one criminal history point, having been applied in 37.5 percent of cases with criminal history points over the last five fiscal years. Of the offenders who received “status points,” 61.5 percent had a higher CHC as a result of the status points. Like other provisions in Chapter Four, “status points” are included in the calculation of a defendant’s criminal history as a reflection of several statutory purposes of sentencing. As described in the Introductory Commentary to Chapter Four, accounting for a defendant’s criminal history in the guidelines, including status points, addresses the need for the sentence “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(A)–(C). A series of recent Commission publications has focused on just one of these purposes of sentencing—specific deterrence—through detailed analyses regarding the recidivism rates of federal offenders. *See, e.g.,* U.S. SENT’G COMM’N, RECIDIVISM OF OFFENDERS RELEASED IN 2010 (2021), available at <https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010>. These reports again concluded that a defendant’s criminal history calculation under the guidelines is strongly associated with the likelihood of future recidivism by the defendant. In a related publication, the Commission also found, however, that status points add little to the overall predictive value associated with the criminal

history score. U.S. SENT'G COMM'N, REVISITING STATUS POINTS (2022), *available at* <https://www.ussc.gov/research/research-reports/revisiting-status-points>.

Part A of the proposed amendment addresses the impact of “status points” under the guidelines. First, it would amend §4A1.1 by redesignating current subsection (d) as subsection (e) and current subsection (e) as subsection (d). Second, it would reduce the impact of “status points” by revising redesignated subsection (e) to provide that 1 criminal history point is added if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Third, Part A of the proposed amendment would also make conforming changes to the Commentary to §4A1.1, §2P1.1 (Escape, Instigating or Assisting Escape), and §4A1.2 (Definitions and Instructions for Computing Criminal History).

(B) Zero Point Offenders

The Sentencing Table in Chapter Five, Part A of the *Guidelines Manual* comprises two components: offense level and criminal history category. Criminal history forms the horizontal axis of the table and is divided into six categories, from I (lowest) to VI (highest). Chapter Four, Part A of the *Guidelines Manual* provides instructions on how to calculate a defendant’s criminal history category by assigning points for certain prior convictions. Criminal History Category I includes offenders with zero criminal history points and those with one criminal history point. Accordingly, the following types of offenders are classified under the same category: (1) offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in subsection (d) and (e) of §4A1.2 (Definitions and Instructions for Computing Criminal History); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their “staleness” (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions, or infractions); and (4) offenders with a prior conviction that received only one criminal history point. In fiscal year 2021, there were approximately 17,500 offenders who received zero criminal history points, of whom approximately 13,200 had no prior convictions.

Chapter Five also addresses what types of sentences a court may impose (e.g., probation or imprisonment), according to the location of the defendant’s applicable sentencing range in one of the four Zones (A–D) of the Sentencing Table. Specifically, §5C1.1 (Imposition of a Term of Imprisonment) provides that defendants in Zones A and B may receive, in the court’s discretion, a probationary sentence or a sentence of incarceration; defendants in Zone C may receive a “split” sentence of incarceration followed by community confinement or a sentence of incarceration only at the court’s discretion; and defendants in Zone D may only receive a sentence of imprisonment absent a downward departure or variance from that zone. The Commentary to §5C1.1 contains an application note that provides that “[i]f the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” USSG §5C1.1, comment. (n.4).

Recidivism data analyzed by the Commission suggest that offenders with zero criminal history points (“zero-point” offenders) have considerably lower recidivism rates than other

offenders, including lower recidivism rates than the offenders in Criminal History Category I with one criminal history point. *See* U.S. SENT’G COMM’N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), *available at* <https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010>. Among other findings, the report concluded that “zero-point” offenders were less likely to be rearrested than “one point” offenders (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

Part B of the proposed amendment sets forth a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 would provide a decrease of 2 levels from the offense level determined under Chapters Two and Three if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A; (2) the defendant did not receive an adjustment under §3A1.4 (Terrorism); (3) the defendant did not use violence or credible threats of violence in connection with the offense; (4) the offense did not result in death or serious bodily injury; (5) the instant offense of conviction is not a sex offense; (6) the defendant did not personally cause substantial financial hardship; (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights); (9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and (10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848.

New §4C1.1 would also include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) as part of the Commission’s implementation of 28 U.S.C. § 994(j). Section 994(j) directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Part B of the proposed amendment would address the alternatives to incarceration available to “zero-point” offenders by revising the application note in §5C1.1 that addresses “nonviolent first offenders” to focus on “zero-point” offenders. Two new provisions would be added. New Application Note 4(A) would provide that if the defendant received an adjustment under new §4C1.1 and the defendant’s applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 4(B) would provide that a departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under new §4C1.1 and the defendant’s applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. Of the 3,024 offenders in fiscal year 2021 who would be eligible for the departure under revised Application Note 4, about one-

quarter (23.8%) were in Zones A and B, over 15 percent (17.1%) were in Zone C, and almost 60 percent (59.2%) were in Zone D.

In addition, Part B of the proposed amendment would amend subsection (b)(2)(A) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, “unless otherwise specified.” Part B of the proposed amendment would also amend Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences) to provide an explanatory note addressing amendments to the *Guidelines Manual* related to the implementation of 28 U.S.C. § 994(j), first offenders, and “zero-point” offenders.

(C) Impact of Simple Possession of Marihuana Offenses

While marihuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA), subjecting offenders to up to one year in prison (and up to two or three years in prison for repeat offenders), many states and territories have reduced or eliminated the penalties for possessing small quantities of marihuana for personal use. Twenty-one states and territories have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities for recreational use. An additional 14 states and territories have lowered the punishment for possession of small quantities for recreational use from criminal penalties (such as imprisonment) to solely civil penalties (such as a fine). At the end of fiscal year 2021, possession of marihuana remained illegal for all purposes only in 12 states and territories.

The Commission recently published a report on the impact of simple possession of marihuana offenses on sentencing. *See* U.S. SENT’G COMM’N, *WEIGHING THE IMPACT OF SIMPLE POSSESSION OF MARIJUANA: TRENDS AND SENTENCING IN THE FEDERAL SYSTEM* (2023), available at <https://www.ussc.gov/research/research-reports/weighing-impact-simple-possession-marijuana>.

The key findings from the report include—

- In fiscal year 2021, 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marihuana possession sentences. Most (79.3%) of the prior sentences were for less than 60 days in prison, including non-custodial sentences. Furthermore, ten percent (10.2%) of these 4,405 offenders had no other criminal history points.
- The criminal history points for prior marihuana possession sentences resulted in a higher Criminal History Category for 40 percent (40.1%) of the 4,405 offenders (1,765).

Part C of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant’s criminal history may be warranted. Specifically, Part C of the proposed amendment would provide that a downward departure may be warranted if

the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

Proposed Amendment:

(A) Status Points under §4A1.1

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.
- ~~(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.~~
- (ed)** Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.
- (e)** Add **1** point if the defendant (1) receives **7** or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. **§4A1.1(a).** Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “*prior sentence*” is defined at §4A1.2(a). The term “*sentence of imprisonment*” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. *See* §4A1.2(e).

A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "**prior sentence**" is defined at §4A1.2(a). The term "**sentence of imprisonment**" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "**prior sentence**" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

~~4. **§4A1.1(d)**. Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a “**criminal justice sentence**” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).~~

54. **§4A1.1(ed)**. In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(ed). For purposes of this guideline, “**crime of violence**” has the meaning given that term in §4B1.2(a). *See* §4A1.2(p).

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(ed) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(ed) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

5. **§4A1.1(e)**. One point is added if the defendant (1) receives 7 or more points under §4A1.1(a) through (d), and (2) committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a “**criminal justice sentence**” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would

not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(de) adds ~~two points~~ **one point** if the defendant **receives 7 or more points under §4A1.1(a) through (d) and** was under a criminal justice sentence during any part of the instant offense.

* * *

§2P1.1. Escape, Instigating or Assisting Escape

* * *

Commentary

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Application Notes:

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5. Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape) and §4A1.1(de) (custody status) would be applicable.

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

* * *

- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence.

Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. *See also* §4A1.1(ed).

* * *

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of §4A1.1(de), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of §4A1.1(de), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

* * *

(p) CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(ed), the definition of “crime of violence” is that set forth in §4B1.2(a).

* * *

CHAPTER FOUR

CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

* * *

PART C — ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§4C1.1. Adjustment for Certain Zero-Point Offenders

(a) ADJUSTMENT.—If the defendant meets all of the following criteria:

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A;
- (2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);
- (3) the defendant did not use violence or credible threats of violence in connection with the offense;
- (4) the offense did not result in death or serious bodily injury;
- (5) the instant offense of conviction is not a sex offense;
- (6) the defendant did not personally cause substantial financial hardship;
- (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);
- (9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and
- (10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by 2 levels.

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

- (1) “*Dangerous weapon*,” “*firearm*,” “*offense*,” and “*serious bodily injury*” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).
- (2) “*Sex offense*” means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.
- (3) In determining whether the defendant’s acts or omissions resulted in “*substantial financial hardship*” to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Application Notes:

1. **Application of Subsection (a)(6).**—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).
2. **Upward Departure.**—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant’s criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.

* * *

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
 - (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. **Application of Subsection (a).**—Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable

guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. **Application of Subsection (b).**—Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. **Application of Subsection (c).**—Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:
 - (A) It may impose a sentence of imprisonment.
 - (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.
 - (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. **Zero-Point Offenders.**—~~If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a “nonviolent first offender” is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous~~

~~weapon in connection with the offense of conviction. The phrase “comparable judicial dispositions of any kind” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.~~

(A) **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

(B) **Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.**—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

5. **Application of Subsection (d).**—Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

6. **Application of Subsection (e).**—Subsection (e) sets forth a schedule of imprisonment substitutes.

7. **Departures Based on Specific Treatment Purpose.**—There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an

abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

8. **Use of Substitutes for Imprisonment.**—The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
9. **Residential Treatment Program.**—In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
10. **Application of Subsection (f).**—Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

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§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

* * *

(b) DOWNWARD DEPARTURES.—

* * *

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—**Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.**

* * *

Commentary

Application Notes:

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3. **Downward Departures.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), ~~due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism~~ unless otherwise specified.

* * *

CHAPTER ONE

INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A — INTRODUCTION AND AUTHORITY

* * *

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

* * *

4. The Guidelines’ Resolution of Major Issues (Policy Statement)

* * *

(d) Probation and Split Sentences.

The statute provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .” 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given

and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**

*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (See USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” (See USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for “zero-point” offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to “zero-point” offenders by revising the application note in §5C1.1 that addressed “nonviolent first offenders” to focus on “zero-point” offenders. (See USSG App. C, amendment [].)

