Before the United States Sentencing Commission
Public Hearing on Proposal 5: Miscellaneous

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My name is Deirdre D. von Dornum, and I am an Assistant Federal Public Defender in the Eastern District of New York. I have been practicing indigent federal criminal defense for 21 years. Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders. This statement explains Defenders' positions on Proposal 5, Parts A through C, E, and F, regarding the miscellaneous proposed amendments.

A. Part A: The Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021.

Given the current lack of data on Safeguard Tribal Objects of Patrimony Act ("STOP Act") offenses,[1] Defenders oppose the amendment and urge the Commission to exercise its empirical function before it amends §2B1.5. And, as we continue to urge with respect to other economic offenses, Defenders encourage the Commission to study and transform §2B1.5 into an empirically based guideline that achieves the statutory purposes of sentencing.[2]

But if the Commission chooses to amend §2B1.5 now, Defenders urge it to provide for certain reduced base offense levels and to recalibrate the guideline's specific offense characteristics. As laid out below, the STOP Act carries a low statutory maximum for first violations and prohibits a wide variety of conduct, including negligent conduct and misprision; the Commission should amend §2B1.5 accordingly. In addition, it should create a new specific offense characteristic with a reduction of at least four levels if a person of Native American, Hawaiian, or indigenous heritage committed the offense, and the offense was not committed for commercial advantage or private financial gain. Finally, the Commission should reconsider the use of the loss table in §2B1.5(b)(1).

I. The Commission should wait and gather more data before amending §2B1.5.

The Commission should wait and gather data about what offenses will look like under this new law, instead of acting now. President Biden signed

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[1] *See* Pub. L. 117–258 (Dec. 21, 2022).

[2] *See* Statement of Daniel Dena on behalf of Fed. Defenders to the U.S. Sent'g Comm on Economic Offense Guidelines (Feb. 27, 2024) (outlining Defender position on Proposed Amendment 1: Rule for Calculating Loss).

the STOP Act into law in December of 2022.[3] We have no data on STOP Act offenses, nor do we know if there have been any STOP Act prosecutions yet. The Commission's public dataset, currently running through the end of fiscal year 2022, contains no cases with counts of conviction under 25 U.S.C. § 3073, the STOP Act's enforcement section.[4] Likewise, the publicly available criminal case dataset of the Federal Judicial Center contains no prosecutions under § 3073 as of the end of fiscal year 2023.[5] This makes sense; the statute is so new that the Department of the Interior has not yet promulgated the necessary rules and regulations to implement the Act and its export certification system.[6]

The data we do have on other offenses sentenced under §2B1.5 suggest that the Commission should consider studying and recalibrating the §2B1.5 guideline. Courts apply §2B1.5 relatively infrequently, with only 122 cases sentenced under it as their primary guideline in the past ten fiscal years.[7] And almost two-thirds of those cases were sentenced below the applicable guideline range, suggesting that the guideline ranges produced by §2B1.5 are out of step with how judges familiar with the facts of these cases sentence such offenses.[8]

Given the lack of data, we cannot know with certainty what STOP Act enforcement and offenses will look like. There is no urgent statutory mandate to amend the guideline. The Commission can, and should, study these

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[3] *See supra* note 1.

[4] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG.

[5] *See* Federal Judicial Center, Integrated Database, http://tinyurl.com/mrys64kt. The public datasets list the top five filing offenses by severity, and thus it is possible that a charge for 25 U.S.C. § 3073 might have been filed, but does not appear, if it was one of the least serious charges in a case involving more than five charges.

[6] *See* 25 U.S.C. § 3078 (rules and regulations to carry out this chapter to be promulgated no "later than 1 year after December 21, 2022"); U.S. Dep't of the Interior, Proposed Regulation Development to Implement the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, Pub. L. No. 117-258: Frequently Asked Questions (July 21, 2023), http://tinyurl.com/28a7dwv6.

[7] *See* Individual Offender Datafiles, *supra* note 4. There have only been 281 cases sentenced under this guideline since its creation in 2002.

[8] *See id.*

offenses as part of a broader review and study of other economic offenses—something it has expressed an interest in doing in the future.[9] Therefore, Defenders urge the Commission to wait and collect data on these offenses before referencing the new statute to §2B1.5.

II. If the Commission decides to act now, it should lower base offense levels and add certain specific offense characteristic reductions to §2B1.5.

If the Commission decides to amend §2B1.5 without empirical study, Defenders urge it to add certain reduced base offense levels and to recalibrate the specific offense characteristics as follows.

1. The Commission should amend §2B1.5's base offense levels to account for the STOP Act's lower statutory maximum for first violations, as well as its prohibition on negligent conduct and misprision.

First, given the statutory maximum of one year and one day for first violations of the STOP Act, an alternative lower base offense level is appropriate.[10] The Commission should provide for a lower base offense level of no greater than six for such first violations. Further, the Commission should assign the lower base offense level of six to certain offenses under other statutes already referenced to §2B1.5 that similarly provide for a statutory maximum of one or two years for first violations or violations involving less than a particular dollar amount.[11] This will help limit the

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[9] *See* USSC, *Sentencing Guidelines for United States Courts: Notice and request for public comment and hearing*, 88 Fed. Reg. 89142, 89145, 2023 WL 8874598 (Dec. 26, 2023) ("the Commission is considering conducting a comprehensive examination of § 2B1.1 during an upcoming amendment cycle"); *see also supra* note 2 (urging empirical study of §2B1.1).

[10] *See* § 3073(a)(1)(C).

[11] Several statutes already referenced to §2B1.5 already carry statutory maximums for certain offenses that are much lower than the advisory range the guideline can produce. *See* 18 U.S.C. § 1170(a) (maximum of one year and one day for first NAGPRA violation involving Native American human remains); 18 U.S.C. § 1170(a) (maximum of one year for first NAGPRA violation involving Native American cultural items); 18 U.S.C. § 2314 (maximum of one year if involved certain objects worth under $1000); 18 U.S.C. § 2315 (maximum of one year if involved certain objects worth under $1000); 18 U.S.C. § 1361 (maximum of one year if

production of guideline ranges that far exceed the statutory maximum in such offenses.

Second, the Commission should provide for a specific offense characteristic reduction of four levels where the offense involved merely negligent conduct. The STOP Act encompasses a wide array of conduct, including mere negligence.[12] The Guidelines recognize, in other parts of the Manual, that a reduced sentence is often appropriate where only negligence was involved in an offense, instead of intentional, knowing, or reckless conduct.[13] The STOP Act covers a much broader array of export conduct than its domestic analogue in the Native American Graves Protection and Repatriation Act ("NAGPRA"), which is already referenced to §2B1.5.[14] An individual who "knowingly sells, purchases, uses for profit, or transports for sale or profit" any Native American cultural items obtained in violation of NAGPRA faces a penalty of not more than one year and one day for a first conviction, and not more than ten years for the second.[15] But the STOP Act is much more expansive. Section 3073(a) makes it unlawful to "export, attempt to export, or otherwise transport from the United States any Item Prohibited from Exportation," along with the corresponding inchoate offenses and concealment of such conduct.[16] And unlike NAGPRA, the STOP Act lacks a

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damage did not exceed $1000); 18 U.S.C. § 1163 (maximum of one year if offense did not exceed $1000); 18 U.S.C. § 641 (maximum of one year if property value did not exceed $1000); 18 U.S.C. § 661 (maximum of one year if value did not exceed $1000); (maximum of one year if value did not exceed $1000); 18 U.S.C. §§ 541–544; 546 (maximum of 2 years).

[12] *See* § 3073(a)(2) (providing a scienter requirement of "knows, or in the exercise of due care should have known").

[13] *See* USSG §2N2.1, comment. (n.1) ("Where only negligence was involved, a downward departure may be warranted."); USSG §2Q1.2, comment. (n.4) ("In cases involving negligent conduct, a downward departure may be warranted."); USSG §2Q1.3, comment. (n.3) ("In cases involving negligent conduct, a downward departure may be warranted."). The Manual also provides a base level of 4 for certain regulatory offenses, in USSG §2T2.2.

[14] *See* 18 U.S.C. § 1170.

[15] *Id.*

[16] § 3073(a)(1)(A). It also creates an export certification system in §3073(b), making it "unlawful for any person to export, attempt to export, or otherwise transport from the United States any Item Requiring Export Certification without first obtaining an export certification." § 3073(b)(5)(i). As of February 1, 2024, the

sale or profit component.[17] Notably, the STOP Act also carries a less stringent scienter requirement than NAGPRA; a § 3073(a) violation can result if an individual "knows, or in the exercise of due care should have known, that the Item Prohibited from Exportation was taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any Federal law or treaty."[18] Therefore, the Commission should amend §2B1.5 to account for this less serious conduct..

Third, § 3073(a)(1)(C) also prohibits concealment of STOP Act violations.[19] The conduct proscribed in this subsection amounts to misprision. Accordingly, if the Commission intends to act this year, it should amend the guideline to cross-reference such offenses to the misprision guideline, §2X4.1. That guideline provides for a base offense level "9 levels lower than the offense level for the underlying offense, but in no event less than 4."[20]

2. The Commission should create a new reduction for certain offenses committed by a person of Native American, Hawaiian, or indigenous heritage that were not committed for profit.

Given that the STOP Act encompasses a broad array of conduct, we urge the creation of a new specific offense characteristic to provide a reduction of at least four levels if the offense was committed by a person of Native American, Hawaiian, or indigenous heritage and was not committed for commercial advantage or private financial gain. Defenders are deeply familiar with the too-frequent pattern of laws passed in response to high profile tragedies that ultimately lead to over-enforcement and over-incarceration for low-level offenses.[21] We understand the importance of

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Department of the Interior has not promulgated the rules and regulations needed for the export certification system.

[17] *See generally id*.

[18] *Id*. at § (a)(1)(2).

[19] *See* § 3073(a)(1)(C) (unlawful for any person "to conceal an activity described in subparagraph (A).").

[20] USSG §2X4.1.

[21] *See* Statement of Michael Carter on behalf of Fed. Defenders to U.S. Sent'g Comm on Proposed Firearms Amendments 23–24 (March 7, 2023), https://bit.ly/42kouIO (noting impact of firearms guideline increases on communities

keeping Native American cultural items out of the hands of foreign auctioneers,[22] but we have concerns regarding this well-intentioned statute. Many tribal nations straddle the United States border with Canada and Mexico.[23] These tribal nations, such as the Tohono O'odham and the Akwesasne Mohawk, long predate the existence of the United States and have citizens on both sides of the modern borders.[24] As the Tribal Border Alliance has explained, "[t]ribes divided by international borders have the inherent right to maintain and develop contacts, relations, and spiritual, cultural, political, and economic activities with their citizens and relations."[25] Yet these borderlands tribal nations often face harassment and overpolicing by Border Patrol,[26] with documented instances of confiscation of cultural

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of color and urging Commission to "collect, study, and publish data" before increasing guideline).

[22] *See* Aaron Haines, *Will the STOP Act Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad*, 39 Cardozo L. Rev. 1091, 1092 (2018) (discussing repeated sale of Native American cultural items by French auction houses "despite protests by Native American tribes and organizations, the U.S. State Department, non-governmental organizations, and others" that spurred the creation of the STOP Act).