**Note: Although the Commission had not addressed “single acts of aberrant behavior” at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)

* * *

(C) Impact of Simple Possession of Marihuana Offenses

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

- (a) UPWARD DEPARTURES.—
- (1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.
 - (2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:
 - (A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).
 - (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
 - (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
 - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
 - (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
 - (3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
 - (4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—
 - (A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.
 - (B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant’s criminal history, taken together, are sufficient to warrant an

upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

- (c) **WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:
- (1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.
 - (2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this policy statement, the terms “*depart*”, “*departure*”, “*downward departure*”, and “*upward departure*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. **Upward Departures.**—
 - (A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:
 - (i) A previous foreign sentence for a serious offense.
 - (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
 - (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
 - (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.
 - (B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.
 - (C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Downward Departures.—

(A) **Examples.**—A downward departure from the defendant’s criminal history category may be warranted ~~if, for example,~~ based on any of the following circumstances:

- (i) ~~the~~The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.
- (ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) **Downward Departures from Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

* * *

PROPOSED AMENDMENT: CAREER OFFENDER

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the “categorical approach” in determining whether an offense is a “crime of violence” or a “controlled substance offense”; and (B) address various application issues, including the meaning of “robbery” and “extortion,” and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. See U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under §4B1.2, as amended in 2016. It would amend §4B1.2 to add a definition of “robbery” that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1). Part A of the proposed amendment would also add a provision defining the phrase “actual or threatened force,” for purposes of the new “robbery” definition, as “force sufficient to overcome a victim’s resistance,” informed by the Supreme Court’s holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). Finally, Part A of the proposed amendment would make conforming changes to the definition of “crime of violence” in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Part B of the proposed amendment would amend §4B1.2 to address a circuit conflict regarding the commentary provision stating that the terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a “crime of violence” and a “controlled substance offense.”

Part C of the proposed amendment would amend the definition of “controlled substance offense” in §4B1.2(b) to include offenses described in 46 U.S.C. § 70503(a) and § 70506(b).

(A) Meaning of “Robbery”

Synopsis of Proposed Amendment: In 2016, the Commission amended §4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the “residual clause” and revise the “enumerated offenses clause” by moving enumerated offenses that were previously listed in the commentary to the guideline itself. *See* USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The “enumerated offenses clause” identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to §4B1.2 definitions for two of the enumerated offenses: “forcible sex offense” and “extortion.”

“Extortion” is defined as “obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.” USSG §4B1.2, comment. (n.1). Under case law existing at the time of the amendment, courts generally defined extortion as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats,” based on the Supreme Court’s holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of 18 U.S.C. § 1952). However, consistent with the Commission’s goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrowed the generic definition of extortion by limiting it to offenses having an element of force or an element of fear or threats “of physical injury,” as opposed to non-violent threats such as injury to reputation.

The Department of Justice has expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under the guideline, as amended in 2016, because the statute of conviction does not fit either the generic definition of “robbery” or the new guideline definition of “extortion.” *See, e.g.*, Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf>. The Hobbs Act defines the term “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property*” 18 U.S.C. § 1951(b)(1) (emphasis added). Following the 2016 amendment, every circuit court addressing the issue has concluded that Hobbs Act robbery does not fall within §4B1.2’s narrow definition of “crime of violence.” *See* *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017). At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. *See, e.g.*, *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part A of the proposed amendment would amend §4B1.2 to address this issue. First, it would move the definitions of enumerated offenses (*i.e.*, “forcible sex offense” and “extortion”) and “prior felony conviction” from the Commentary to §4B1.2 to a new subsection (d) in the guideline itself. Second, Part A of the proposed amendment would add to new subsection (d) a definition of “robbery” that mirrors the “robbery” definition at 18 U.S.C. § 1951(b)(1). Specifically, it would provide that “robbery” is “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” Finally, Part A of the proposed amendment would add a provision defining the phrase “actual or threatened use of force,” for purposes of the “robbery” definition, as “force that is sufficient to overcome a victim’s resistance.” This definition is informed by the Supreme Court’s holding in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

In addition, Part A of the proposed amendment sets forth conforming changes to the definition of “crime of violence” in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) **CRIME OF VIOLENCE.**—The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or 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).
- (b) **CONTROLLED SUBSTANCE OFFENSE.**—The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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.
- (c) **TWO PRIOR FELONY CONVICTIONS.**—The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction

subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(d) ADDITIONAL DEFINITIONS.—

- (1) FORCIBLE SEX OFFENSE.—{“**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.}*
- (2) EXTORTION.—{“**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.}*
- (3) ROBBERY.—“**Robbery**” is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase “actual or threatened force” refers to force that is sufficient to overcome a victim’s resistance.
- (4) PRIOR FELONY CONVICTION.—{“**Prior felony conviction**” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction

* The text in braces currently appears in the Commentary to §4B1.2. The proposed amendment would place the text here.

if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).}*

Commentary

Application Notes:

1. **Definitions Further Considerations Regarding “Crimes of Violence” and “Controlled Substance Offenses”**.—For purposes of this guideline—

“*Crime of violence*” and “*controlled substance offense*” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

~~“*Foreible 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(e) or (B) an offense under state law that would have been an offense under section 2241(e) 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.~~

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

~~“*Prior felony conviction*” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such~~

* The text in braces currently appears in the Commentary to §4B1.2. The proposed amendment would place the text here.

~~offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).~~

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

2. **Definitions.**—For purposes of this guideline:

“Crime of violence” means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. **“Robbery”** is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase **“actual or threatened force”** refers to force that is sufficient to overcome a victim’s resistance. **“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.

* * *

(B) Inchoate Offenses

Synopsis of Proposed Amendment: The career offender guideline includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a “crime of violence” and a “controlled substance offense.” See USSG §4B1.2, comment. (n.1). In the original 1987 *Guidelines Manual*, these offenses were included only in the definition of “controlled substance offense.” See USSG §4B1.2, comment. (n.2) (effective Nov. 1, 1987). In 1989, the Commission amended the guideline to provide that both definitions—“crime of violence” and “controlled substance offense”—include the offenses of aiding and abetting, conspiracy, and attempt to commit such crimes. See USSG App. C, Amendment 268 (effective Nov. 1, 1989). A circuit conflict has now arisen relating to the definitions of “crime of violence” and “controlled substance offense” in §4B1.2 (Definitions of Terms Used in Section 4B1.1) and their inclusion of inchoate offenses.

The circuit conflict concerns whether the definition of controlled substance offense in §4B1.2(b) includes the inchoate offenses listed in Application Note 1 to §4B1.2. Although courts had previously held that §4B1.2’s definitions include inchoate offenses based on the Commentary to §4B1.2 and the Supreme Court’s decision in *Stinson v. United States*, 508 U.S. 36 (1993), four circuits have now held that §4B1.2(b)’s definition of a “controlled substance offense” does not include inchoate offenses because such offenses are not expressly included in the guideline text, while five have continued with their long-standing holding that such offenses are included.

The Third, Fourth, Sixth, and D.C. Circuits have held that inchoate offenses are not included in the definition of a “controlled substance offense” because the commentary is inconsistent with the text of the guideline and, thus, does not control. These courts have concluded that the Commission exceeded its authority under *Stinson* when it attempted to incorporate inchoate offenses to §4B1.2(b)’s definition through the commentary, because the commentary can only interpret or explain the guideline, it cannot expand its scope by adding qualifying offenses. See *United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018) (Where the guideline “present[ed] a very detailed ‘definition’ of controlled substance offense that clearly excludes inchoate offenses,” the Commentary’s inclusion of such offenses had “no grounding in the guidelines themselves.”); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (“To make attempt crimes a part of §4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in §4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline.”); *United States v. Nasir*, 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc), *vacated and remanded on other grounds*, 142 S. Ct. 56, 211 L.Ed.2d 1 (2021), *aff’d on remand*, 17 F.4th 459, 467–72 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438, 444–47 (4th Cir. 2022).

The First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits continue to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of §4B1.2(b) because it does not include any offense that is explicitly excluded by the text of the guideline. See *United States v. Smith*, 989 F.3d 575, 583–85 (7th Cir. 2021) (citing *United States v. Adams*, 934 F.3d 720, 727–29 (7th Cir. 2019) (“conclud[ing] that §4B1.2’s Application Note 1 is

authoritative and that ‘controlled substance offense’ includes inchoate offenses” (citation omitted), *cert. denied*, 142 S.Ct. 488 (2021); *accord* United States v. Lewis, 963 F.3d 16, 21–23 (1st Cir. 2020); United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020) (citing United States v. Tabb, 949 F.3d 81, 87–89 (2d Cir. 2020)); United States v. Garcia, 946 F.3d 413, 417 (8th Cir. 2019); United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019); United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2017). *See also* United States v. Goodin, 835 F. App’x 771, 782 n.1 (5th Cir. 2021) (unpublished) (noting that circuit precedent provides that Application Note 1 in the career offender guideline is binding).

Part B of the proposed amendment would address this circuit conflicts by moving the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c).

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) **CRIME OF VIOLENCE.**—The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or 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).
- (b) **CONTROLLED SUBSTANCE OFFENSE.**—The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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.
- (c) **INCHOATE OFFENSES INCLUDED.**—The terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.
- ~~(e)~~(d) **TWO PRIOR FELONY CONVICTIONS.**—The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense,

or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline—

~~“**Crime of violence**” and “**controlled substance offense**” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.~~

“**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.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“**Prior felony conviction**” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult

conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

(C) Definition of “Controlled Substance Offense”

Synopsis of Proposed Amendment: Subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a “controlled substance offense” as an offense that prohibits “the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” USSG §4B1.2(b).

An application issue has arisen as a result of statutory changes to chapter 705 of title 46 (“Maritime Drug Law Enforcement Act”). The career offender directive at 28 U.S.C. § 994(h) directed the Commission to assure that “the guidelines specify a term of imprisonment at or near the maximum term authorized” for offenders who are 18 years or older and have been convicted of a felony that is, and also have previously been convicted of two or more felonies that are, a “crime of violence” or “an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959), and *chapter 705 of title 46.*” 28 U.S.C. § 994(h) (emphasis added). Until 2016, the only substantive criminal offense included in “chapter 705 of title 46” was codified in section 70503(a) and read as follows:

An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

- (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
- (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring to violate section 70503 was subject to the same penalties as provided for violating section 70503.

In 2016, Congress enacted the Coast Guard Authorization Act of 2015, Pub. L. 114–120 (2016), amending, among other things, Chapter 705 of Title 46. Specifically, Congress revised section 70503(a) as follows:

While on board a covered vessel, an individual may not knowingly or intentionally—

- (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
- (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 881(a)); or
- (3) conceal, or attempt or conspire to conceal, more than \$100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container,

or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Following this statutory change, these two new offenses may not be covered by the current definition of “controlled substance offense” in §4B1.2.

Part C of the proposed amendment would amend the definition of “controlled substance offense” in §4B1.2(b) to include “an offense described in 46 U.S.C. § 70503(a) or § 70506(b).”

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) prohibits the manufacture, import, export, distribution, or dispensing of 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; or
 - (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

* * *

PROPOSED AMENDMENT: CRIME LEGISLATION

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[i]mplementation of any legislation warranting Commission action”).

The proposed amendment contains eleven parts (Parts A through K). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), by amending Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Part B responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), by amending Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).

Part C responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), by amending Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Part D responds to the SUPPORT for Patients and Communities Act, Pub. L. 115–271 (2018), by amending Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery).

Part E responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018), by amending Appendix A and the Commentary to §2X5.2.

Part F responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019), by amending Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part G responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019), by amending Appendix A and the Commentary to §2X5.2.

Part H responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part I responds to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part J responds to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021, Pub. L. 116–260 (2020), by amending Appendix A.

Part K responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), by amending Appendix A and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts).

(A) FDA Reauthorization Act of 2017

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017).

That act amended 21 U.S.C. § 333 (Penalties [for certain violations of the Federal Food, Drug, and Cosmetic Act]) to add a new criminal offense for the manufacture or distribution of a counterfeit drug. The new offense states that

any person who violates [21 U.S.C. § 331(i)(3)] by knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug shall be imprisoned for not more than 10 years or fined in accordance with title 18, [United States Code,] or both.

21 U.S.C. § 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

Currently, subsections (b)(1) through (b)(6) of 21 U.S.C. § 333 are referenced in Appendix A (Statutory Index) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Subsection (b)(7) is referenced to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). New subsection (b)(8) is not referenced to any guideline.

Part A of the proposed amendment would amend Appendix A to reference 21 U.S.C. § 333(b)(8) to §2N2.1. Part A would also amend the Commentary to §2N2.1 to reflect that subsection (b)(8), as well as subsections (b)(1) through (b)(6), of 21 U.S.C. § 333 are all referenced to §2N2.1. Finally, Part A also makes a technical change to the Commentary to §2N1.1, adding 21 U.S.C. § 333(b)(7) to the list of statutory provisions referenced to that guideline.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

21 U.S.C. § 333(b)(1)–(6)	2N2.1
21 U.S.C. § 333(b)(7)	2N1.1
21 U.S.C. § 333(b)(8)	2N2.1
21 U.S.C. § 458	2N2.1

* * *

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg, 6810, 7734, 8313; 21 U.S.C. §§ 115, 117, 122, 134–134e, 151–158, 331, 333(a)(1), (a)(2), (b)(1)–(6), (b)(8), 458–461, 463, 466, 610, 611, 614, 617, 619, 620, 642–644, 676; 42 U.S.C. § 262. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2N1.1. Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(B) Allow States and Victims to Fight Online Sex Trafficking Act of 2017

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018).

That act created two new criminal offenses codified at 18 U.S.C. § 2421A (Promotion or facilitation of prostitution and reckless disregard of sex trafficking). The first new offense, codified at 18 U.S.C. § 2421A(a), provides that

[w]hoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service . . . , or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

The second new offense, codified at 18 U.S.C. § 2421A(b), is an aggravated form of the first. It provides an enhanced statutory maximum penalty of 25 years for anyone who commits the first offense and either “(1) promotes or facilitates the prostitution of 5 or more persons” or “(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C. §] 1591(a).” Section 1591(a) criminalizes sex trafficking of a minor or sex trafficking of anyone by force, threats of force, fraud, or coercion.

Part B of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Offenses involving the promotion or facilitation of commercial sex acts are generally referenced to these guidelines.

If the offense did not involve a minor, §2G1.1 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(2) would apply, and the defendant’s base offense level would be level 14. Part B of the proposed amendment would amend §2G1.1(b)(1) so that the four-level increase in the defendant’s offense level provided by that specific offense characteristic would also apply if subsection (a)(2) applies and the offense of conviction is 18 U.S.C. § 2421A(b)(2). Section 2421A(b)(2) is the version of the new aggravated offense under which the defendant has acted in reckless disregard of the fact that their conduct contributed to sex trafficking in violation of 18 U.S.C. § 1591(a).

If the offense involved a minor, §2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant’s base offense level would be level 24. Part B of the proposed amendment would amend §2G1.3(b)(4) to renumber the existing specific offense characteristic as §2G1.3(b)(4)(A) and to add a new §2G1.3(b)(4)(B), which provides for a 4-level increase in the defendant’s

offense level if (i) subsection (a)(4) applies; and (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2). Only the greater of §2G1.3(b)(4)(A) or §2G1.3(b)(4)(B) would apply.

Part B of the proposed amendment would also amend the specific offense characteristic at §2G1.3(b)(3) to add a new provision instructing that if 18 U.S.C. § 2421A(a) or § 2421A(b)(1) is the offense of conviction, subsection (b)(3)(B) shall not apply. Subsection (b)(3)(B) provides for a two-level increase in the defendant’s offense level if the offense involved the use of a computer or an interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor.

Part B of the proposed amendment would make conforming changes to §§2G1.1 and 2G1.3 and their accompanying commentary.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 2421 2G1.1, 2G1.3

18 U.S.C. § 2421A 2G1.1, 2G1.3

18 U.S.C. § 2422 2G1.1, 2G1.3

* * *

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

- (1) **34**, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
- (2) **14**, otherwise.

(b) Specific Offense Characteristic

- (1) If (A) subsection (a)(2) applies; and (B) (i) the offense involved fraud or coercion, or (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2), increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

- (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“*Commercial sex act*” has the meaning given that term in 18 U.S.C. § 1591(e)(3).

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

“*Promoting a commercial sex act*” means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

“*Victim*” means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, “victim” may include an undercover law enforcement officer.

2. **Application of Subsection (b)(1).**—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1), “*coercion*” includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. **Application of Chapter Three Adjustment.**—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. **Application of Subsection (c)(1).**—
 - (A) **Conduct Described in 18 U.S.C. § 2241(a) or (b).**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim 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 victim to appraise or control conduct was substantially impaired by drugs or alcohol.
 - (B) **Conduct Described in 18 U.S.C. § 2242.**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
6. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

* * *

§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

- (1) 34, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

- (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels. **Provided, however, that subsection (b)(3)(B) shall not apply if the offense of conviction is 18 U.S.C. § 2421A(a) or § 2421A(b)(1).**
- (4) **(Apply the greater):**
 - (A)** If **(A_i)** the offense involved the commission of a sex act or sexual contact; or **(B_{ii})** subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.
 - (B)** **If (i) subsection (a)(4) applies; and (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2), increase by 4 levels.**
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **8** levels.

(c) Cross References

- (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, 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.

- (2) If a minor was killed under 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.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“**Commercial sex act**” has the meaning given that term in 18 U.S.C. § 1591(e)(3).

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

“**Illicit sexual conduct**” has the meaning given that term in 18 U.S.C. § 2423(f).

“**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)).

“**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.

“**Participant**” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“**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 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).

2. **Application of Subsection (b)(1).—**

(A) **Custody, Care, or Supervisory Control.**—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age 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 enhancement, 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 under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(2).—**

(A) **Misrepresentation of Participant’s Identity.**—The enhancement in subsection (b)(2)(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 prohibited sexual conduct. Subsection (b)(2)(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)(2)(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)(2)(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 prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Undue Influence.**—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior. The voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.

However, subsection (b)(2)(B) does not apply in a case in which the only “minor” (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. **Application of Subsection (b)(3)(A).**—Subsection (b)(3)(A) 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 in subsection (b)(3)(A) 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.

5. **Application of Subsection (c).**—
 - (A) **Application of Subsection (c)(1).**—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), “*sexually explicit conduct*” has the meaning given that term in 18 U.S.C. § 2256(2).

 - (B) **Application of Subsection (c)(3).**—For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):
 - (i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (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.

 - (ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).

 - (iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

6. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

7. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

* * *

(C) FAA Reauthorization Act of 2018

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018). That act created two new criminal offenses concerning the operation of unmanned aircraft, commonly known as “drones,” and added a new provision to an existing criminal statute that also concerns drones.

The first new criminal offense, codified at 18 U.S.C. § 39B (Unsafe operation of unmanned aircraft), prohibits the unsafe operation of drones. Specifically, section 39B(a)(1) prohibits any person from operating an unmanned aircraft and knowingly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft’s occupants. Section 39B(a)(2) prohibits any person from operating an unmanned aircraft and recklessly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft’s occupants. Section 39B(b) prohibits any person from knowingly operating an unmanned aircraft near an airport runway without authorization. A violation of any of these prohibitions is punishable by a fine, not more than one year in prison, or both. A violation of subsection (a)(2) that causes serious bodily injury or death is punishable by a fine, not more than 10 years of imprisonment, or both. A violation of subsection (a)(1) or subsection (b) that causes serious bodily injury or death is punishable by a fine, imprisonment for any term of years or for life, or both.

The second new criminal offense, codified at 18 U.S.C. § 40A (Operation of unauthorized unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

The act also adds a new subsection (a)(5) to 18 U.S.C. § 1752 (Restricted building or grounds). The new subsection prohibits anyone from knowingly and willfully operating an unmanned aircraft system with the intent to knowingly and willfully direct or otherwise cause the system to enter or operate within or above a restricted building or grounds. A violation of section 1752 is punishable by a fine, imprisonment for not more than one year, or both. If the violator used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, the maximum term of imprisonment increases to ten years.

Part C of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 39B to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Accordingly, courts would use §2A5.2 for felony violations of section 39B and §2X5.2 for misdemeanor violations. Part C would also make conforming changes to §2A5.2 and its commentary and to the Commentary to §2X5.2. Part C of the proposed amendment would also amend the title of §2A5.2 to add “Unsafe Operation of Unmanned Aircraft.”

In addition, Part C of the proposed amendment would amend Appendix A to reference 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). It would also make conforming changes to the Commentary to §2A2.4.

Section 1752 is currently referenced in Appendix A to §2A2.4 and §2B2.3 (Trespass). Accordingly, courts would use those guidelines for violations of 18 U.S.C. § 1752(a)(5). Part C of the proposed amendment would make no changes to the guidelines to account for that provision.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 39A	2A5.2
18 U.S.C. § 39B	2A5.2, 2X5.2
18 U.S.C. § 40A	2A2.4
18 U.S.C. § 43	2B1.1

* * *

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 39B, 1992(a)(1), (a)(4), (a)(5), (a)(6); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

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Commentary

Statutory Provisions: 18 U.S.C. §§ 39B, 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).

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§2A2.4. Obstructing or Impeding Officers

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 40A, 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(D) SUPPORT for Patients and Communities Act

Synopsis of Proposed Amendment: Part D of the proposed amendment responds to the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (“the SUPPORT for Patients and Communities Act”), Pub. L. 115–271 (2018).

This Act includes the Eliminating Kickbacks in Recovery Act of 2018, which added a new offense at 18 U.S.C. § 220 (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories). Section 220(a) prohibits, with respect to services covered by a “health care benefit program,” knowing or willfully: (1) soliciting or receiving any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; and (2) paying or offering any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for inducing a referral of a patient to or in exchange for a patient using the services of a recovery home, clinical treatment facility, or laboratory. The new offense has a statutory maximum term of imprisonment of ten years.

A “health care benefit program,” for purposes of section 220, includes public and private plans and contracts affecting commerce. *See* 18 U.S.C. § 220(e)(3) (referring to the definition of such term at 18 U.S.C. § 24(b)). Section 220 also sets forth exemptions to the offense relating to certain discounts, payments, and waivers. *See* 18 U.S.C. § 220(b).

Part D of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The conduct prohibited in 18 U.S.C. § 220 is similar to the conduct prohibited in 42 U.S.C. § 1320a-7b(b) (Criminal penalties for acts involving Federal health care programs). Currently, section 1320a-7b offenses are referenced in Appendix A to both §§2B1.1 and 2B4.1.