[23] *See* Tribal Issues Advisory Group Comments on the U.S. Sent'g Comm's 2024 Proposed Amendments, at 10 (Feb. 20, 2024) (discussing cross-border tribal nations and requesting lowered base offense level or reduction "when Indian people transport cultural artifacts across international boundaries"); *see also* Native American Environmental Protection Coalition, *Border Tribes and Maps*, http://tinyurl.com/smus9zun (listing 29 border tribal nations that span the U.S.-Mexico border); *see also* Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 Fordham L. Rev. 315, 315–16 (1984) ("More than thirty tribes on the northern border are affected" by the U.S.-Canadian border).

[24] *See* Tohono O'odham Nation, No Wall, http://tinyurl.com/nhk7sb5h ("The Nation is a federally recognized tribe of 34,000 members, including more than 2,000 residing in Mexico."); *see also* Mohawk Council of Akwesasne, Open Letter to Our Neighbors (Jan. 15, 2021), http://tinyurl.com/2dndb2bv ("[O]ur community was settled in this area *prior to* the line being drawn. . . . we are considered to be citizens of both the United States and Canada.") (emphasis in original).

[25] Tribal Border Alliance, *Tribal Border Alliance Proposal*, (2019) http://tinyurl.com/2spv3e9b.

[26] *See* Tohono O'odham Nation, *Tohono O'odham History & Culture*, http://tinyurl.com/5xyvu2yv ("On countless occasions, the U.S. Border Patrol has detained and deported members of the Tohono O'odham Nation who were simply traveling through their own traditional lands . . . . Similarly, on many occasions U.S.

items at the hands of United States border agents.[27] Defenders hope the government will not use the STOP Act against citizens of these tribal nations carrying cultural items across the border in their own historic lands. But Native American individuals are already vastly overrepresented in the criminal legal system, with a rate of imprisonment in state or federal prison that is four times higher than their white counterparts.[28] Given the realities faced by frequent-crosser citizens of such tribal nations, the Commission should add a specific offense characteristic providing for a reduction of at least four levels for offenses committed by a person of Native American, Hawaiian, or indigenous heritage that were not committed for commercial advantage or private financial gain.

Customs have prevented Tohono O'odham from transporting raw materials and goods essential for their spirituality, economy and traditional culture. Border officials are also reported to have confiscated cultural and religious items, such as feathers of common birds, pine leaves or sweet grass."); *see also* Caitlin Blanchfield and Nina Valerie Kolowratnik, "*Persistent Surveillance": Militarized Infrastructure on the Tohono O'odham Nation*, 40 Avery Review (May 2019), http://tinyurl.com/38r2cbtv (discussing militarization along the U.S.-Mexico border and its infringement upon Tohono O'odham cultural sovereignty); Associated Press, *Arizona tribe is protesting the decision not to prosecute Border Patrol agents for fatal shooting* (Oct. 13, 2023), http://tinyurl.com/372xrthu (discussing Border Patrol shooting of unarmed Tohono O'odham citizen).

[27] *See supra* note 25 ("For example, one southern tribe when crossing with a sacred deer mask for a ceremony had their mask forcibly ripped apart by border agents attempting to search the interior of the item. This item had passed through generations of tribal cultural leaders and is now desecrated and unusable.").

[28] *See* Prison Policy Initiative, *Native Incarceration in the U.S.*, http://tinyurl.com/ywmrd6zx (noting flaws in data collection due to single-race categorization resulting in a potential undercount of Native American individuals in incarcerated populations); *see also* Leah Wang, *The U.S. criminal justice system disproportionately hurts Native people: the data, visualized*, Prison Policy Initiative (Oct. 8, 2021), http://tinyurl.com/4cxdcp8a ("Native people made up 2.1% of all federally incarcerated people in 2019, larger than their share of the total U.S. population, which was less than one percent."). As of the end of year 2022, Native Americans represented 2.6% of individuals in federal prison, as calculated using the Bureau of Justice Statistics' Federal Criminal Case Processing Statistics Data Tool, http://tinyurl.com/2p9y5hu2.

3. The Commission should untether §2B1.5(b)(1) from the flawed loss table.

If the Commission decides to act at this time, Defenders urge it to recalibrate §2B1.5(b)(1) to untether it from the flawed loss table in §2B1.1.[29] As we discuss in our statement on Proposed Amendment 1, this Commission inherited the flawed §2B1.1 guideline, which must be retooled to appropriately track culpability in economic offenses. Defenders continue to urge the Commission to exercise its empirical function and study the §2B1.1 guideline.[30] The loss table creates anomalies in §2B1.5 cases. Even though the STOP Act and several statutes already referenced to §2B1.5 provide for a statutory maximum penalty of two years or less, given §2B1.5(b)(1)'s use of the loss table, the guideline can produce sentencing ranges far exceeding the maximum of the statute of conviction. As Defenders and others have explained, the loss table and the concept of "intended loss" are premised on a flawed metric for culpability, resulting in guideline ranges in economic offenses that judges widely ignore.[31] Thus, the Commission should reconsider and remove the use of the loss table in §2B1.5.

III. Conclusion.

Given the lack of data, as well as the many flaws we have identified elsewhere with respect to the ranges produced by the economic offense guideline,[32] Defenders oppose the proposed amendment and urge the Commission to study these offenses before acting. In the alternative, if the Commission chooses to act now, we urge it to amend §2B1.5 to better account

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[29] *See supra* note 2 (outlining Defender position on Proposed Amendment 1: Rule for Calculating Loss).

[30] *See id.*

[31] *See id.* at pt. 1, III (outlining critiques of loss amount as proxy); *see also* Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud*, 81 MO L. Rev. 716, 719 (2016) ("intended loss is a fatally flawed proxy for culpability"); Statement of Kathryn Nester on behalf of Fed. Defenders to the U.S. Sent'g Comm on Dodd-Frank Act/Fraud Offenses, at 1 (Mar. 14, 2012), http://tinyurl.com/bdfk7mke ("A careful examination of the sentencing data for sentences imposed under §2B1.1 shows the guideline does a poor job of capturing offense seriousness").

[32] *See supra* note 2 (outlining Defender position on Proposed Amendment 1: Rule for Calculating Loss).

for the variety of offense conduct and to avoid excess punishment for conduct committed by a person of Native American, Hawaiian, or indigenous heritage that was not committed for commercial advantage or private financial gain.

B. Part B: Evasion of Export Controls.

Defenders submit this comment in opposition to the Department of Justice's proposed changes to §2M5.1. Defenders contend that such changes are unnecessary and inconsistent with the statutory text and caselaw upon which the guideline rests.

Defenders' comment proceeds in five parts. First, Defenders provide a brief overview of the operation and history of §2M5.1 and recap DOJ's expressed concerns with the §2M5.1. Second, Defenders provide a review of the law underlying export control violations. Third, Defenders address the absence of evidence of courts having difficulties applying §2M5.1. Fourth, Defenders address the single case upon which DOJ bases its request for amendment and explain how that case is entirely consistent with export control violation law. Finally, Defenders explain why both the underlying law and available data indicate that the Commission should not promulgate any amendments that do or may expand the scope of §2M5.1's higher base offense level.

I. Overview of §2M5.1.

Section 2M5.1 serves as the primary guideline for violations of a variety of export control statutes and regulations, including the Export Control Reform Act of 2018. The operation of §2M5.1 is straightforward, with only two base offense levels and no specific offense characteristics.

Section 2M5.1 provides for a base offense level of 26 for offenses in which "(A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism."[1] All other §2M5.1 offenses are an offense level 14.[2] The guideline's commentary also advises the court, in determining where within the guideline to sentence a person, to consider "the degree to which the violation threatened a security interest of the United States . . . ."[3]

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[1] USSG §2M5.1(a)(1).

[2] §2M5.1(a)(2).

[3] §2M5.1, comment. (n.2).

The Commission has only slightly altered §2M5.1 over the course of its existence. As now, in the first Guidelines manual, §2M5.1 provided for two base offense levels and no specific offense characteristics.[4] Specifically, §2M5.1 called for a base offense level 22 "if national security or nuclear proliferation controls were evaded," and a 14 for all other offenses. The original version of §2M5.1 also contained identical commentary regarding courts accounting for the degree of impact on security interests in deciding within-guidelines sentences.[5]

The Commission has only twice modified §2M5.1's base offense levels. First, in 2001, the Commission increased §2M5.1(a)(1)'s base offense level to 26, leaving §2M5.1(a)(2) unchanged.[6] Simultaneously, the Commission expanded the applicability of §2M5.1(a)(1), providing that violating "controls relating to the proliferation of . . . biological[] or chemical weapons or materials" would also trigger the higher base offense level.[7] The Commission explained that these changes reflected "a sense of Congress in the National Defense Authorization Act for Fiscal Year 1997 . . . that guideline penalties [we]re inadequate for certain offenses involving the . . . exportation of nuclear, chemical, and biological weapons, materials, or technologies . . . ."[8]

Second, in 2002, the Commission amended §2M5.1(a)(1) to apply where an "offense involved a financial transaction with a country supporting international terrorism."[9] The Commission added that provision to incorporate a statute prohibiting that conduct.[10]

The Department of Justice via both its main comment and that of its Disruptive Technology Strike Force (referred to herein solely as DOJ) requests that the Commission alter the text of §2M5.1(a)(1) and a §2M5.1 departure provision. Specifically, DOJ requests, and the Commission has

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[4] USSG §2M5.1 (1987).

[5] *See generally id.*

[6] USSG App. C., Amend. 633 (Nov. 1, 2001).

[7] *Id.*

[8] *See* USSC App. C, Amend. 633, Reason for Amendment (Nov. 1, 2001) (citing Pub. L. 104-201 (1997)).

[9] USSC App. C., Amend. 637 (Nov. 1, 2002).

[10] USSC App. C., Amend. 637, Reason for Amendment (Nov. 1, 2002) (citing 18 U.S.C. § 2332d).

proposed, replacing the term "national security controls" with the phrase "controls relating to national security."[11] The Commission notes that DOJ urges this change based upon its stance that "some courts may erroneously conclude that only the goods controlled under the Commerce Control List's "NS" designation . . . qualify for the higher alternative base offense level 26 at §2M5.1(a)(1)(A)."[12]

DOJ further asks that the Commission revisit the application note "to ensure that sanctions, embargoes, anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, and military and WMD end-user and entity-specific controls are included."[13] A significant number of those categories are already explicitly contained within the plain text of §2M5.1(a)(1).[14] DOJ thus appears to be asking the Commission to expand the commentary so that the national security controls language encompasses: sanctions and embargoes that are not tied to those express categories, and regional stability.

In so requesting, DOJ appeared to be requesting that the Commission cause all items on the Commerce Control List, discussed *infra* Section II.B, to be treated as triggering the §2M5.1(a)(1) base offense level, the position DOJ took in the very case upon which it bases its request for the amendment to be taken up.[15] However, in its comment on the proposed amendments, DOJ

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[11] 2024 Proposed Amendments, 88 Fed. Reg. at 89142, 89157–58.

[12] *Id.* at 89,157.