Part D of the proposed amendment would also amend the commentaries to §§2B1.1 and 2B4.1 to reflect that 18 U.S.C. § 220 is referenced to these guidelines.

Proposed Amendment:

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* * *

18 U.S.C. § 219	2C1.3
18 U.S.C. § 220	2B1.1, 2B4.1
18 U.S.C. § 224	2B4.1

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 220, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 215, 220, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 8702, 8707; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(E) Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018).

Among other things, the Act amended 18 U.S.C. § 2259 (Mandatory restitution), with respect to victims of child pornography, by adding a new subsection (d). This new subsection permits any victim of child pornography trafficking to receive “defined monetary assistance” from the Child Pornography Victims Reserve when a defendant is convicted of trafficking in child pornography. It also sets forth rules for determining the amount of “defined monetary assistance” a victim may receive and certain limitations relating to the effect of restitution and on eligibility. In addition, new subsection (d)(4)(A) states that that any attorney representing a victim seeking “defined monetary assistance” may not charge, receive, or collect (nor may the court approve) the payment of fees and costs that in the aggregate exceeds 15 percent of any payment made under new subsection (d) in general. It also provides that an attorney who violates subsection (d)(4)(A) may be subject to a statutory maximum term of imprisonment of not more than one year. *See* 18 U.S.C. § 2259(d)(4)(B).

Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 18 U.S.C. § 2259(d)(4) is referenced to the guideline.

Proposed Amendment:

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18 U.S.C. § 2257A	2G2.5	* * *
18 U.S.C. § 2259(d)(4)	2X5.2	
18 U.S.C. § 2260(a)	2G2.1	* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(f), 1801, 2259(d)(4); 34 U.S.C. § 12593; 49 U.S.C. § 31310.
For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(F) Foundations for Evidence-Based Policymaking Act of 2018

Synopsis of Proposed Amendment: Part F of the proposed amendment responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019).

This Act includes the Confidential Information Protection and Statistical Efficiency Act of 2018, which added a new offense at 44 U.S.C. § 3572 (Confidential information protection). Section 3572 prohibits the unauthorized disclosure of information collected by an agency under a pledge of confidentiality and for exclusively statistical purposes, or the use of such information for other than statistical purposes. Any willful unauthorized disclosure of such information by an officer, employee, or agent of an agency acquiring information for exclusively statistical purposes is punishable by a statutory maximum term of imprisonment of five years. *See* 44 U.S.C. § 3572(f).

Part F of the proposed amendment would amend Appendix A (Statutory Index) to reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Similar confidential information disclosure offenses, such as 18 U.S.C. § 1039 and 26 U.S.C. § 7213(a), are referenced to this guideline. Part F of the proposed amendment would also amend the Commentary to §2H3.1 to reflect that 44 U.S.C. § 3572 is referenced to the guideline.

Proposed Amendment:

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* * *

43 U.S.C. § 1822(b) 2Q1.2

44 U.S.C. § 3572 2H3.1

45 U.S.C. § 359(a) 2B1.1

* * *

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

* * *

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(5)(B)(i), (ii); 18 U.S.C. §§ 119, 1039, 1905, 2511; 26 U.S.C. §§ 7213(a)(1)–(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 44 U.S.C. § 3572; 47 U.S.C. § 605. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(G) National Defense Authorization Act for Fiscal Year 2020

Synopsis of Proposed Amendment: Part G of the proposed amendment responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019).

The Act added a new statute at 10 U.S.C. § 2733a regarding medical malpractice claims by members of the uniformed services. The new statute authorizes the Secretary of Defense to allow, settle, and pay a claim against the United States for personal injury or death that occurred during the service of a member of the uniformed services and that was caused by the medical malpractice of a health care provider of the Department of Defense, if certain requirements are met. Under section 2733a(c)(2), the Department of Defense is not liable for the payment of attorney fees for a claim under the new statute. However, section 2733(g)(1) prohibits any attorney from charging, demanding, receiving, or collecting fees in excess of 20 percent of any claim paid pursuant to the new statute. Any attorney who charges, demands, receives, or collects a fee in excess of 20 percent faces a statutory maximum term of imprisonment of not more than one year. *See* 10 U.S.C. § 2733a(g)(2).

Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 10 U.S.C. § 2733a(g)(2) is referenced to the guideline.

Proposed Amendment:

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		* * *
10 U.S.C. § 987(f)	2X5.2	
10 U.S.C. § 2733a(g)(2)	2X5.2	
12 U.S.C. § 631	2B1.1	
		* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

* * *

Commentary

Statutory Provisions: 10 U.S.C. § 2733a(g)(2); 18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(H) Representative Payee Fraud Prevention Act of 2019

Synopsis of Proposed Amendment: Part H of the proposed amendment responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020).

The Act amended certain sections in chapters 83 (Retirement) and 84 (Federal Employees’ Retirement System) of title 5 (Government Organization and Employees), United States Code, relating to the Civil Services Retirement System (“CSRS”) and the Federal Employees Retirement System (“FERS”). Under both retirement programs, annuities that are due to a minor or an individual mentally incompetent or under other legal disability may be made to the guardian or other fiduciary of such individual. *See* 5 U.S.C. §§ 8345(e), 8466(c).

The Act added two identical new offenses at 5 U.S.C. §§ 8345a and 8466a, regarding embezzlement or conversion of payments due to a minor or an individual mentally incompetent or under other legal disability under CSRS and FERS. Both offenses apply to a “representative payee.” The Act added similar provisions to both chapters 83 and 84 of title 5 defining the term as “a person (including an organization) designated under [section 8345(e)(1) or section 8466(c)(1)] to receive payments on behalf of a minor or an individual mentally incompetent or under other legal disability.” 5 U.S.C. §§ 8331(33), 8401(39).

The new offense at 5 U.S.C. § 8345a prohibits a representative payee from embezzling or in any manner converting all or any part of the amounts received from payments under the CSRS retirement program for a use other than for the use and benefit of the minor or individual on whose behalf the payments were received. The new offense at 5 U.S.C. § 8466a prohibits a representative payee from engaging in the same conduct prohibited under section 8345a for purposes of payments received under the FERS retirement program. Offenses under both sections 8345a and 8466a are punishable by a statutory maximum term of imprisonment of five years.

Part H of the proposed amendment would amend Appendix A (Statutory Index) to reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). Similar financial fraud and embezzlement offenses relating to social security, veterans’ benefits, and welfare benefit and pension plans (such as 18 U.S.C. § 664, 38 U.S.C. § 6102, and 42 U.S.C. §§ 408(a)(5), 1011(a)(4) and 1383a(a)(4)) are referenced to §2B1.1. Part H of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 5 U.S.C. §§ 8345a and 8466a are referenced to the guideline.

Proposed Amendment:

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* * *

2 U.S.C. § 390

2J1.1, 2J1.5

5 U.S.C. § 8345a 2B1.1

5 U.S.C. § 8466a 2B1.1

7 U.S.C. § 6 2B1.1

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

Statutory Provisions: 5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(I) Stop Student Debt Relief Scams Act of 2019

Synopsis of Proposed Amendment: Part I of the proposed amendment responds to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (2020).

The Act created a new offense at 20 U.S.C. § 1097(e). Current subsections (a) through (d) of section 1097 provide criminal penalties for crimes relating to student assistance programs, including embezzlement, theft, fraud, forgery, and making unlawful payments to a lender to acquire a loan. New subsection (e) of section 1097 prohibits knowingly using an access device (as defined in 18 U.S.C. § 1029(e)(1)) issued to another person or obtained by fraud or false statement to access information technology systems of the Department of Education for purposes of obtaining commercial advantage or private financial gain, or in furtherance of any criminal or tortious act. The statutory maximum term of imprisonment for the offense is five years.

Part I of the proposed amendment would amend Appendix A (Statutory Index) to reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). Section 1097(a), (b), and (d) offenses (theft, embezzlement, and fraud) are currently referenced to §2B1.1, while section 1097(c) offenses (unlawful payments to acquire a loan) are referenced to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). Part I of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 20 U.S.C. § 1097(a), (b), (d), and (e) are referenced to the guideline.

Proposed Amendment:

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20 U.S.C. § 1097(d)	2B1.1	* * *
20 U.S.C. § 1097(e)	2B1.1	
21 U.S.C. § 101	2N2.1	* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 20 U.S.C. § 1097(a), (b), (d), (e); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(J) Protecting Lawful Streaming Act of 2020

Synopsis of Proposed Amendment: Part J responds to title II of Division Q of the Consolidated Appropriations Act, 2021, referred to as the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2020).

The Act created a new commercial streaming piracy offense at 18 U.S.C. § 2319C (Illicit digital transmission services). Section 2319C(b) makes it unlawful to willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service that (1) is primarily designed or provided for the purpose of publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; (2) has no commercially significant purpose or use other than to publicly perform works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; or (3) is intentionally marketed to promote its use in publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law. Section 2319C(a) provides definitions for some of the terms used in the statute.

A violation of section 2319C has a statutory maximum term of imprisonment of three years. 18 U.S.C. § 2319C(c)(1). However, the maximum penalty increases to five years if (1) the offense was committed in connection with one or more works being prepared for commercial public performance; and (2) the offender knew or should have known that the work was being prepared for commercial public performance. *Id.* § 2319C(c)(2). A ten-year maximum penalty applies if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). *Id.* § 2319C(c)(3).

Part J of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). Similar offenses, such as 17 U.S.C. § 506 (prohibiting infringing a copyright of a work being prepared for commercial distribution) and 18 U.S.C. §§ 2319A and 2319B (prohibiting the unauthorized recording and trafficking of live musical performances for commercial advantage or private financial gain, and the unauthorized recording of motion pictures in movie theaters), are referenced to §2B5.3.

Proposed Amendment:

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* * *

18 U.S.C. § 2319B	2B5.3
18 U.S.C. § 2319C	2B5.3
18 U.S.C. § 2320	2B5.3

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount (A) exceeded \$2,500 but did not exceed \$6,500, increase by **1** level; or (B) exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.
 - (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.
 - (5) If the offense involved a drug that uses a counterfeit mark on or in connection with the drug, increase by **2** levels.
 - (6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“*Circumvention devices*” are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

“*Commercial advantage or private financial gain*” means the receipt, or expectation of receipt, of anything of value, including other protected works.

“*Counterfeit military good or service*” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

“*Drug*” and “*counterfeit mark*” have the meaning given those terms in 18 U.S.C. § 2320(f).

“*Infringed item*” means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

“*Infringing item*” means the item that violates the copyright or trademark laws.

“*Uploading*” means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. “Uploading” does not include merely downloading or installing an infringing item on a hard drive on a defendant’s personal computer unless the infringing item is an openly shared file.

“*Work being prepared for commercial distribution*” has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. **Determination of Infringement Amount.**—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) **Use of Retail Value of Infringed Item.**—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
- (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.
- (iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.
- (iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the “retail value of the infringed item” is the price the user of the transmission would have paid to lawfully receive that transmission, and the “infringed item” is the satellite transmission rather than the intercepting device.)

- (v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.
 - (vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the “retail value of the infringed item” is the value of that item upon its initial commercial distribution.
 - (vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the “infringed item” is the identifiable, genuine good or service.
 - (viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the “retail value of the infringed item” is the price the user would have paid to access lawfully the copyrighted work, and the “infringed item” is the accessed work.
- (B) **Use of Retail Value of Infringing Item.**—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.
- (C) **Retail Value Defined.**—For purposes of this Application Note, the “*retail value*” of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.
- (D) **Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.**—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (*i.e.*, the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (*i.e.*, the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).
- (E) **Indeterminate Number of Infringing Items.**—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.
3. **Application of Subsection (b)(7).**—In subsection (b)(7), “*other significant harm to a member of the Armed Forces*” means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

4. **Application of §3B1.3.**—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
5. **Departure Considerations.**—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:
 - (A) The offense involved substantial harm to the reputation of the copyright or trademark owner.
 - (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.
 - (C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.
 - (D) The offense resulted in death or serious bodily injury.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

* * *

(K) William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Synopsis of Proposed Amendment: Part K of the proposed amendment responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021). The Act created several new offenses at 31 U.S.C. §§ 5335 and 5336.

The Act included two regulatory offenses in a new section 5335 of title 31, United States Code. Section 5335(b) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction if (1) the person or entity who owns or controls the assets is a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure; and (2) the aggregate value of the assets involved in one or more monetary transactions is not less than \$1,000,000. Section 5335(c) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the source of funds in a monetary transaction that (1) involves an entity found to be a primary money laundering concern under 31 U.S.C. § 5318A or applicable regulations; and (2) violates the prohibitions or conditions prescribed under 31 U.S.C. § 5318A(b)(5) or applicable regulations. Both new offenses cover conspiracies to commit the prohibited conduct and have a statutory maximum term of imprisonment of ten years. *See* 31 U.S.C. § 5335(d).

The Act also added a new section 5336 to title 31, United States Code, concerning reporting requirements of beneficial ownership of certain entities. Specifically, section 5336(b) requires certain United States and foreign corporations, limited liability companies, and similar entities, to file annual reports with the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”). The annual reports must identify an entity’s beneficial owners (*i.e.*, those exercising substantial control or who own or control no less than 25% of the ownership interests), including names, dates of birth, street address, and unique identification numbers (such as passport numbers, driver’s license numbers, or FinCEN identifiers). Section 5336(c) provides certain conditions under which FinCEN may disclose the beneficial ownership information to certain requesting agencies, including federal agencies, state, local and tribal law enforcement agencies, federal agencies on behalf of law enforcement, or a prosecutor or judge of a foreign country.

Section 5336 includes three new offenses relating to the provisions described above. First, section 5336(h)(1) prohibits (1) willfully providing, or attempting to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN; or (2) willfully failing to report complete or updated beneficial ownership information to FinCEN. The statutory maximum term of imprisonment for this offense is two years. Second, section 5336(c)(4) prohibits any employee or officer of a requesting agency from violating the protocols established by the regulations promulgated by the Secretary of the Treasury under section 5336, including unauthorized disclosure or use of the beneficial ownership information obtained from FinCEN. Third, section 5336(h)(2) prohibits the knowing disclosure or knowing use, without authorization, of beneficial ownership information obtained through a report submitted to FinCEN or a disclosure made by FinCEN. Both sections 5336(c)(4) and

5336(h)(2) offenses face a statutory maximum term of imprisonment of five years, with an enhanced penalty of up to ten years if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period.

Part K of the proposed amendment would amend Appendix A (Statutory Index) to reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses under 31 U.S.C. §§ 5313 and 5318(g)(2), are referenced to §2S1.3. Part K of the proposed amendment would also amend the Commentary to §2S1.3 to reflect that 31 U.S.C. §§ 5335 and 5336 are referenced to the guideline.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

		* * *
31 U.S.C. § 5332	2S1.3	
31 U.S.C. § 5335	2S1.3	
31 U.S.C. § 5336	2S1.3	
31 U.S.C. § 5363	2E3.1	
		* * *

§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

(a) Base Offense Level:

- (1) 8, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A;
or
- (2) 6 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.

(b) Specific Offense Characteristics

- (1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by **2** levels.
- (2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period, increase by **2** levels.
- (3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.

(c) Cross Reference

- (1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. §§ 7203 (if a violation based upon 26 U.S.C. § 6050I), 7206 (if a violation based upon 26 U.S.C. § 6050D); 31 U.S.C. §§ 5313, 5314, 5316, 5318, 5318A(b), 5322, 5324, 5326, 5331, 5332, 5335, 5336. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definition of “Value of the Funds”.**—For purposes of this guideline, “*value of the funds*” means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.
2. **Bulk Cash Smuggling.**—For purposes of subsection (b)(1)(B), “*bulk cash smuggling*” means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than \$10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. “United States” has the meaning given that term in Application Note 1 of the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).
3. **Enhancement for Pattern of Unlawful Activity.**—For purposes of subsection (b)(2), “*pattern of unlawful activity*” means at least two separate occasions of unlawful activity involving a total amount of more than \$100,000 in a 12-month period, without regard to whether

any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.

Background: Some of the offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business.

This guideline also covers offenses under 31 U.S.C. §§ 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.

* * *

PROPOSED AMENDMENT: CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses circuit conflicts involving §3E1.1 (Acceptance of Responsibility). *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying resolution of circuit conflicts as a priority, including the circuit conflict concerning whether the government may withhold a motion pursuant to §3E1.1(b) because a defendant moved to suppress evidence).

Subsection (a) of §3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility for the offense. *See* USSG §3E1.1(a). Subsection (b) of §3E1.1 sets forth the circumstances under which a defendant is eligible for an additional 1-level reduction by providing:

If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. USSG §3E1.1(b).

Section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (“PROTECT Act”), among other things, directly amended §3E1.1(b) to include the language requiring a government motion and consideration of government resources. *See* Pub. L. 108–21, § 401(g)(1), 117 Stat. 650 (2003). The PROTECT Act also added the following sentence to Application Note 6 of the Commentary to §3E1.1: “Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.” *Id.* § 401(g)(2).

In 2013, the Commission promulgated Amendment 775 to address two circuit conflicts over the §3E1.1(b) motion requirement. *See* USSG App. C, amend. 775 (effective Nov. 1, 2013). Among other things, the amendment added the following sentence to Application Note 6: “The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.” *Id.*

Two circuit conflicts have arisen relating to §3E1.1(b). The first conflict concerns whether a §3E1.1(b) reduction may be withheld or denied because a defendant moved to suppress evidence. Justice Sotomayor, joined by Justice Gorsuch, recently “emphasize[d] the need for clarification from the Commission” on this “important and longstanding split.” *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joins, respecting the denial of certiorari). The second conflict concerns whether the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges.

These conflicts largely turn on how much discretion the government has to withhold a motion under §3E1.1(b). Some circuits use the analytical framework from *Wade v. United States*, 504 U.S. 181, 185–86 (1992), applicable to substantial assistance motions under §5K1.1 (Substantial Assistance to Authorities) (Policy Statement) and 18 U.S.C. § 3553(e)—that the government’s discretion is broad, but refusal to file a motion cannot be based on “an unconstitutional motive” or a reason “not rationally related to any legitimate Government end.” Other circuits specify that withholding is permissible if based on an interest identified in §3E1.1. Courts also have grappled with whether the government’s discretion is limited to situations involving trial preparation, and whether suppression motions or sentencing disputes are enough like trial preparation to withhold a motion.

In relation to the first circuit conflict, the Third, Fifth, and Sixth Circuits have permitted the government to withhold a §3E1.1(b) motion based on a suppression motion. *See, e.g., United States v. Longoria*, 958 F.3d 372, 376–78 (5th Cir. 2020) (Amendment 775 did not clearly overrule its caselaw “allowing the government to withhold the third point when it must litigate a suppression motion”; suppression hearing was largely the “substantive equivalent of a full trial” (quoting *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994))), *cert. denied*, 141 S. Ct. 978 (2021); *United States v. Collins*, 683 F.3d 697, 707 (6th Cir. 2012) (suppression motion required the government “to undertake trial-like preparations”; “Avoiding litigation on a motion to suppress is rationally related to the legitimate government interest in the efficient allocation of its resources. Accordingly . . . the government’s decision to withhold the §3E1.1(b) motion was not arbitrary or unconstitutionally motivated.”); *United States v. Drennon*, 516 F.3d 160, 161, 163 (3d Cir. 2008) (suppression hearing involved “the large majority of the work to prepare for trial”; motion withheld due to “concern for the efficient allocation of the government’s litigating resources,” not an unconstitutional motive).

The First, Second, Ninth, Tenth, and D.C. Circuits have held that a reduction may not be denied based on a suppression motion. *See, e.g., United States v. Vargas*, 961 F.3d 566, 582–84 (2d Cir. 2020) (district court erred in denying government’s §3E1.1(b) motion because of suppression hearing; any “experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing”); *United States v. Price*, 409 F.3d 436, 443–44 (D.C. Cir. 2005) (district court erred in denying additional reduction based on suppression motion; while government had to prepare for a suppression hearing, “it never had to prepare for trial”); *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003) (“district court may not rely on the fact that the defendant filed a motion to suppress requiring a ‘lengthy suppression hearing’ to justify a denial of the third level reduction”; even where issues substantially overlap, “preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples”); *United States v. Marroquin*, 136 F.3d 220, 225 (1st Cir. 1998) (“[g]uidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease”); *United States v. Kimple*, 27 F.3d 1409, 1415 (9th Cir. 1994) (district court erred in denying the additional reduction where “resources were expended not in conducting trial preparation, but in considering pretrial motions [including suppression motion] necessary to protect [the defendant’s] rights”).

With respect to the second circuit conflict, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a §3E1.1(b) motion where the defendant has

raised sentencing challenges. *See, e.g.*, *United States v. Adair*, 38 F.4th 341, 361 (3d Cir. 2022) (government properly withheld motion where defendant “caused [the government] to have to prepare for a two-day sentencing hearing”; government did not act with an unconstitutional motive); *United States v. Jordan*, 877 F.3d 391, 395 (8th Cir. 2017) (defendant’s denial of conduct relevant to sentencing did not “permit[] the government and the court to allocate their resources efficiently” (citation omitted)); *United States v. Sainz-Preciado*, 566 F.3d 708, 716 (7th Cir. 2009) (government had “good reason” to withhold motion where it had to prepare “testimony and other evidence to prove the full scope of [defendant’s] criminal conduct at the sentencing hearing”); *United States v. Beatty*, 538 F.3d 8, 16–17 (1st Cir. 2008) (within the government’s broad discretion to withhold motion where government reasonably determined that the defendant frivolously contested issues related to sentencing). The Second and Fifth Circuits have held that the government may not withhold a motion on this basis. *See, e.g.*, *United States v. Castillo*, 779 F.3d 318, 324–26 (5th Cir. 2015) (“we disagree that the government may withhold a §3E1.1(b) motion simply because it has had to use its resources to litigate a sentencing issue”; however, dispute must be in good faith); *United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011) (“As long as the defendant disputes the accuracy of a factual assertion in the PSR in good faith, the government abuses its authority by refusing to move for a third-point reduction because the defendant has invoked his right to a *Fatico* hearing.”).