[13] *Accord* Letter from Matthew G. Olsen & Matthew S. Axelrod, DOJ National Security Division and Bureau of Industry & Security, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 2-3 (Aug 1, 2023) (citing *United States v. Komoroski*, No. 3:17-cr-156, doc. 61 (M.D. Pa. Dec. 11, 2019)) (*Olsen & Axelrod Letter*) *with* Letter from Jonathan J. Wroblewski, Director, DOJ Office of Policy and Legislation, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 24–25 n.111 (Feb. 22, 2024) (*DOJ Comment on Proposed Amendments*) (noting that DOJ argued in *Komoroski* that the entire EAR constitutes national security controls, but claiming not to be taking the same position again).

[14] USSG §2M5.1(a)(1).

[15] *Cf.* United States' Sentencing Memorandum at 11, *United States v. Komoroski*, No. 3:17-cr-156, doc. 51 (M.D. Pa. July 30, 2019) (*US Memorandum*) ("[T]he entire regulatory regime of the EAR is premised on national security. And indeed, all of the reasons for control listed above . . . directly implicate the national security of the United States.").

instead now describes its goal as requiring that judges "examine the array of possible national security underpinnings of the applicable controls on the flow of goods, money, and services in each case."[16]

Defenders oppose the proposed "national security controls" language and oppose any commentary changes meant to expand the applicability of the §2M5.1(a)(1) base offense level. Only treating items with an "NS" designation as national security controls is entirely consistent with the underlying law and regulations, most of which receive no mention in DOJ's comments.

II. Overview of export control law.

The United States controls exports through an array of statutory authorities.[17] Among them are: (1) the Export Administration Regulations (EAR);[18] (2) the Export Administration Act of 1979 (EAA);[19] (3) the Commerce Control List,[20] and (4) the Export Control Reform Act of 2018 (ECRA).[21] An overview of these authorities will aid in explaining why the Commission should reject proposed amendments to §2M5.1.

1. The EAR and EAA.

The Export Administration Regulations (EAR) control, inter alia, "the export . . . of most commercial and some military items."22 The EAR controls both "dual use" items—"items that have both commercial and military or proliferation applications" and "some military items and purely commercial

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[16] *DOJ Comment on Proposed Amendments*, *supra* note 13 at 25.

[17] *See* Cong. Rsch. Serv., R46814, *The U.S. Export Control System and the Export Control Reform Act of 2018* at 1 (2021) (*CRS Report*) ("Through the Export Control Reform Act (ECRA), the Arms Export Control Act (AECA), the International Emergency Economic Powers Act (IEEPA), and other authorities, Congress has delegated to the executive branch some of its express constitutional authority to regulate foreign commerce by controlling exports.").

[18] *See generally* 15 C.F.R. § 730 *et seq.*

[19] 50 U.S.C. §§ 4601–23 (repealed 2018).

[20] *See generally* 15 C.F.R. § 774.1 *et seq.*

[21] 50 U.S.C. § 4801–52.

[22] U.S. Dep't of Commerce Bureau of Industry & Security Office of Exporter Servs., *Introduction to Commerce Department Export Controls* at 1 (Nov. 2018), http://tinyurl.com/f4ha422m.

items without an obvious military use . . . ."[23] The present-day EAR is based on the EAA.[24] The EAA operated by directing the Executive branch to implement export controls[25] consistent with a series of EAA findings regarding the needs for limited export laws[26] and "declaration[s] of policy" for the United States pertaining to exports.[27] The EAA likewise established procedures for how the Executive branch should implement those controls, including creation of a "commodity control list."[28] That control list continues in existence today as the Commerce Control List, a "list of specific commodities, technologies, and software controlled by EAR."[29]

Among the policy statements underlying the EAR and Commerce Control List, the EAA identified three separate bases upon which a good might be subjected to export controls:

> (A) To restrict the export of goods and technology which would make a significant contribution to the military potential of any other country . . . which would prove detrimental to the national security of the United States;
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> (B) To restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and
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> (C) To restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials

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[23] *Id.*

[24] *CRS Report*, *supra* note 17 at 2–4 (discussing evolution of export control statutory schemes).

[25] *See, e.g.*, *id.* § 4, 93 Stat. at 505–06 (establishing general provisions for imposing export controls).

[26] *See* Export Administration Act of 1979, Pub. L. 96-72 (Sep. 29, 1979) § 2, 93 Stat. 503, 503–04 (repealed 2018).

[27] *Id.* § 3, 93 Stat. at 504–05.

[28] *Id.* § 4(b), 93 Stat. at 506.

[29] *CRS Report*, *supra* note 17 at 6.

> and to reduce the serious inflationary impact of foreign demand.[30]

In turn, the EAA established different procedural requirements and constraints for export controls depending on which of the foregoing policy bases underlay an item's restrictions. Section 5 of the EAA addressed the first of these bases, "National Security Controls."[31] It required that National Security Controls be identified "in consultation with the Secretary of Defense" and required clearly identifying the national security basis for the same.[32]

Section 6 of the EAA established the requirements for foreign policy-based controls.[33] Differing from National Security Controls, items controlled for foreign policy purposes required no specific consultation with the Secretary of Defense and foreign policy-based controls would expire one year after issuance unless extended by the President in consultation with Congress.[34]

Section 7 of the EAA addressed "Short Supply Controls,"[35] controlling items out of concerns regarding "protect[ing] the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand."[36] Short Supply Controls were required to be published in the Federal Register and subjected to public comment.[37]

A significant motivating purpose behind the EAA's design was Congress's desire to differentiate between these bases for implementing an

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[30] Export Administration Act of 1979, Pub. L. 96–72 (Sep. 29, 1979) § 3(2), 93 Stat. 503, 504 (repealed 2018).

[31] *Id.* § 5, 93 Stat. 506–13.

[32] *See id.* § 5(a), 93 Stat. at 506 (establishing consultation requirement and requiring public notice of goods controlled under § 5 authority).

[33] *See id.* § 6, 93 Stat. at 513–15 (establishing "Foreign Policy Controls").

[34] *See id.* § 6(a)(2), 93 Stat. at 513 ("Export controls maintained for foreign policy purposes shall expire . . . one year after imposition . . . unless extended by the President . . . .").

[35] *Id.* § 7, 93 Stat. at 515–21.

[36] *Id.* § 3(2)(C), 93 Stat. at 504.

[37] *Id.* § 7(a)(2), 93 Stat. at 516.

export control. Specifically, in its report on the EAA, the House Committee on Foreign Affairs noted its concern that "the distinction between [national security- and foreign policy-based export controls] has not been adequately made in the past."[38] The Committee explained that those bases for controls differ significantly in underlying purpose:

> National security and foreign policy controls have different purposes and should be governed by different criteria and procedures. Natural security controls have a very clear and precise purpose: to prevent the acquisition or delay by hostile or potentially hostile countries of goods and technologies which would significantly enhance their military capabilities to the detriment of U.S. national security . . . . The purpose of foreign policy controls are more vague and diffuse. The purposes can range from changing the human rights policy of another country; to inhibiting another country's capacity to threaten the security of countries friendly to the United States; to associating the United States diplomatically with one group of countries as against another; to disassociating the United States from a repressive regime . . . . [39]

Despite these differences, the Committee was "not convinced that the Executive Branch itself is always clear for what purpose a control is imposed . . . ."[40] The Committee explained that the EAA addressed this concern by "consolidat[ing] the national security and foreign policy control provisions of the Act into separate sections, and requir[ing] that they be treated differently . . . ."[41]

2. The Commerce Control List.

Based in part upon the EAA, the Department of Commerce established the Commerce Control List, a portion of the EAR which identifies those items

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[38] H.R. Rep. No. 96-200, at 7 (1979).

[39] *Id.* at 7.

[40] *Id.* at 8.

[41] *Id.*

for which exports require a license.[42] The Commerce Control List identifies the reason for which each item is controlled.[43] Reasons the Commerce Control List may identify for an export control, each of which are designated by a two-letter abbreviation, include:

- proliferation of chemical and biological weapons (designated as "CB");
- Nuclear Nonproliferation ("NP");
- National Security ("NS");
- Missile Technology ("MT");
- Regional Stability ("RS");
- Crime Control and Detection ("CC");
- and short supply economic concerns ("SS").[44]

The Commerce Control List identifies, via the two-letter abbreviations, from which export concern each designation is derived.

The Commerce Control List describes NS-designated controls as pertaining to "items that would make a significant contribution to the military potential of any other destination . . . that would prove detrimental to the national security (NS) of the United States."[45] In contrast, the Commerce Control List attributes CB, MT, RS, and CC designations to foreign policy,[46] and attributes SS issues to economic concerns.[47] Because the

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[42] *See generally* The Commerce Control List, 15 C.F.R. § 774 *et seq.*

[43] *See* 15 C.F.R. § 738.2(d)(2)(ii)(A) (listing "all possible Reasons for Control").

[44] *Id.*

[45] 15 C.F.R. § 742.4(a).

[46] *See id.* at § 742.2(a)(1) (indicating that designations regarding proliferation of chemical and biological weapons "are maintained in support of the U.S. foreign policy); *id.* § 742.5(a)(1) (same for missile technology); *id.* § 742.6(a)(1) (regional stability); *id.* § 742.7(a) (crime control).

[47] *See* 15 C.F.R. § 754.1(a) ("This part implements the provisions of section 7, "Short Supply Controls," of the Export Administration Act (EAA) and similar provisions in other laws that are not based on national security and foreign policy grounds.").

Commerce Control List includes items controlled for reasons other than the EAA's tripartite framework, there are also multiple designations not tethered to national security, foreign policy, or the economy specifically. For example, the Commerce Control List includes items designated as controlled pursuant to a nuclear nonproliferation statute ("NP")[48] and anti-terrorism authorities ("AT").[49]

Categories of items on the Commerce Control List appear along with the corresponding two-letter designation indicating the basis for which the category is controlled. Significantly—and reflecting the reality that an export restriction may be grounded in concern for the United States only, for the United States and other nations, or for other nations only—items on the Commerce Control List often include multiple bases for inclusion.[50] So, for example, the Commerce Control List includes items which are simultaneously controlled for national security and crime control,[51] but also includes crime control-only items.[52]

3. ECRA.

The EAA expired in 2001; however, after its expiration, the President continued the EAA's export control regime by declaring a national emergency and relying upon the International Emergency Economic Powers Act,[53]

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[48] *See* 15 C.F.R. 742.3(a)(1) ("Section 309(c) of the Nuclear Non-Proliferation Act of 1978 requires BIS to identify items subject to the EAR that could be of significance for nuclear explosive purposes . . . .").

[49] *See, e.g.*, 15 U.S.C. § 742.8(a)(1) (discussing anti-terrorism purposes related to Iran).

[50] *See id.* § 738.2(d)(2)(ii)(A) ("Reasons for Control are not mutually exclusive, items controlled within a particular [numerical designation] may be controlled for more than one reason.")

[51] *See, e.g.*, 15 C.F.R. Supp. No. 1 To Part 774 (controlling, *inter alia*, 4A003 "digital computers" for national security, regional stability, crime control, and anti-terrorism reasons).

[52] *See, e.g.*, *id.* (identifying only crime control as reason for 3A980 "voice print identification and analysis equipment").

[53] *See CRS Report*, *supra* note 17 at 18.

another of the statutes upon which export authorities rest.[54] The lapsing of the EAA eventually led to Congress passing ECRA.