The proposed amendment would amend §3E1.1(b) to provide a definition of the term “preparing for trial” that provides more clarity on what actions ordinarily constitute preparing for trial for purposes of §3E1.1(b). It would also delete the following sentence in Application Note 6 of the Commentary to §3E1.1: “The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level. **The term “*preparing for trial*” means substantive preparations taken to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial. “Preparing for trial” is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine**

motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered “preparing for trial” under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered “preparing for trial.”

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
 - (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant’s challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;
 - (B) voluntary termination or withdrawal from criminal conduct or associations;
 - (C) voluntary payment of restitution prior to adjudication of guilt;
 - (D) voluntary surrender to authorities promptly after commission of the offense;
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (F) voluntary resignation from the office or position held during the commission of the offense;
 - (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and
 - (H) the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.
2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.
4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.
5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.
6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. ~~The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.~~

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply,

however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

* * *

Exhibit I

PROPOSED AMENDMENT: FIREARMS OFFENSES

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend §2K2.1 to respond to the Bipartisan Safer Communities Act.

Part B of the proposed amendment addresses concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, "ghost guns").

(A) Bipartisan Safer Communities Act

Synopsis of Proposed Amendment: The Bipartisan Safer Communities Act (the “Act”), among other things, created two new firearms offenses, amended definitions, increased penalties for certain firearms offenses, and contained a directive to the Commission relating to straw purchases and trafficking of firearms offenses.

Specifically, the Act created two new offenses at 18 U.S.C. §§ 932 and 933. Section 932 prohibits knowingly purchasing, or conspiring to purchase, any firearm on behalf of, or at the request or demand of, another person with knowledge or reasonable cause to believe that such other person: (1) meets at least one of the criteria set forth in 18 U.S.C. § 922(d); (2) intends to use, carry, possess, sell, or otherwise dispose of the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or (3) intends to sell or otherwise dispose of the firearm to a person who meets either of the previous criteria. *See* 18 U.S.C. § 932(b). Section 933 prohibits: (1) shipping, transporting, transferring, causing to be transported, or otherwise disposing of, any firearm to another person with knowledge or reasonable cause to believe that the use, carrying, or possession of a firearm by the recipient would constitute a felony; (2) receiving from another person any firearm with knowledge or reasonable cause to believe that such receipt would constitute a felony; or (3) attempt or conspiracy to commit either of the acts described before. *See* 18 U.S.C. § 933(a).

Both new offenses carry a statutory maximum term of imprisonment of 15 years. The statutory maximum term of imprisonment for offenses under section 932 increases to 25 years if the offense was committed with knowledge or reasonable cause to believe that any firearm involved will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 932(c)(2).

In addition, the Act increased the statutory maximum term of imprisonment for the offenses under 18 U.S.C. §§ 922(d), 922(g), 924(h), and 924(k) from ten to 15 years. The Act also made changes to the elements of some of these offenses. First, the Act expanded the scope of section 922(d) by adding two additional categories of persons to whom it is unlawful to sell or otherwise dispose of any firearm or ammunition: (1) persons who intend to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; and (2) persons who intend to sell or otherwise dispose of the firearm or ammunition to a person to whom sale or disposition is prohibited under the other categories in section 922(d). *See* 18 U.S.C. § 922(d)(10)–(11).

Second, the Act amended section 924(h). Prior to the Act, section 924(h) prohibited knowingly transferring a firearm with knowledge that such firearm will be used to commit a crime of violence or drug trafficking crime. As amended by the Act, section 924(h) prohibits knowingly receiving or transferring a firearm or ammunition, or attempting or conspiring to do so, with knowledge or reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, a drug trafficking crime, or a crime under the Arms Export Control Act (22 U.S.C. § 2751 *et seq.*), the Export Control Reform Act of 2018 (50 U.S.C. § 4801 *et seq.*), the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. § 1901 *et seq.*). *See* 18 U.S.C. § 924(h).

Third, the Act also amended section 924(k). Prior to the Act, section 924(k) prohibited smuggling or knowingly bringing into the United States a firearm, or attempting to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46, United States Code; (2) violates any law of a State relating to any controlled substance; or (3) constitutes a crime of violence. Section 924(k), as amended by the Act, prohibits smuggling or knowingly bringing into or out of the United States a firearm or ammunition, or attempting or conspiring to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46, United States Code; or (2) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 924(k)

The Act also expanded the definition of “misdemeanor crime of domestic violence” at 18 U.S.C. § 921(a)(33) to include offenses against a person in “a current or recent former dating relationship.” *See* 18 U.S.C. § 921(a)(33)(A). In addition, the Act added a new provision to section 921(a)(33) indicating that a person is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, by reason of a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship if certain criteria are met. *See* 18 U.S.C. § 921(a)(33)(C).

Finally, the Act includes a directive requiring the Commission, pursuant to its authority under 28 U.S.C. § 994, to

review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

Pub. L. 117–159, §12004(a)(5) (2022).

*New Offenses and Increased Penalties for Straw Purchasing and
Firearms Trafficking Offenses*

Part A of the proposed amendment implements part of the directive of the Bipartisan Safer Communities Act by addressing the new offenses at 18 U.S.C. § 932 and 933 and increasing penalties for other offenses applicable to straw purchases and trafficking of firearms. First, Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. §§ 932 and 933 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Offenses involving firearms trafficking and straw purchases are generally referenced to this guideline.

Second, Part A of the proposed amendment would amend §2K2.1 to address the new offenses and increase penalties for offenses applicable to straw purchases and trafficking of firearms, as required by the directive.

Part A of the proposed amendment addresses the new offenses at 18 U.S.C. §§ 932 and 933 and increases penalties for offenses applicable to straw purchases and trafficking of firearms. It would accomplish this by adding references to the new offenses in §2K2.1(a) and revising the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses.

Specifically, Part A of the proposed amendment would add references to 18 U.S.C. §§ 932 and 933 in subsections (a)(4)(B)(ii)(II) and (a)(6)(B). In addition, it would revise the 4-level enhancement for firearms trafficking at §2K2.1(b)(5) to make it a tiered-enhancement applicable to defendants who transferred or intended to transfer firearms or ammunition to certain individuals, which would provide the requisite increase for a defendant convicted of violating 18 U.S.C. § 922(d), § 932, or § 933(a)(1), as well as other offenses, including violations of 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The revised enhancement would also apply to defendants convicted under 18 U.S.C. § 933(a)(2) or (a)(3). Specifically, a 2-level enhancement would apply if the defendant was convicted under 18 U.S.C. § 933(a)(2) or (a)(3). A 2-level increase would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i). A 5-level enhancement would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i). In response to the changes that the Act made

to section 921(a)(33), the revised §2K2.1(b)(5) would also include a provision indicating that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

In addition, Part A of the proposed amendment would amend Application Note 13 to conform its content with the revised version of §2K2.1(b)(5). It would also amend the departure provision in Application Note 13 to provide that if the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.

“Straw Purchasers” with Mitigating Factors

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to “consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” See Pub. L. 117–159, §12004(a)(5) (2022). It would add a new 2-level reduction based on certain mitigating factors.

Specifically, Part A of the proposed amendment would set forth the new 2-level reduction at subsection (b)(9). The reduction would be applicable if the defendant (A) receives an enhancement under subsection (b)(5); (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to physical or mental condition.

In relation to this part of the directive, Part A of the proposed amendment would delete the departure provision at Application Note 15 of §2K2.1.

Enhancement for Defendants with Criminal Affiliations

Finally, Part A of the proposed amendment addresses the part of the directive that requires the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.” See Pub. L. 117–159, §12004(a)(5) (2022). It would provide a new 2-level enhancement in response to this part of the directive.

Specifically, Part A of the proposed amendment would set forth the new 2-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant

(A) receives an enhancement under subsection (b)(5); and (B) committed the offense in connection with the defendant’s participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 931	2K2.6
18 U.S.C. § 932	2K2.1
18 U.S.C. § 933	2K2.1
18 U.S.C. § 956	2A1.5, 2X1.1

* * *

§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 the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; 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), § 932, or § 933; 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(e), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

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

NUMBER OF FIREARMS		INCREASE IN LEVEL
(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.

- (5) ~~If the defendant engaged in the trafficking of firearms, increase by 4 levels.~~ (Apply the Greatest) If the defendant—
 - (A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **2** levels;
 - (B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or
 - (C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or

more firearms as a result of inducing the conduct described in clause (i), increase by 5 levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(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.

(8) If the defendant—

(A) receives an enhancement under subsection (b)(5); and

(B) committed the offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses;

increase by 2 levels.

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to physical or mental condition;

decrease by 2 levels.

(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), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“**Ammunition**” has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

“**Controlled substance offense**” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“**Crime of violence**” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

“**Destructive device**” has the meaning given that term in 26 U.S.C. § 5845(f).

“**Felony conviction**” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

“**Firearm**” has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**— For purposes of subsections (a)(1), (a)(3), and (a)(4), a “**semiautomatic firearm that is capable of accepting a large capacity magazine**” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.
3. **Definition of “Prohibited Person.”**—For purposes of subsections (a)(4)(B) ~~and~~ (a)(6), and (b)(5), “**prohibited person**” means any person described in 18 U.S.C. § 922(g) or § 922(n).
4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.
5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.
6. **Application of Subsection (b)(2).**—Under subsection (b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant’s criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. **Application of Subsection (b)(4).**—

(A) **Interaction with Subsection (a)(7).**—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) **Knowledge or Reason to Believe.**—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. **Application of Subsection (b)(7).**—Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying ~~subsection~~ **subsections** (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable (“plastic”) firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).
12. **Armed Career Criminal.**—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.
13. **Application of Subsection (b)(5).**—

~~(A) **In General.** Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—~~

~~(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and~~

~~(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—~~

~~(I) whose possession or receipt of the firearm would be unlawful; or~~

~~(II) who intended to use or dispose of the firearm unlawfully.~~

(B) Definitions.—For purposes of this subsection:

~~“**Individual whose possession or receipt of the firearm would be unlawful**” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.~~

~~“Crime of violence” and “controlled substance offense” have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~“Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).~~

The term “**criminal justice sentence**” includes probation, parole, supervised release, imprisonment, work release, or escape status.

The term “**defendant**”, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.—If the defendant trafficked, transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. **Application of Subsections (b)(6)(B) and (c)(1).**—

(A) **In General.**—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) **Application When Other Offense is Burglary or Drug Offense.**—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) **Definitions.**—

“**Another felony offense**”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

“**Another offense**”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) **Upward Departure Provision.**—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) **Relationship Between the Instant Offense and the Other Offense.**—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) **Firearm Cited in the Offense of Conviction.** Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a

robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

- (ii) **Firearm Not Cited in the Offense of Conviction.** Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not “part of the same course of conduct or common scheme or plan,” then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

~~15. **Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).** In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.~~

* * *

(B) Firearms Not Marked with Serial Number (“Ghost Guns”)

Synopsis of Proposed Amendment: Subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen or that has an altered or obliterated serial number. Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number. The Commentary to §2K2.1 provides that the enhancement applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG §2K2.1, comment. (n.8(B)).