ECRA made two changes to the law relevant to the proposed amendments. First, ECRA requires that the President coordinate with the Secretaries of Defense, Energy, State, and other agency heads to "identify emerging and foundational technologies that are essential to the national security of the United States . . . "[55] and "establish appropriate controls under the [EAR]" pertaining to those technologies.[56] Second, ECRA changed the statutory maximum prison terms previously applicable to EAA violations, raising the prior 5- or 10-year maximums to 20 years,[57] consistent with other export violation statutes.[58]

While ECRA made significant changes to the export statutory landscape, it left undisturbed much of the preexisting law and regulations. In particular, ECRA left in place pre-existing export controls such as the EAR and Commerce Control List, including those issued pursuant to the EAA, "until modified, superseded, set aside, or revoked" pursuant to ECRA.[59] Thus, despite the expiration and replacement of the EAA, the Commerce Control List remains in effect today and lists items added pursuant to the EAA's bases.

ECRA also left in place the underlying policies for which export controls are to be imposed. As under the EAA, ECRA continues to recognize explicitly both national security and foreign policy as reasons for restrictions.[60] However, under ECRA, the separate *procedural* requirements

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[54] *See generally* 50 U.S.C. § 1701–09.

[55] 50 U.S.C. § 4817(a)(1).

[56] *Id.* § (b)(1).

[57] *See* 50 U.S.C. § 4819(b)(2) (establishing 20-year maximum imprisonment term).

[58] 88 Fed. Reg. 89142, 89157, 2023 WL 8874598 (2023) ("2024 Proposed Amendments") (discussing change in statutory maximum sentence).

[59] 50 U.S.C. § 4826(a).

[60] *See, e.g.*, *id.* § 4811(2)(A) (identifying purposes for which exports should be restricted and grounding in "[t]he national security and foreign policy of the United States"); *see also id.* § 4811(2)(D) (including as purpose of export restrictions "[t]o carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy").

(yearly renewals and Congressional consultation) no longer exist for foreign policy-based controls. Similarly, while ECRA no longer includes explicit reference to crime control or short supply issues, it did not foreclose those bases (and others) from underlying export restrictions.[61] Thus, for example, the Commerce Control List continues to include crime control-based[62] and short supply-based[63] categories. As a result, despite this new statutory silence, the Commerce Control List continues to include categories of items for reasons beyond national security.

III. The Commission should not change §2M5.1(a)(1)'s reference to "national security controls".[64]

1. Courts are not experiencing difficulty applying §2M5.1(a)(1)(A).

In its initial comments asking the Commission to prioritize amending §2M5.1(a)(1)(A), DOJ primarily posits that its change will address the potential that courts misunderstand and misinterpret §2M5.1(a)(1)(A)'s current phrasing. In so doing, DOJ first cites to a number of cases that DOJ believes support its broad reading of the phrase before referring to "at least one court recently interpret[ing] §2M5.1's reference to 'national security

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[61] *See CRS Report*, *supra* note 17 at 25 (noting that the statute's new silence as to foreign policy-based controls and crime controls means that "sections of EAR implementing these provisions . . . may be changed without legislation."); *see also id.* at 26 ("While the statutory authority for short supply controls w[as] removed in ECRA, regulatory authority remains. Short supply controls may continue to be imposed under IEEPA or other authorities.")

[62] *See* Bureau of Industry and Security, *Human Rights Frequently Asked Questions (FAQs)* at 3 (Mar. 2023) (identifying categories of items then subject to human rights concerns and noting that agency "continually reviews"), http://tinyurl.com/4s4f3xby.

[63] *See* 15 C.F.R. § 754.1(a) (continuing to indicate that "[t]his part implements the provisions of section 7, "Short Supply Controls," of the Export Administration Act (EAA) and similar provisions in other laws that are not based on national security and foreign policy grounds.").

[64] Defenders do not oppose Part B's proposal to change the Appendix A statutory reference from 50 U.S.C. § 4610 to 50 U.S.C § 4819. Nor do Defenders oppose the Commission's proposed specific changes to §2M5.1's commentary.

controls'" differently than DOJ seeks.[65] However, DOJ cites only a single case as an example of a potential misunderstanding, [66] and Defenders are aware of no other examples.

The absence of other examples is particularly telling given the history of §2M5.1. Section 2M5.1 has been a part of the Guidelines for the Guidelines' entire, 37-year existence and has, at all times, included the "national security controls" language.[67] Defenders submit that if such examples are not commonplace after decades of the provision's existence—and especially if DOJ's citation of a single district court case is the *only* example—there is no confusion to be resolved.[68] This absence of other examples is further magnified here where DOJ is (now) expressly disavowing the argument rejected by the court it once described as confused.[69]

The Commission's role is not to serve as a case-by-case sentencing appeals court from district court cases. In any event, DOJ is incorrect in its assertion that this one court erred and is inaccurate in its interpretation of other courts with which it purports to agree.

2. The case cited by DOJ as an example of court confusion accurately interpreted §2M5.1.

DOJ contends that the Commission should amend §2M5.1 because DOJ believes a district court misconstrued the provision.[70] Defenders submit

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[65] *See Olsen & Axelrod Letter*, *supra* note 13 at 2(citing *United States v. Hanna*, 661 F.3d 271, 293 (6th Cir. 2011); *United States v. Elashyi*, 554 F.3d 480, 508 (5th Cir. 2008); *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997); *United States v. Shetterly*, 971 F.2d 67, 76 (7th Cir. 1992)).

[66] *Id.* (citing *United States v. Komoroski*, 3:CR-17-156 (M.D. Pa. Dec. 11, 2019)).

[67] *Accord* USSG §2M5.1(a)(1) (1987) (applying base offense level 22 "if national security . . . controls were evaded"); USSG §2M5.1(a)(1)(A) (2023) (applying base offense level 26 if "national security controls . . . were evaded").

[68] *Cf.* USSG, *Rules of Practice and Procedure* 5.2(c)(3) (discussing Commission's consideration of "number of court decisions involved" when deciding whether to address *circuit*-level conflicts).

[69] *See DOJ Comment on Proposed Amendments*, *supra* note 13 at 25 n.111 (noting that *Komoroski* court rejected DOJ's argument that entire EAR is national security-based in footnote explicitly disclaiming same argument).

[70] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *United States v. Komoroski*, 3:CR-17-156 (M.D. Pa. Dec. 11, 2019)).

that DOJ does not sufficiently describe the arguments and holding in that case, *United States v. Komoroski*. A full review of *Komoroski* shows that the court was not only un-confused, but correctly interpreted §2M5.1. If anything, that case provides ample justification for the Commission modifying the §2M5.1 commentary to make explicit that §2M5.1(a)(1) *does* only apply to NS-designated categories.

In directing the Commission to *United States v. Komoroski*, DOJ describes the court as "interpret[ing] §2M5.1's reference to 'national security controls' to apply only where an offense involves those items designated NS pursuant to the EAR."[71] DOJ emphasizes that the court declined to apply the national security-controls enhancement even though the case involved "attempting to send to Russia export-controlled rifle scopes that were advertised as having been designed to U.S. Marine Corps specifications and were controlled because, among other reasons, they were subject to a United Nations embargo."[72]

The *Komoroski* court's holding was considerably more informed and grounded in the nuances of the issues than DOJ's brief recitation.

In *Komoroski*, the parties disagreed regarding whether §2M5.1(a)(1)(A) provided the appropriate base offense level for an individual convicted of exporting two commercially available rifle scopes to Russia.[73] As pertained to the export in *Komoroski*, the Commerce Control List identified the basis for limiting exporting the rifle scopes as "CC," or crime control.[74] A CC

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[71] *Id.* at 2–3.

[72] *Id.* at 3.

[73] *See* Defendant's Sentencing Memorandum at 2–14, *United States v. Komoroski*, No. 3:17-cr-156 doc. 57 (M.D. Pa. Aug. 7, 2019) (*Komoroski Memorandum*) (arguing that §2M5.1(a)(2) provided appropriate base offense level); *US Memorandum*, *supra* note 15 at 3-12, (arguing for application of §2M5.1(a)(1) base offense level).

[74] Oddly, DOJ's original comment did not refer to the crime control basis, which was the entire focus of the *Komoroski* dispute; instead, DOJ referred only to the rifle scopes as being controlled pursuant to a United Nations embargo, seemingly implying that Mr. Komoroski violated that embargo. *See Olsen & Axelrod Letter*, *supra* note 13 at 3 (claiming the offense involved rifle scopes subject to a United Nations embargo). To be clear: the embargo was not at issue in *Komoroski*, as both parties agreed the only relevant basis was crime control. *See US Memorandum*, *supra* note 15 at 11 ("The Government agrees with Komoroski that . . . the reason for

designation indicates that an item is controlled "to promote the observance of human rights throughout the world."[75]

The parties extensively briefed the dispute, with Mr. Komoroski devoting 13 pages to the matter[76] and the Government providing 10 pages of its own.[77]

In its briefing, the Government posited that all controls under the EAR are national security-related.[78] The Government acknowledged that the position conflicted with prior stipulations by the Government in other §2M5.1 cases, but expressed unawareness as to why those stipulations had been made and asserted that its current position constituted the Government's informed stance.[79]

In advocating instead for a base offense level pursuant to §2M5.1(a)(2), Mr. Komoroski explained, as Defenders have *supra*, that items may appear on the Commerce Control List for varying reasons apart from national security, including foreign policy and short supply economic concerns.[80] Mr. Komoroski likewise explained to the court how the structure of the EAA,

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control is crime control.") *See also Komoroski Memorandum*, *supra* note 73 at 6 n.1 (explaining that items at issue were not destined for countries subject to embargo provisions and thus only crime control designation applied to case at hand). DOJ's comment on the proposed amendment at last acknowledges that crime control was the basis but elides mention of the embargos being inapplicable to that case's offense. *See DOJ Comment on Proposed Amendments*, *supra* note 13 at 25 n.111 (referring to crime control designation but remaining silent as to parties' apparent agreement that the person convicted in *Komoroski* had not violated the embargo-based controls).

[75] 15 C.F.R. § 742.7(a).

[76] *See Komoroski Memorandum*, *supra* note 73 at 2–14 (arguing that §2M5.1(a)(2) provided appropriate base offense level).

[77] *See US Memorandum*, *supra* note 15 at 3–12 (arguing for application of §2M5.1(a)(1) base offense level).

[78] *See id.* at 11 ("[T]he entire regulatory regime of the EAR is premised on national security. And indeed, all of the reasons for control listed above . . . directly implicate the national security of the United States.")

[79] *See id.* at 12 (acknowledging citations to contradictory positions and noting that "[u]ndersigned counsel [wa]s unaware why the Government made those agreements").

[80] *Accord Komoroski Memorandum*, *supra* note 73 at 3–5 (explaining different bases and procedures for controls under EAA).

pursuant to which the Commerce Control List operated, made clear that Congress and the Executive are to treat national security and foreign policy as discrete areas of concern, meaning that an item can implicate either only one or both.[81]

Mr. Komoroski's argument emphasized that the parties agreed that the items were listed on the Commerce Control list based on code CC—meaning that they were limited pursuant to crime controls measures and noted that such a designation meant that the reason for controlling was "to promote the observance of human rights throughout the world."[82] Mr. Komoroski thus emphasized that the items at issue were not national security-based controls, but were instead foreign policy-based given their explicit focus on human rights beyond the United States.[83]

Mr. Komoroski also noted the absurd results that the Government's maximalist position would entail—including that it would establish that a national security-focused offense level applies to exporting horses overseas.[84] Additionally, Mr. Komoroski noted that the Government's proposed reading would render superfluous the remainder of §2M5.1(a)(1)(A), as, if all Commerce Control List items are national security items, there is no need for §2M5.1(a)(1) to specify that the offense level also applies to nuclear, biological, and chemical weapons proliferation, each of which are bases for an item's inclusion on the Commerce Control List.[85]

The court agreed with Mr. Komoroski, holding "that there is a distinction" between items placed on the Commerce Control List for national security purposes and those placed due to foreign policy reasons.[86] Likewise,

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[81] *See id.*

[82] *Id.* at 6.

[83] *Id.*

[84] *See id.* at 9 ("Worse, under the government's overbroad analysis, the export of horses by sea without a license would be the evasion of a national security control and subject to a Base Offense Level of 26.")

[85] *See id.* at 12–13 (noting that Government's interpretation would mean higher offense level applies to all export violations, rendering the categories in §2M5.1(a)(1) purposeless).

[86] Order at 1–2, *United States v. Komoroski*, No. 3:17-cr-156, doc. 61 (M.D. Pa. Dec. 11, 2019).

the court "disagree[d] with the government's conflation of national security and foreign policy reasons" and held that "the government's own classification system would seem to also rebut" the conflation.[87] The court also noted that it would "make[ ]little sense" to agree with the Government's reading because doing so would render the same base offense level applicable to exporting horses by sea or unprocessed cedar as to exporting pathogens, nuclear detonators, and stealth technology.[88]

Far from being confused, in so holding, the court was reaching a determination that DOJ has itself reached in a case *post*-dating the *Komoroski* dispute. Specifically, in *United States v. Nilov*, a post-*Komoroski* and post-ECRA case, the Government has agreed that the lower, §2M5.1(a)(2) base offense level applied in a sentencing for sending rifle buttons to Russia.[89] Put simply, courts are not confused by §2M5.1(a)(1) but rather, like DOJ, evaluate the position of the parties and law before them.

3. Courts have not, as DOJ posits, regularly held that all items on the Commerce Control List are necessarily national security-based controls.

As part of contending that the *Komoroski* court erred, DOJ references several cases that DOJ describes as concluding "that §2M5.1's reference to 'national security controls' encompasses the broader definition of 'national security' and is not a limitation tied to the specific NS designation under the

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[87] *Id.* at 2.

[88] *Id.* at 3. DOJ's disavowal of this possibility in its comment on the proposed amendments, *see DOJ Comment on Proposed Amendments*, *supra* note 13 at 25 (claiming DOJ does not support applying the enhanced offense level to all export controls), provides little assurance of what DOJ will argue in future cases as demonstrated by DOJ's own shifting position between *Komoroski* and its comments this Amendment Cycle.

[89] *See* Gov't's Sentencing Submission at 11, *United States v. Nilov*, No. 1:20-cr-193, doc. 30 (S.D.N.Y. Feb. 12, 2021) (agreeing to guideline range calculated using §2M5.1(a)(2) base offense level).

EAR."[90] This description of the cases—each of which were presented to, and did not persuade, the *Komoroski* court—[91]is inapt.

Problematically, none of the cases DOJ cites discuss the EAR's designation scheme, NS or otherwise, and thus none involve a court opining at all on whether an NS designation necessarily triggers §2M5.1(a)(1)(A).

First, DOJ relies on *United States v. Hanna*,[92] a case involving a violation of an embargo against Iraq following the president designating Iraq a state sponsor of terror. *Hanna* did not involve Commerce Control List or EAR arguments.[93] Instead, *Hanna* rejected a defendant's argument that they should not be subjected to the elevated §2M5.1(a) offense level where the specific items involved in the offense were themselves intended for innocent use.[94] Significantly, when saying that violation of an embargo necessarily involves national security, the court did so focusing on the fact that the text of the specific embargo at issue—one based on designating Iraq as a state sponsor of terrorism—on its face purported to be grounded in national security.[95]

Second, DOJ directs the Commission to *United States v. Elashyi*.[96] As with *Hanna* the court did not address a dispute over the EAR/Commerce Control List designation, but rather addressed an argument about focusing on the specific goods involved in the instant offense instead of the overall

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[90] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *Hanna*, 661 F.3d at 293; *Elashyi*, 554 F.3d at 508; *McKeeve*, 131 F.3d at 14; *Shetterly*, 971 F.2d at 76)).

[91] *Accord id. with Komoroski Memorandum*, *supra* note 73 at 11-12 (differentiating same caselaw).

[92] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *Hanna*, 661 F.3d at 293).

[93] *See generally* 661 F.3d 271 (making no reference to EAR or Commerce Control List).

[94] *See id.* at 294 (holding that proof of national security threat from specific transaction was unnecessary in case concerning violation of an embargo expressly predicated on national security).

[95] *See id.* at 290 (quoting text of embargo forbidding exports to Iraq).

[96] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *Elashyi*, 554 F.3d at 508).

embargo outlawing exporting the same.[97] Rather than holding that all export controls are national security controls, the court instead simply agreed that "evasion of sanctions *against state sponsors of terrorism* are 'national security controls.'"[98]

The same flaws exist in DOJ's reliance on *United States v. McKeeve*.[99] *McKeeve* involved the same overall dispute, unrelated to the EAR designation issue, of whether the nature of the specific goods mattered instead of the overarching basis for which the goods were embargoed.[100] Notably, *McKeeve* grounded its decision to rely upon categorical inclusion instead of item-by-item assessment in concerns for the separation-of-powers.[101] The *McKeeve* court worried that a court exercising its own judgment about whether items implicated national security after the executive branch had already made such a determination would be "fraught with separation-of-powers perils."[102] That concern is equally present here: DOJ expressly proposes that the Commission ensure that courts do *not* rely upon the Executive's own identification of bases for which items are controlled and instead cause courts to "examine the array of possible national security underpinnings . . . in each case."[103] The Executive should be held to what it says when decisionmakers list items subject to controls, not when DOJ argues before sentencing courts..

Finally, DOJ refers the Commission to *United States v. Shetterly*.[104] The reliance on *Shetterly* is perplexing as *Shetterly* did not involve any dispute about whether the national security controls base offense level applies. Rather, the lone sentencing dispute in *Shetterly* concerned whether the sentencing judge erred by declining a request to depart based upon the

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[97] *See* 554 F.3d at 508–09 (rejecting defendant's argument that court should consider the innocent nature of specific goods at issue).

[98] *Id.* at 508 (emphasis added).

[99] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *McKeeve*, 131 F.3d at 14).

[100] *See* 131 F.3d at 14–15.

[101] *Id.* at 14.

[102] *Id.*

[103] *DOJ Comment on Proposed Amendments*, *supra* note 13 at 25.

[104] *See Olsen & Axelrod Letter*, *supra* note 13 at 2 (citing *Shetterly*, 971 F.2d at 76).

items at issue no longer being subject to export controls.[105] DOJ's quoted language is simply from the appellate court's recitation of the guidelines calculation below and does not involve the circuit court assessing its propriety at all.[106]

IV. The data do not support any actions that might broaden §2M5.1(a)(1)'s applicability, including the addition of "emerging and foundational technologies" to that provision.

Defenders submit that available data militates against any changes to §2M5.1 or its commentary that would expand the applicability of the enhanced base offense level. Quite the opposite, that data indicates that the present §2M5.1(a)(1) offense level ought to be lowered.

Defenders are concerned that any changes other than those that expressly decrease the coverage of §2M5.1 will be viewed as expanding the scope of §2M5.1(a)(1)'s elevated offense level. Defenders think this is particularly likely given that the primary impetus for several such changes is a DOJ request based on expansive interpretation of the Guideline. Sentencing courts already appear to view §2M5.1(a)(1) as overly punitive and thus the Commission should at worst leave the provision untouched and at best further limit it.

In the past five fiscal years, people sentenced with a guideline range relying upon the elevated §2M5.1(a)(1) base offense level are markedly less likely to receive within-guidelines sentences than those subject to the significantly lower §2M5.1(a)(2) base offense level.

From fiscal years 2018 to 2022, 86 people were sentenced with §2M5.1 as their primary guideline, with 65 sentenced pursuant to §2M5.1(a)(1) and 21 sentenced pursuant to §2M5.1(a)(2).[107] 89.2% of people sentenced

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[105] *See* 971 F.2d at 75-77. (describing lower court sentencing proceedings).

[106] *See id.*

[107] The limited number of cases subject to §2M5.1 is a significant caveat when interpreting any of the relevant data. However, Defenders submit that the combination of relatively unaltered Guideline text, absence of concerning caselaw, and small numbers of people sentenced pursuant to the Guideline all combine with the limited data to militate against any potential expansion; The data used for these

pursuant to §2M5.1(a)(1) received a below-guidelines sentence, compared to 52.4% of people sentenced pursuant to §2M5.1(a)(2).[108]

The extent of below-guidelines sentences for people sentenced pursuant to §2M5.1(a)(1) is striking. Among those receiving a below-range sentence after starting with a base offense level pursuant to §2M5.1(a)(1), the average sentence imposed was 17.6 months—a nearly 63% average reduction from the bottom of the guideline range.

V. ECRA's reference to the economy in the national security context may warrant limiting commentary.

In proposing issues for comment, the Commission notes that ECRA is "the first export control statute to explicitly consider the economic security of the United States as a component or element of national security."[109] Defenders presume that this refers to ECRA's policy statement that "[t]he national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors . . . ."[110] Defenders note two points about reading ECRA as expanding the definition of "national security" to include economics, both of which support either limiting language or leaving §2M5.1 substantively unchanged.

First, the provision upon which Defenders believe the Commission relies appears to be one identifying a countervailing concern *against* export controls. In essence, Defenders read the provision to be requiring the Executive to be selective in its imposition of export controls because such controls—both by limiting United States' products' access to global sales and by possibly leading to retaliatory controls limiting the flow of materials into the United States—can threaten the United States' ability to lead in those

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analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG.

[108] *Id.* Part, but not all, of this difference can be attributed to the greater percentage of cases that received departures pursuant to §5K1.1.

[109] 2024 Proposed Amendments at 89157.

[110] 50 U.S.C. § 4811(3).

areas.[111] Defenders submit that the text of ECRA falls short of anything that would warrant, for example, treating purely economic short supply controls (like those applicable to horses and unprocessed cedar) as akin to materials involved in nuclear and biological weaponry.

Second, as a more general interpretive principle, Defenders emphasize that while Congress may elevate the importance of the economy by expanding the definition of national security to place the economy alongside controlling nuclear, biological and chemical weapons, doing so also dilutes the category by expanding it to include otherwise lesser concerns. Defenders think it uncontroversial that the law presumes that economic harms are of a lower degree, even if potentially severe, than nuclear or biological attacks. Adding in the former to a term that included the latter might serve to emphasize the importance of economic interests but doing so simultaneously waters down the overall category by expanding its reach to lesser concerns.