The enhancement at §2K2.1 currently does not apply to “ghost guns.” “Ghost guns” is the term commonly used to refer to firearms that are not marked by a serial number by which they can be identified and traced, and that are typically made by an unlicensed individual from purchased components (such as standalone parts or weapon parts kits) or homemade components. Because of their lack of identifying markings, it is difficult to trace ghost guns and determine where and who manufactured them, and to whom they were sold or otherwise disposed. The Commission has heard from commenters that the very purpose of “ghost guns” is to avoid the tracking and tracing systems associated with a firearm’s serial number and that they increasingly are associated with violent crime. Commenters have also indicated that §2K2.1 does not adequately address “ghost guns,” as the enhancement at §2K2.1(b)(4)(B) only covers firearms that were marked with a serial number when manufactured but where such identifier was later altered or obliterated.

Part B of the proposed amendment would revise §2K2.1(b)(4)(B) to add that the 4-level enhancement applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

Proposed amendment:

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

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

* * *

(b) Specific Offense Characteristics

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

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(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 (A) any firearm (A) was stolen, increase by **2** levels; or (B)(i) any firearm had an altered or obliterated serial number; or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, 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.

- (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.

* * *

Commentary

* * *

Application Notes:

* * *

8. Application of Subsection (b)(4).—

- (A) **Interaction with Subsection (a)(7).**—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in

subsection (b)(4)(B)(i). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, ~~if~~ the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).

- (B) ~~Knowledge or Reason to Believe~~ **Defendant's State of Mind**.—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. However, subsection (b)(4)(B)(ii) only applies if defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

* * *

PROPOSED AMENDMENT: FIRST STEP ACT—DRUG OFFENSES

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) (“First Step Act” or “Act”), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Although Commission action is not necessary to implement most of the First Step Act, revisions to the *Guidelines Manual* may be appropriate to implement the Act’s changes to the eligibility criteria of the “safety valve” provision at 18 U.S.C. § 3553(f), and the recidivist penalties for drug offenders at 21 U.S.C. §§ 841(b) and 960(b). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

(A) Safety Valve

Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. As originally enacted, the safety valve applied only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, and 963 and to defendants who, among other things, had not more than one criminal history point, as determined under the guidelines. When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to “carry out the purposes of [section 3553(f)].” See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). Two other guidelines provisions, subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), currently provide a 2-level reduction in a defendant’s offense level if the defendant meets the criteria in paragraphs (1) through (5) of §5C1.2(a).

Section 402 of the First Step Act expanded the safety valve provision at 18 U.S.C. § 3553(f) in two ways. First, the Act extended the applicability of the safety valve to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, the Act amended section 3553(f)(1) to broaden the eligibility criteria of the safety valve to include defendants who do not have: (1) “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines”; (2) a “prior 3-point offense, as determined under the sentencing guidelines”; and (3) a “prior 2-point violent offense, as determined under the sentencing guidelines.” The Act defines “violent offense” as a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment. In addition, the First Step Act incorporated into section 3553(f) a provision instructing that “[i]nformation disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”

Following the enactment of the First Step Act, circuit courts have disagreed about how the word “and” connecting subsections (A) through (C) in section 3553(f)(1) operates. The Fifth, Sixth, Seventh, and Eighth Circuits have held that section 3553(f)(1) should be read to

exclude a defendant who meets any single disqualifying condition listed in subsections (A) through (C). *See United States v. Palomares*, 52 F.4th 640, 642 (5th Cir. 2022) (“To be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, *and* does not have a 2-point violent offense.”); *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022) (same); *United States v. Pace*, 48 F.4th 741, 756 (7th Cir. 2022) (“[A] defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief.”); *United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022) (“A court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense.”). Specifically, the Eighth Circuit concluded that the word “and” is conjunctive in a “distributive” sense rather than in a “joint” sense. Thus, the phrase “does not have” is distributed across all three subsections (*i.e.*, should be read as repeated before each of the three conditions) such that a defendant is ineligible for safety valve relief if the defendant meets any one of the three conditions. *Pulsifer*, 39 F.4th at 1022 (“The distributive reading therefore gives meaning to each subsection in § 3553(f)(1), and we conclude that it is the better reading of the statute.”); *see also Palomares*, 52 F.4th at 642 (“We agree with the Eighth Circuit that Congress’s use of an em-dash following ‘does not have’ is best interpreted to ‘distribute’ that phrase to each following subsection.”); *Haynes*, 55 F.4th at 1080 (“We agree with the Eighth Circuit that, of the interpretations on offer here, ‘[o]nly the distributive interpretation avoids surplusage.’”).

The Fourth, Ninth, and Eleventh Circuits, in contrast, have held that the “and” connecting subparagraphs (A), (B), and (C) of section 3553(f)(1) is “conjunctive” and joins together the enumerated characteristics in those provisions. *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021); *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc). Accordingly, a defendant “must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively,” to be disqualified from safety valve relief under section 3553(f). *Lopez*, 998 F.3d at 433. Unlike the Fifth, Sixth, and Eighth Circuits, the Ninth and Eleventh Circuits interpret the word “and” to be conjunctive in a “joint,” rather than “distributive,” sense. On February 27, 2023, the Supreme Court granted a petition for a writ of certiorari in *Pulsifer* to resolve this question. *See Pulsifer v. United States*, 39 F.4th 1018, 1022 (8th Cir. 2022), *cert. granted*, 2023 WL 2227657 (U.S. Feb. 27, 2023) (No. 22-340).

Using fiscal year 2021 data, Commission analysis estimated that of 17,520 drug trafficking offenders, 11,866 offenders meet the non-criminal history requirements of the safety valve (18 U.S.C. § 3553(f)(2)–(5)). Of those 11,866 offenders, 5,768 offenders have no more than one criminal history point and would be eligible under the unamended pre-First Step Act criminal history requirement. Under a disjunctive interpretation of the expanded criminal history provision, 1,987 offenders would become eligible. The remaining 4,111 offenders would be ineligible. In comparison, under the Ninth Circuit’s conjunctive interpretation of the expanded criminal history provision, 5,778 offenders would become eligible. The remaining 320 offenders would be ineligible.

Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 and its

corresponding commentary. Specifically, it would revise §5C1.2(a) to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also revise §5C1.2(b) in relation to the minimum offense level required for certain offenders. Revision of this provision, which implements a directive to the Commission in section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–222 (Sept. 13, 1994), may be appropriate given the expanded class of defendants who would qualify for safety valve relief under the proposed revisions to §5C1.2(a).

In addition, Part A of the proposed amendment would make changes to the Commentary to §5C1.2. First, it would revise Application Note 1 by deleting the current language and adding the statutory definition for the term “violent offense.” Second, Part A of the proposed amendment would revise Application Note 7, to implement the new statutory provision stating that information disclosed by a defendant pursuant to 18 U.S.C. § 3553(f) may not be used to enhance the defendant’s sentence unless the information relates to a violent offense. Finally, it would make additional technical changes to the rest of the Commentary by renumbering and inserting headings at the beginning of certain notes.

Part A of the proposed amendment would also make conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by §5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make non-substantive changes to §2D1.1 and §2D1.11, the 2-level reductions in both guidelines that are tethered to the eligibility criteria of paragraphs (1)–(5) of §5C1.2(a). It would allow the 2-level reductions in §2D1.1(b)(18) and §2D1.11(b)(6) to automatically apply to any defendant who meets the revised criteria of §5C1.2. Because §5C1.2(a)(1) would closely track the language in 18 U.S.C. § 3553(f)(1), as amended by the First Step Act, the “and” used to set forth the criminal history criteria in §5C1.2 might be read by some courts as *disjunctive* (e.g., the courts in the Fifth, Sixth, Seventh, and Eighth Circuits) and by other courts as *conjunctive* (e.g., the courts in the Ninth and Eleventh Circuits). The amendment would not resolve the circuit conflict for purposes of §2D1.1(b)(18) and §2D1.11(b)(6).

Part A also would make changes to the Commentary to §§2D1.1 and 2D1.11 that correspond to the applicable provisions of the revised Commentary to §5C1.2.

(B) Recidivist Penalties for Drug Offenders

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. §§ 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. §§ 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, *or* who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Prior to the First Step Act, all of the recidivist penalty provisions within sections 841(b) and 960(b) provided for an enhanced mandatory minimum penalty if a defendant had one or more convictions for a prior “felony drug offense,” which is defined in 21 U.S.C. § 802(44) as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” Section 401 of the Act both narrowed and expanded the type of prior offenses that trigger enhanced mandatory minimum penalties under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2). The Act narrowed the triggering prior offenses for these statutory provisions by replacing the term “felony drug offense” with “serious drug felony.” The term “serious drug felony” is defined in 21 U.S.C. § 802(57) as “an offense described in [18 U.S.C. § 924(e)(2)] for which—(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense.” The Act also expanded the class of triggering offenses for the same statutory provisions by adding “serious violent felony.” The term “serious violent felony” is defined in 21 U.S.C. § 802(58) as “(A) an offense described in [18 U.S.C. § 3559(c)(2)] for which the offender served a term of imprisonment of more than 12 months; and (B) any offense that would be a felony violation of [18 U.S.C. §113], if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.” The First Step Act did not amend 21 U.S.C. § 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), or 960(b)(5), which still provide for enhanced mandatory minimum penalties if a defendant was convicted of a prior “felony drug offense.”

Part B of the proposed amendment would revise subsection (a) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to make the guideline’s base offense levels consistent with the First Step Act’s changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term “similar offense” used in these guideline provisions with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

First, Part B of the proposed amendment would amend §2D1.1(a)(1) and split it into two subparagraphs. Subparagraph (A) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “serious drug felony or serious violent felony.” Subparagraph (B) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “felony drug offense.”

Second, Part B of the proposed amendment would amend §2D1.1(a)(3), which provides for a base offense level of 30 for a defendant convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “similar offense.” Specifically, it would replace the term “similar offense” with “felony drug offense,” as provided in the relevant statutory provisions.

Proposed Amendment:

(A) Safety Valve

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, **or 46 U.S.C. § 70503 or § 70506**, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) ~~set forth below~~ **as follows:**
- (1) the defendant does not have ~~more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);~~
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;**
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and**
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;**
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of

the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, ~~the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17~~ the applicable guideline range shall not be less than 24 to 30 months of imprisonment.

Commentary

Application Notes:

1. **Definitions.—**

~~“More than 1 criminal history point, as determined under the sentencing guidelines,” as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).~~

(A) The term “*violent offense*” means a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment.

2. (B) “*Dangerous weapon*” and “*firearm*,” as used in subsection (a)(2), and “*serious bodily injury*,” as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

3. (C) “*Offense*,” as used in subsection (a)(2)–(4), and “*offense or offenses that were part of the same course of conduct or of a common scheme or plan*,” as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

4. **Application of Subsection (a)(2).—**Consistent with §1B1.3 (Relevant Conduct), the term “*defendant*,” as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

3. **Application of Subsection (a)(4).—**

5. (A) “**Organizer, leader, manager, or supervisor of others in the offense**.”—~~“Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines,” as used in~~The first prong of subsection (a)(4), ~~means a~~ requires that the defendant who receives was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. (B) “**Engaged in a continuing criminal enterprise**.”—“*Engaged in a continuing criminal enterprise*,” as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who “engaged in a continuing criminal enterprise” but is convicted of an offense to which

this section applies will be an “organizer, leader, manager, or supervisor of others in the offense.”