To the extent that the Commission feels compelled to address the economy being included as a national security concern in ECRA, Defenders submit that it should do so by clarifying that controls that the Executive identifies as purely economic are not now treated as triggering the elevated base offense level.

VI. Conclusion.

Defenders urge the Commission to leave §2M5.1's text unaltered and to avoid any changes that may arguably expand the scope of the Guideline. Defenders further encourage the Commission to make clear, either in commentary or in explaining its declining to alter the text, that only NS-designated items on the Commerce Control List are national security controls.

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[111] This is consistent with the first provision of ECRA, which requires that the Executive "use export controls *only* after full consideration of the impact on the economy of the United States and only to the extent necessary." 50 U.S.C. § 4811(1).

C. Part C: Offenses Involving Records and Reports on Monetary Instruments Transactions.

Proposed amendment part C, which was requested by DOJ,[1] would expand the 2-level enhancement at USSG §2S1.3(b)(2) to apply if an individual commits an offense under subchapter II of chapter 53 of title 31, of the United States Code "while violating another law of the United States."[2] Defenders strongly oppose the broad, unstudied expansion of this guideline, which disproportionately applies to people of color.

The Commission should pause and exercise its empirical function to study the nature of §2S1.3 offenses and the potential impact of the proposed amendment, prior to expanding the §2S1.3(b)(2) enhancement. If the Commission moves forward with the proposed amendment, Defenders urge the Commission to narrow its language to encompass only those serious tax evasion offenses that DOJ has repeatedly identified as its concern. A narrowly tailored amendment will serve the statutory purposes of punishment and avoid exacerbating unwarranted sentencing disparities.

Defenders oppose the amendment for the reasons laid out below. First, the history of the guideline does not suggest the omission of the proposed language was a mere drafting error. Second, the proposed amendment will exacerbate existing racial and ethnic disparities in §2S1.3 sentences, and it will create a potentially duplicative enhancement for individuals convicted of bulk cash smuggling offenses. Finally, it furthers neither the statutory sentencing mandate of § 3553(a), nor Congressional intent, as it will exacerbate unwarranted disparity and create an enhancement that is, in some ways, broader than the penalty statute it is meant to track.

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[1] *See* USSC, *Sentencing Guidelines for United States Courts: Notice and request for public comment and hearing*, 88 Fed. Reg. 89142, 89159, 2023 WL 8874598 (Dec. 26, 2023) (explaining DOJ "noted that when the Commission promulgated §2S1.3(b)(2) it did not include the additional factor set forth in 31 U.S.C. § 5322(b)").

[2] *Id.* Currently, the (b)(2) enhancement applies if an individual was convicted of a title 31 offense, and that offense was "part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." §2S1.3(b)(2).

I. The history of §2S1.3 does not support DOJ's claim that the omission was a simple drafting error.

While DOJ has characterized this amendment as fixing a simple "drafting error,"[3] there is nothing in the history of the guideline to indicate that excluding offenses committed while "violating another law of the United States" was an accidental omission. As explained below, given the precise language used in the 2002 Reason for Amendment; the contemporaneous expansion of the §2S1.3(b)(1) enhancement to cover bulk smuggling offenses and offenses involving the "proceeds of illegal activity;" and the fact that an iteration of the enhanced penalty statute had existed for three decades prior to 2002, the record suggests that—far from a simple "drafting error"— the Commission intentionally elected not to include the broad language regarding offenses in violation of "another law of the United States," in order to ensure the §2S1.3(b)(2) enhancement would target only more serious conduct.

Since its inception, the §2S1.3 guideline has carried some iteration of the specific offense characteristic at (b)(1), which raises the offense level if an individual "knew or believed that the funds" were derived from unlawful activity.[4] The original guideline referenced only offenses relating to "records and reports of certain transactions involving currency and monetary instruments,"[5] in the Bank Secrecy Act.[6] Decades later, in the wake of a

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[3] DOJ Comments on the Sent'g Comm's Proposed Amendments, at 26 (Feb. 15, 2023).

[4] §2S1.3(b)(1) (1987) (applying (b)(1) enhancement if "the defendant knew or believed that the funds were criminally derived").

[5] *Id.* at comment. background; *see also id.* at Statutory Provisions (listing "31 U.S.C. §§ 5313 [Reports on domestic coins and currency transactions], 5314 [Records and reports on foreign financial agency transactions], 5316 [Reports on exporting and importing monetary instruments], 5322 [Criminal penalties], 5324 [Structuring transactions to evade reporting requirement prohibited]").

[6] *See* Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1976) and 31 U.S.C. §§ 1051–1062, 1081–1083, 1101–1105, 1121–1122 (1976) (recodified as amended at 31 U.S.C. §§ 321, 5311–5314, 5316–5322 (1982)).The Bank Secrecy Act of 1970 aimed to expand the financial information available to government law enforcement agencies in criminal, tax and regulatory prosecution, with a particular goal of targeting the "serious and widespread use" of foreign financial accounts to evade "domestic criminal, tax, and regulatory enactments." *See Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 27, 94 (1974) (discussing legislative history).

national tragedy, the PATRIOT Act was signed into law on October 26, 2001.[7] Among many other things, it contained new money laundering statutes, which Congress considered a "crucial part of our efforts to defeat terrorism."[8] These included a new bulk cash smuggling offense at 31 U.S.C. § 5332.[9] Shortly after the PATRIOT Act's enactment, Commission promulgated the corresponding terrorism amendment package.[10] After that amendment cycle, Commissioner O'Neill applauded the hard work by Commission staff,[11] but also gave special thanks to DOJ for "pull[ing] together with us to work in a very collaborative fashion in bringing forth this project."[12] Commissioner Kendall also highlighted that the DOJ ex officio Commissioner John Elwood was in fact "instrumental and was a major player in drafting the U.S. Patriot Act."[13]

As part of this collaboration with DOJ, the Commission's terrorism package amended §2S1.3 to incorporate new money laundering provisions.[14] First, the Commission expanded the (b)(1) enhancement to account for the new bulk cash smuggling offense, adding the (b)(1)(B) prong, such that a 2-level increase applies 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."[15] The Reason for Amendment explains that the Commission added the enhancement because "[f]indings set forth in that section of the [PATRIOT] Act indicate that bulk

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[7] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act Of 2001, Pub. L. 107–56, 115 Stat. 272 (2001) ("PATRIOT Act").

[8] 147 Cong. Rec. S10990, S11005 (Oct. 25, 2001).

[9] *See* PATRIOT Act, *supra* note 7 at 115 Stat. 337.

[10] *See* Minutes of Public Meeting of U.S. Sent'g Comm, Washington, D.C. (April 5, 2002), http://tinyurl.com/3cmpdx32.

[11] *See id.*

[12] Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 24, (Apr. 5, 2002), http://tinyurl.com/yj24ezse; *see also id.* at 23–24 (noting that Commission policy team's draft "showed an incredible amount of thought and work" and thanking DOJ "for its responsiveness and the help that it offered in being able to help the Sentencing Commission pull this together").

[13] *Id.* at 19.

[14] *See* USSC app. C, Amend. 637 (Nov. 1, 2002).

[15] §2S1.3(b)(1) (2002).

cash smuggling typically involves the promotion of unlawful activity."[16] It does not appear that the Commission added this enhancement based on its characteristic exercise of its empirical function.

The Commission also added an additional specific offense characteristic at (b)(2). The then-new (b)(2) provided for a 2-level increase 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." This addition also does not appear to be based on empirical study, and the record is largely silent on why the Commission added such a specific offense characteristic at that time. However, the Reason for Amendment stated that it added (b)(2) "to give effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b) for offenses under subchapter II of chapter 53 of title 31, United Stated Code, if such offenses were committed as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period."[17]

While DOJ now claims that the addition of (b)(2) was a "response to statutory amendments providing for the enhanced criminal penalty provisions under § 5322(b),"[18] the PATRIOT Act did not, in fact, provide that enhanced penalty provision. The PATRIOT Act expanded the conduct and offenses encompassed by the enhanced penalty provision,[19] but the language that we know today providing for the enhanced statutory maximum in § 5322 predates the PATRIOT Act by decades, appearing in the 1970 Bank Secrecy Act's original penalty statute.[20]

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[16] *Supra* note 14, Reason for Amendment.

[17] *Supra* note 14.

[18] *Supra* note 3 at 26.

[19] *See* PATRIOT Act, *supra* note 7 at 115 Stat. 323 (amending § 5322(b) to insert "'or order issued' after 'willfully violating this subchapter or a regulation prescribed'" and "by inserting 'or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508,' after 'under section 5315 or 5324'").

[20] Section 5322's predecessor penalty statute carried substantially similar language. *See* 12 U.S.C. § 1059 (1970) ("Whoever willfully violates any provision of this chapter where the violation is (1) committed in furtherance of the commission of any other violation of Federal law, or (2) committed as part of a pattern of illegal

Far from a "drafting error," it would have been reasonable for the Commission to see no need to add additional language regarding offenses committed "while violating another law of the United States" to the new (b)(2) enhancement, in light of the contemporaneous expansion of the specific offense characteristic in (b)(1). Indeed, just like the (b)(2) enhancement, the 2002 Reason for Amendment explicitly employs language from only the second prong of § 5322(b), suggesting that the Commission wanted the (b)(2) enhancement to focus only on such conduct. The Commission likely understood then, as is true now, that there was no need for both the (b)(1) enhancement and an additional enhancement at (b)(2) that went beyond the language of the penalty statute in 31 U.S.C. § 5322 to apply to *all* offenses under subchapter II of chapter 53 of title 31 that were committed "while violating another law of the United States."[21] It seems more likely that the Commission intentionally omitted the language regarding another violation of the laws of the United States from (b)(2) because it intended that specific offense characteristic to apply only to more serious offenses involving a longer time period and larger dollar amount. Further, given the close collaboration between DOJ and the Commission on the terrorism amendment package, it seems unlikely DOJ would have missed such an error.

Regardless of the origin of (b)(2), the landscape has changed since 2002. Over the past two decades, with the post-PATRIOT Act enforcement of the bulk cash smuggling statute and the expansion of United States border enforcement, actual §2S1.3 cases have grown to look very different than the original tax evasion offenses the guideline referenced.

II. Ethnic disparities and the realities of §2S1.3 offenses.

The proposed amendment threatens to exacerbate grave racial and ethnic disparities in §2S1.3 convictions and sentences. Hispanic individuals

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activity involving transactions exceeding $100,000 in any twelve-month period, shall be fined not more than $500,000 or imprisoned not more than five years, or both."). Congress amended § 5322 in 1986 to raise the enhanced penalty from 5 to 10 years. Money Laundering Control Act of 1986, Pub. L. 99–570, § 1357, 100 Stat. 3207, 3207–26 (Oct. 27, 1986).

[21] 31 U.S.C. § 5322(b).

make up over two-thirds of those sentenced under §2S1.3.[22] And the proposed amendment would target a rare subset of cases at the cost of exacerbating existing disparities. Although high-profile cases involving hidden offshore accounts are the ones that make headlines,[23] in our experience, the majority of §2S1.3 offenses do not involve such conduct. Defenders and scholars alike have long warned that "high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects[,]" particularly on communities of color.[24] The proposed increase in the (b)(2) illustrates the importance of looking at the data on contemporary §2S1.3 offenses.

As discussed above, Congress created the cash smuggling offense in § 5332 as part of terrorism legislation following the September 11, 2001 attack, but Commission data show that no cases with at least one count of conviction under § 5332 have ever received the §3A1.4 terrorism enhancement.[25] And although DOJ has claimed in the past that the

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[22] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG.

[23] *See Bittner v. United States*, 598 U.S. 85, 104 (2023) (Barrett, J. dissenting) ("Alexandru Bittner, an American citizen, held as much as $16 million across more than 50 bank accounts in Romania, Switzerland, and Liechtenstein."). Notably, the violation at issue in *Bittner* came from the neighboring civil penalty statute in 31 U.S.C. § 5321, not § 5322.

[24] Testimony of Kyle Welch on behalf of Fed. Defenders to the U.S. Sent'g Comm on Proposed Firearm Amendments, Washington, D.C., at 1 (Mar. 17, 2011) (noting that 18 U.S.C. § 924(c) was enacted after the shooting death of Martin Luther King, Jr. and amended after the assassination of Robert F. Kennedy, and the punitive crack penalties set forth in the Anti-Drug Abuse Act of 1986 followed the overdose death of famous basketball player, Len Bias); *see also* Eric Luna and Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 23 (2010) (explaining even a "single traumatic case that grabs news headlines" can trigger "a 'moral panic,' where intense outbursts of emotion impede rational deliberation . . . and generate a public demand for swift and stern government action"); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. Rev. 1751, 1787 (1999), http://tinyurl.com/yckywaus (discussing the moral panic of the war on drugs and 1980s tough on crime laws, resulting in the "startling increase since 1980 in the numbers and percentages of black men and women in American prisons convicted of drug offenses").

[25] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2002 to 2022, which are available at https://bityl.co/HBGG.

expansion of this enhancement is needed to provide adequate penalties for individuals who conceal offshore accounts to avoid taxes, [26] the reality is that the vast majority of §2S1.3 offenses do not involve such conduct. Commission data show that over the past two decades, only 27 cases with at least one count of conviction under § 5314 have been sentenced with a primary guideline §2S1.3.[27] Likewise, DOJ has complained that tax evaders might receive the reduced adjusted base offense level of 6 after application of the reduction in §2S1.3(b)(3),[28] yet in the past five fiscal years, less than 2% of cases sentenced with a primary guideline of §2S1.3 have received an adjusted base offense level of 6.[29]

Instead, in the past five fiscal years, §2S1.3 offenses have disproportionately involved Hispanic individuals, and over *half* of §2S1.3 cases have come from the five Southwestern border districts alone.[30] This comes as no surprise to the Defender community, as we are deeply familiar with "border bust" bulk cash smuggling offenses, which typically involve low-level actors recruited as mules to simply carry cash out of the country for someone else.

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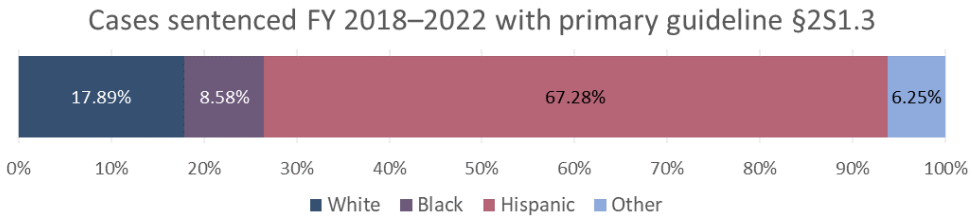
[26] *See* DOJ Annual Letter to the U.S. Sent'g Comm, at 13–14 (July 24, 2015) ("2015 DOJ Letter) (discussing violations of § 5314 and arguing "guidelines in their current form impede the application of this statutory sentencing enhancement" to such cases); *see also* DOJ Annual Letter to the U.S. Sent'g Comm, at 17–18 (July 19, 2016) ("2016 DOJ Letter) ("if defendant is sentenced as though the funds in the undisclosed foreign bank account were amassed legally and used for a lawful purpose, the Government's ability to avoid the reset to offense level 6 is largely limited to proving that the enhancement under §2S1.3(b)(2) applies").

[27] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2002 to 2022, which are available at https://bityl.co/HBGG. An additional 54 cases involving at least one count of conviction under § 5314 were sentenced under other primary guidelines, including 41 cases sentenced under §2T1.1.

[28] *See* 2015 DOJ Letter, *supra* note 26 at 14 ("If the funds in the undisclosed foreign bank account were amassed legally and are used for a lawful purpose, the government's ability to avoid the reset to offense level six is largely limited to proving that the enhancement under §2S1.3(b)(2) applies . . . .").

[29] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG.

[30] *Id.*



In addition to making up the majority of those sentenced under §2S1.3, people of color face longer sentences than their white counterparts. 84% of Hispanic individuals sentenced under §2S1.3 in the past five fiscal years received the (b)(1) enhancement.[31] And for the same time period, the average sentence length for Hispanic individuals was 12 months, compared to 11 months for Black individuals, and 9 months for white individuals.[32]

DOJ's requests for the proposed enhancement have focused on a narrow subset of high-profile cases instead of the mine-run §2S1.3 case. If the Commission insists on expanding the (b)(2) enhancement now due to DOJ's concern regarding such tax evasion offenses by high net-worth individuals, it should use narrow language that specifically targets this small subset of cases. As written, the proposed amendment would broadly expand an enhancement in a guideline that already creates disparate sentencing outcomes for people of color.

III. The proposed amendment would not further the statutory purposes of punishment.

There is no statutory mandate forcing the Commission to act now, but there is a statutory mandate to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."[33] The Commission should not increase penalties in this guideline without first studying these offenses carefully. In the alternative, if the Commission believes it must expand the enhancement in (b)(2) now, Defenders urge the Commission to include the statutory exceptions and narrowly tailor any enhancement such that it only applies to subchapter II offenses that carry the enhanced 10-year statutory

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[31] *Id.*

[32] *Id.*

[33] 28 U.S.C. § 991.

maximum and constitute tax evasion offenses involving legally-obtained, yet undisclosed funds—the offenses which DOJ has repeatedly pointed to as necessitating the amendment.[34] The proposed amendment, as written, would increase unwarranted disparities and will not further the statutory purposes of punishment.

1. It would increase unwarranted disparities.

The proposed amendment would increase unwarranted disparities and achieve anomalous sentencing results, in a guideline already plagued by racial and ethnic disparities. It risks imposing double punishment on the same conduct, because the conduct covered by the (b)(1) enhancement is already extremely broad. Not only does (b)(1) impose a 2-level increase in bulk cash smuggling offenses, but it also applies to offenses where an individual "knew or believed that the funds were proceeds of unlawful activity."[35] Under the proposed expansion of (b)(2), a typical money mule—who, in our experience, are typically low-level participants—arrested for driving $15,000 across the border could potentially receive both the (b)(1) and proposed expanded (b)(2) enhancements for committing the "offense while violating another law of the United States." On the other hand, a high net-worth individual evading taxes via undisclosed foreign bank account full of funds that were "amassed legally and are used for a lawful purpose" would only receive the proposed enhancement under (b)(2).[36] DOJ argues that the proposed "amendment would ensure that the guidelines are consistent with current statute and that they properly reflect the intent of Congress,"[37] but (b)(1) already applies to a vast universe of offenses.[38] If the Commission wishes to target the small subset of offenses involving tax evasion violations of title 31 subject to the enhanced 10-year statutory maximum penalty that also involved funds that were legally obtained without careful study, it should do so with precision.

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[34] *See* 2015 DOJ Letter, *supra* note 26 at 13–14.

[35] §2S1.3(b)(1)(A).

[36] 2015 DOJ Letter, *supra* note 26 at 13.

[37] 2016 DOJ Letter, *supra* note 26 at 18.

[38] §2S1.3(b)(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. It does not further the statutory purposes of punishment or congressional intent.

As discussed above, the proposed amendment could result in double punishment for the same conduct, and thus would overrepresent the seriousness of the offense.[39] The data show that more than half of §2S1.3 cases sentenced in the past five fiscal years received sentences below the advisory guideline range.[40] And nearly one-third of these cases received a sentence other than straight imprisonment, with 17% receiving a sentence of probation.[41] The data suggest that if anything, sentencers find the ranges too high, and the proposed amendment would create sentencing ranges that are greater than necessary.

Finally, the proposed amendment would not, as DOJ has claimed, "properly reflect the intent of Congress."[42] As discussed above, the predecessor statute of § 5322 originated with the Bank Secrecy Act, which aimed to target foreign financial accounts and tax evasion, and the bulk cash smuggling offense itself was a creation of the War on Terror.[43] Yet the bulk of §2S1.3 offenses involve low-level money mules, not tax evaders or terrorists.[44] And the proposed amendment goes beyond the offenses subject to the 10-year statutory maximum penalty in § 5322. Unlike the proposed amendment,

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[39] 18 U.S.C. § 3553(a)(2)(A).

[40] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG.

[41] *Id.*

[42] 2016 DOJ Letter, *supra* note 34 at 18.

[43] PATRIOT Act, *supra* note 7 at § 371(a)(3) ("The transportation and smuggling of cash in bulk form may now be the most common form of money laundering, and the movement of large sums of cash is one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes.").

[44] *Id.* at § 371(a)(5) ("the couriers who attempt to smuggle the cash out of the United States are typically low-level employees of large criminal organizations, and thus are easily replaced").

§ 5322 does not provide for a 10-year statutory maximum penalty for *all* subchapter II offenses; it carves out certain exceptions.[45]

IV. Conclusion.

The proposed amendment would result in an unstudied upward expansion to a guideline initially intended to target tax evasion and terrorism, but instead primarily impacts low-level offenses committed by people of color. It would also exacerbate unwarranted disparities. Defenders oppose the proposed amendment, and urge the Commission to wait and study §2S1.3 offenses, along with other economic offenses and the loss table.[46] Alternatively, if the Commission opts to act now, we urge it to narrowly tailor the enhancement language to ensure it only applies to subchapter II offenses that carry the enhanced 10-year statutory maximum and constitute tax evasion offenses involving legally-obtained, yet undisclosed funds, given DOJ's concerns regarding such offenses.

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[45] § 5322 (exceptions for "section 5315, 5324, or 5336 of this title or a regulation prescribed under section 5315, 5324, or 5336").

[46] *See* Statement of Daniel Dena on behalf of Fed. Defenders to the U.S. Sent'g Comm on Economic Offense Guidelines (Feb. 27, 2024) (laying out Defender position on Proposed Amendment 1: Rule for Calculating Loss).

E. Part E: Enhanced Penalties for Certain Drug Offenses.

On Part E of the Miscellaneous proposed amendments, Defenders generally support Option 1, although we agree with DOJ that a modification is needed to account for stipulations. Last year, Defenders advocated for deleting §2D1.1(a)(1) and (a)(3) altogether, for several reasons.[1] We still think this would be the cleanest way to structure these enhanced base offense levels. But at least Option 1 carries out the Commission's longstanding intent for the enhanced base offense levels to reflect the statutory penalties and ensures consistency in application of the enhanced base levels.