74. **Use of Information Disclosed under Subsection (a).**—~~Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except, where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.~~ Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).
85. **Government’s Opportunity to Make Recommendation.**—Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. *See also* Fed. R. Crim. P. 32(f), (i).
96. **Exemption from Otherwise Applicable Statutory Minimum Sentences.**—A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.

Background: This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994 and subsequently amended, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). *See also* H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

* * *

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

* * *

(b) DOWNWARD DEPARTURES.—

* * *

(3) LIMITATIONS.—

* * *

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—~~A defendant whose criminal history category is Category I after receipt of~~ who receives a downward departure under this subsection does not meet the ~~criteria~~ criminal history requirement of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, ~~before receipt of the downward departure, the defendant had more than one criminal history~~

point under §4A1.1 (Criminal History Category) the defendant did not otherwise meet such requirement before receipt of the downward departure.

* * *

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

(18) If the defendant meets the criteria set forth in subdivisions paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

* * *

Commentary

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Application Notes:

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21. **Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17 that the applicable guideline range shall not be less than 24 to 30 months of imprisonment, is not pertinent to the determination of whether subsection (b)(18) applies.

* * *

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

(6) If the defendant meets the criteria set forth in subdivisions paragraphs (1)–(5) of subsection (a) of §5C1.2

(Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

* * *

Commentary

* * *

Application Notes:

* * *

7. **Applicability of Subsection (b)(6).**— The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring a ~~minimum offense level of level 17~~an applicable guideline range of not less than 24 to 30 months of imprisonment if the “statutorily required minimum sentence is at least five years”).

* * *

(B) Recidivist Penalties for Drug Offenders

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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

(1) **43**, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), or (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), or (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a ~~similar offense~~ **serious drug felony or serious violent felony**; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a **felony drug offense**; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a ~~similar offense~~ **felony drug offense**; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant

receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.—**

{For purposes of the guidelines, a “*plant*” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).}*²

For purposes of subsection (a), “*serious drug felony*,” “*serious violent felony*,” and “*felony drug offense*” have the meaning given those terms in 21 U.S.C. § 802.

- ±2. “**Mixture or Substance**”—“*Mixture or substance*” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

- ~~2. “**Plant**”. For purposes of the guidelines, a “*plant*” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).~~

* * *

* The text in braces currently appears in Application Note 2 of §2D1.1. The proposed amendment would place the text here without making any changes.

PROPOSED AMENDMENT: FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3582(c)(1)(A)

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) (“First Step Act” or “Act”), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Specifically, the sentencing reform provisions of the Act (1) amended the sentencing modification procedures set forth in 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a reduction in the defendant’s term of imprisonment under certain circumstances; (2) reduced certain enhanced penalties imposed pursuant to 21 U.S.C. § 851 for some repeat offenders and changed the prior offenses that qualify for such enhanced penalties; (3) broadened the eligibility criteria of the “safety valve” provision at 18 U.S.C. § 3553(f); (4) limited the “stacking” of certain mandatory minimum penalties imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense; and (5) allowed for retroactive application of the Fair Sentencing Act of 2010. Revisions to the *Guidelines Manual* may be appropriate to implement the Act’s changes to 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Reform Act of 1984 (“SRA”) established a system of determinate sentencing, prohibiting a court from modifying a term of imprisonment once it had been imposed except in certain instances specified in section 3582(c) of title 18, United States Code. One of those instances is set forth in 18 U.S.C. § 3582(c)(1)(A), which authorizes a court to reduce the term of imprisonment of a defendant, after considering the factors in 18 U.S.C. § 3553(a) to the extent they are applicable, 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).

Prior to the First Step Act, a court was authorized to grant a reduction in a defendant’s term of imprisonment under section 3582(c)(1)(A) only “upon motion of the Director of the Bureau of Prisons.” Section 603(b) of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a sentence reduction after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons (“BOP”) to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.

Section 3582(c)(1)(A) does not define the phrase “extraordinary and compelling reasons.” Instead, the SRA directs that “[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, 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.” 28 U.S.C. § 994(t). Section 994(t) also directs that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” *Id.* The SRA provides the Commission with the authority to set the policy regarding what reasons should qualify as “extraordinary and compelling reasons” for a sentence reduction under section 3582(c)(1)(A) and the courts with the authority to find that the “extraordinary and compelling reasons warrant such a reduction . . . and that such reduction is consistent with applicable policy statements issued

by the Sentencing Commission.” See 28 U.S.C. §§ 994(a)(2)(C), 994(t), & 995(b); 18 U.S.C. § 3582(c)(1)(A).

The Commission implemented the section 994(t) directive by promulgating the policy statement at §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)). See U.S. Sent’g Comm’n, *Guidelines Manual*, §1B1.13 (Nov. 2021). Currently, §1B1.13 provides only for motions filed by the Director of the BOP and does not account for motions filed by a defendant under the amended statute. The policy statement describes the circumstances that constitute “extraordinary and compelling reasons” in the Commentary to §1B1.13. Application Note 1(A) through (C) provides for three categories of extraordinary and compelling reasons, *i.e.*, “Medical Condition of the Defendant,” “Age of the Defendant,” and “Family Circumstances.” See USSG §1B1.13, comment. (n.1(A)–(C)). Application Note 1(D) provides that the Director of the BOP may determine whether there exists in a defendant’s case “other reasons” that are extraordinary and compelling “other than, or in combination with,” the reasons described in Application Note 1(A) through (C). USSG §1B1.13, comment. (n.1(D)).

The proposed amendment would implement the First Step Act’s relevant provisions by amending §1B1.13 and its accompanying commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, authorizes a defendant to file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of “extraordinary and compelling reasons” in §1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with the revisions described below), add two new categories, and revise the “Other Reasons” category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.

Second, the proposed amendment would add two new subcategories to the “Medical Circumstances of the Defendant” category at new subsection (b)(1). The first new subcategory is for a defendant suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death. The other new subcategory is for a defendant who presents the following circumstances: (1) the defendant is housed at a correctional facility affected or at imminent risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be adequately mitigated in a timely manner.

Third, the proposed amendment would modify the “Family Circumstances” category at new subsection (b)(3) in three ways. First, the proposed amendment would revise the current subcategory relating to the death or incapacitation of the caregiver of a defendant’s minor child by making it also applicable to a defendant’s child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. Second, the proposed amendment would add a new subcategory to the “Family Circumstances” category for cases where a defendant’s parent is incapacitated and the defendant would be the only available caregiver for the parent. Third, the proposed amendment would add a more general subcategory applicable if the defendant establishes that circumstances similar to those listed in the other subcategories of “Family Circumstances” exist involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. The new category would also provide a definition for the term “immediate family member.”

Fourth, the proposed amendment would add a new category relating to a victim of abuse that applies to a defendant who, while in custody serving the term of imprisonment sought to be reduced, was a victim of (A) sexual abuse involving a “sexual act,” as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or (B) physical abuse resulting in serious bodily injury; that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant. The new category would also provide that the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

Fifth, the proposed amendment would revise the “Other Reasons” category currently found in Application Note 1(D) and expand the scope of the category to apply to all motions filed under 18 U.S.C. § 3582(c)(1)(A), regardless of whether such motion is filed by the Director of the BOP or the defendant. It would be applicable if the defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

Sixth, the proposed amendment would add a new category (“Unusually Long Sentences”) providing that if a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the *Guidelines Manual* that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant’s individualized circumstances.

Seventh, the proposed amendment would add a new subsection (c) providing that, except as provided in subsection (b)(6), a change in the law (including an amendment to the *Guidelines Manual* that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under §1B1.13. It

also provides that if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under §1B1.13, a change in the law (including an amendment to the *Guidelines Manual* that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

Eighth, the proposed amendment would move current Application Note 3 (stating that, pursuant to 28 U.S.C. § 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of §1B1.13) into the guideline as a new subsection (d). It would also add new language providing that rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

Eighth, the proposed amendment would move Application Note 2 (concerning the foreseeability of extraordinary and compelling reasons) into the guideline as a new subsection (e).

Finally, as conforming changes, the proposed amendment would delete application notes 4 (concerning a motion by the Director of the Bureau of Prisons) and 5 (concerning application of subdivision 3) and make a minor technical change to the Background commentary. The proposed amendment would add two new application notes to the Commentary to §1B1.13. New application note 1 would clarify how the policy statement interacts with the temporary release of a defendant from custody under 18 U.S.C. § 3622. New application note 2 would provide that the Commission encourages the court to make its best effort to ensure that any victims of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard.

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

(a) **IN GENERAL.**—Upon motion of the Director of the Bureau of Prisons or the defendant underpursuant to 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.

(b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) MEDICAL CIRCUMSTANCES OF THE DEFENDANT.—

(A) {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.}*

(B) {The defendant is—

- (i) suffering from a serious physical or medical condition,
- (ii) suffering from a serious functional or cognitive impairment, or
- (iii) experiencing deteriorating physical or mental health because of the aging process,

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

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.

(D) The defendant presents the following circumstances—

- (i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;
- (ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing

* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.

outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) {AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.}*

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The death or incapacitation of the caregiver of the defendant’s minor child or ~~minor children~~ the defendant’s child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.}*^{**}

(B) {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.}*

(C) The incapacitation of the defendant’s parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. For purposes of this provision, “*immediate family member*” refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of the defendant.

(4) VICTIM OF ABUSE.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse involving a “sexual act,” as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or

* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.

** The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here with the changes shown in revision marks.

(B) physical abuse resulting in “serious bodily injury,” as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.

For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) UNUSUALLY LONG SENTENCES.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the *Guidelines Manual* that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant’s individualized circumstances.

(c) LIMITATION ON CHANGES IN LAW.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the *Guidelines Manual* that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the *Guidelines Manual* that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) {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 this policy statement. However, rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant’s term of imprisonment is warranted.}**

** The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here with the changes shown in revision marks.

- (e) {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.}*¹

Commentary

Application Notes:

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

(A) ~~Medical Condition of the Defendant.~~—

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

- (ii) ~~The defendant is—~~

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

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

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

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

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

(C) ~~Family Circumstances.~~—

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

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

* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.

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

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

~~3. **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 this policy statement.~~

~~4. **Motion by the Director of the Bureau of Prisons.**—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 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.~~

1. Interaction with Temporary Release from Custody Under 18 U.S.C. § 3622 (“Furlough”).—A reduction of a defendant’s term of imprisonment under this policy statement is not appropriate when releasing the defendant under 18 U.S.C. § 3622 for a limited time adequately addresses the defendant’s circumstances.

2. Notification of Victims.—Before granting a motion pursuant to 18 U.S.C. § 3582(c)(1)(A), the Commission encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

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~~ **required** 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).

* * *