The Commission's intent has historically been for the §2D1.1(a) enhanced base offense levels to mirror the statutory penalties.[2] The Commission has consistently chosen to use the term of art "offense of conviction" to ensure that §2D1.1(a)'s enhanced base offense levels "apply only in the case of a conviction under circumstances specified in the statutes cited."[3] Despite the Commission's clear intent, at least one Circuit has read §2D1.1(a) to require the enhanced base offense levels even in cases where a

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[1] Statement of Michael Caruso on behalf of Fed. Defenders to U.S. Sent'g Comm. on Acceptance of Responsibility and Controlled Substances, at 9–14 (Mar. 7, 2023).

[2] *See* 21 U.S.C. §§ 841(b), 960(b); USSG §2D1.1(a)(1)–(4); *id.* comment. background ("The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute."); *United States v. Greenough*, 669 F.3d 567, 575 (5th Cir. 2012) ("The similarities between the language indicate that the offense level was intended to mirror the criminal statute.").

[3] USSG App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989) (amending the §2D1.1(a)(1) and (a)(2) offense levels to replace "an offense that results in" death or serious bodily injury with the "offense of conviction establishes" death or serious bodily injury); *see also* USSG App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009) (using the same "offense of conviction" language when adding §2D1.1(a)(3) and (a)(4)); USSG §1B1.2(a) (defining "offense of conviction" as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted"). Last year's amendment continued this practice, revising §2D1.1(a)(1) and (a)(3) to replace the non-statutory term "similar offense" with the statutory language describing the prior offenses that trigger enhanced penalties. USSG App. C, Amend. 817, Reason for Amendment (Nov. 1, 2023).

person is not subject to enhanced statutory penalties.[4] Defenders previously alerted the Commission to this application inconsistency.[5]

Option 1 clarifies that the enhanced base offense levels apply only when the person is convicted of an offense that triggers the statutory enhancement for death or serious bodily injury or where the government established a qualifying prior under 21 U.S.C. § 851 that is sustained at sentencing. By stating that the enhanced base offense levels apply only when the person "is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction" for both death or serious bodily injury and for a qualifying prior established by § 851,[6] Option 1 resolves the ambiguity.

Unlike Option 1, Option 2 fails to effectively clarify when the enhanced base offense levels apply. This is true not only with regard to the "death or serious bodily injury" clause (which appears to be the point of Option 2) but also the § 851-related clause. By removing the overarching language "subject to a statutorily enhanced sentence," Option 2 would allow the enhanced base offense levels that match statutory penalties to apply even in cases where an individual is not subject to those penalties, as where an § 851 information was filed (and thus could be said to have "established" something) but was later withdrawn.[7]

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[4] *Compare United States v. Johnson*, 706 F.3d 728, 732 (6th Cir. 2013) (holding the district court "was still permitted to take into account" a prior conviction when determining whether to apply § 2D1.1(a)(1) even though the government did not file an information under § 851 and therefore the statutory enhancement did not apply), *with United States v. Lawler*, 818 F.3d 281, 284 (7th Cir. 2016) (holding §2D1.1(a)(2) applies "only when death is an element of the crime that is admitted by the defendant or proven beyond a reasonable doubt") *and Greenough*, 669 F.3d at 575 (same); *see also United States v. Sica*, 676 F. App'x 81, 86 (2d Cir. 2017) (collecting additional decisions the Court read to indicate a wider circuit split).

[5] Fed. Defenders Comment on 2023–2024 Proposed Priorities, at 14–16 (Aug. 1, 2023).

[6] 2024 Proposed Amendments, at 89160–61.

[7] *Id.*; *see also* USSC, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 18–19 (July 2018), http://tinyurl.com/hubxj6ve (reporting that in over one-fifth of cases, the government filed but later withdrew an § 851 information).

The main thrust of Option 2—broadening the "death or serious bodily injury" clause to cover any "offense involving death or serious bodily injury"—is highly problematic.[8] As noted, the Commission has always used the term of art "offense of conviction" in this context, which refers only to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted."[9] By switching to "offense," which includes all relevant conduct,[10] Option 2 conflicts with the Commission's longstanding intent that the enhanced base offense levels "apply only in the case of a conviction under circumstances specified in the statutes cited."[11] And it results in a base offense level that calls for a life sentence in every case that falls under §2D1.1(a)(1), which covers many commonly charged drug offenses, regardless of whether the statute of conviction mandates a life sentence or, indeed, even if it prohibits any sentence above 30 years. Further, Option 2 would open the door to differing interpretations in individual cases about whether or not a particular offense "involved" death or serious bodily injury.[12] Instead of providing clarity and ensuring uniform application of the enhanced base offense levels across jurisdictions, Option 2 would do just the opposite.[13]

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[8] 2024 Proposed Amendments, at 89161.

[9] USSG §1B1.2(a); *see also* USSG App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989) (amending the §2D1.1(a)(1) and (a)(2) offense levels to replace "an offense that results in" death or serious bodily injury with the "offense of conviction establishes" death or serious bodily injury); *see also* USSG App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009) (using the same "offense of conviction" language when adding §2D1.1(a)(3) and (a)(4)).

[10] USSG §1B1.1 cmt. (n.1(I)).

[11] USSG App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989).

[12] For example, courts are likely to inconsistently apply the enhanced base offense levels in cases in which a jury acquitted the defendant of causing death or serious bodily injury, but the government argues at sentencing that the court should find the offense "involved" death or serious bodily injury (assuming the Commission does not adopt Option 1 for Proposed Amendment 3 regarding acquitted conduct, of course). *See* 2024 Proposed Amendments, at 89150–51.

[13] *See United States v. Maung*, 267 F.3d 1113, 1119 (11th Cir. 2001) (noting that the language "offense involved" is "general and passive"), *abrogated on other grounds, Dolan v. United States*, 560 U.S. 605 (2010). *Cf. Johnson v. United States*, 576 U.S. 591, 596–602 (2015) (striking as unconstitutionally vague the statutory language "involves conduct that presents a serious potential risk of physical injury to another" because "the indeterminacy of the wide-ranging inquiry required by the

Finally, Option 1 is the better choice because it also would avoid exacerbating a drafting anomaly from the First Step Act that sets a *lower* bar to trigger a mandatory-life sentence for those convicted of trafficking only a detectable amount of Schedule I and II controlled substances than for those convicted of a mandatory-minimum-triggering quantity.[14] Although DOJ has a policy against seeking mandatory life sentences under the less serious charge if the enhancement would not apply to a more serious charge,[15] Defenders continue to be concerned about the enhancement of the base offense level in §2D1.1(a)(1)(B) based on the defendant having committed the offense after a prior conviction for a "felony drug offense."[16] Option 1, together with DOJ charging policy, would ensure that §2D1.1(a)(1)(B) does not recommend life imprisonment unless: (1) the prior conviction was a "serious drug felony" or "serious violent felony"; and (2) the government establishes and the court sustains the conviction pursuant to § 851.

Turning to the need for stipulation language, Defenders share DOJ's concern that Option 1's language may preclude agreements stipulating to the enhanced base offense levels in lieu of the government charging death or

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residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges").

[14] *See* 21 U.S.C. §841(b)(1)(C) (setting a mandatory minimum of life imprisonment if death or serious bodily injury resulted and the individual committed a prior "felony drug offense"); USSG §2D1.1(a)(1)(B) (setting a base offense level 43 if the offense of conviction establishes that death or serious bodily injury resulted and that the individual committed prior "felony drug offense"); U.S. Dep't of Justice, *First Step Act Annual Report* 50 (Apr. 2022), http://tinyurl.com/439sdd4h (explaining that mandatory life provision § 841(b)(1)(C) is more expansive than §§ 841(b)(1)(A), (B)).

[15] Because DOJ recognizes that 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3) now proscribe "a mandatory sentence of life imprisonment upon a lesser showing than that required under [§§] 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2)," the current DOJ has committed "as a matter of policy not to seek a mandatory sentence of life imprisonment under [§§] 841(b)(1)(C) or 960(b)(3) unless a defendant's prior conviction meets the statutory definition of a 'serious drug felony' or 'serious violent felony.'" *Id.*

[16] *See* Fed. Defenders Comment on 2023–2024 Proposed Priorities, at 14–16 (Aug. 1, 2023); Fed. Defenders Comment on First Step Act—Drug Offenses (Proposal 2), at 1–2 (Mar. 14, 2023); Statement of Michael Caruso on behalf of Fed. Defenders to U.S. Sent'g Comm. on Acceptance of Responsibility and Controlled Substances, at 9–14 (Mar. 7, 2023).

serious bodily or pursuing a § 851 enhancement.[17] It may be that USSG §1B1.2(a) would permit such agreements, but, unfortunately, this is less than clear. Defenders urge the Commission to add language to §2D1.1(a), or perhaps to each subsection of §2D1.1(a), to clarify that the district court may apply one of the enhanced base offense levels pursuant to a stipulation that the elevated level should apply. In the absence of a stipulation, though, the enhanced offense levels would apply only when the conviction triggers statutory enhanced penalties.[18]

[17] Dep't of Justice Comment on 2023–2024 Proposed Amendments, at 29 (Feb. 22, 2024).

[18] It would remain true that with or without any stipulation, courts are free to consider information about a death, injury, or prior convictions when determining the appropriate sentence. *See* 18 U.S.C. §§ 3553(a), 3661; *see also* USSG §4A1.3 (departure for underrepresented criminal activity); USSG §5K2.1 and §5K2.2 (departures for death and bodily injury).

F. Part F: "Sex Offense" Definition in §4C1.1.

Defenders oppose the proposed amendment to the definition of "sex offense" in §4C1.1(b)(2), which would increase the number of individuals who are precluded from benefiting from the "Zero-Point Offender" reduction.[1]

Last year, the Commission took a critical step towards implementing its statutory duties under 28 U.S.C. §§ 991(b)(1), 994(g), and 994(j).[2] Armed with data showing that people with zero criminal history points are rearrested at a significantly lower rate than even people with one criminal history point, and that courts more often impose sentences below the guidelines for all people with zero criminal history points, the Commission established §4C1.1 to provide a 2-level decrease from the offense level for certain people with zero criminal history points.[3]

While the data referenced in the Reason for Amendment would provide support for a §4C1.1 reduction for *everyone* with zero criminal history points, the Commission "identified circumstances in which [individuals with zero points] are appropriately excluded from eligibility in light of the seriousness of the instant offense of conviction or the existence of aggravating factors in the instant offense (*e.g.*,. . .where the instant offense was a 'sex offense')."[4]

DOJ now asks—before §4C1.1 has been in effect for even a year—for the Commission to expand §4C1.1's "sex offense" exclusion because it only excludes people convicted of sex offenses "perpetrated against minors" and

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[1] *See* USSC, *Sentencing Guidelines for United States Courts: Notice and request for public comment and hearing*, 88 Fed. Reg. 89142, 89161–62, 2023 WL 8874598 (Dec. 26, 2023) ("Proposed Amendment").

[2] *See* 28 U.S.C. §§ 991(b)(1) (requiring the Commission to establish sentencing policies that are fair and that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process"); 944(g) (requiring the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); 994(j) (requiring the Commission to ensure that "first offender[s]" who commit non-serious offenses generally receive non-custodial sentences).

[3] *See* USSG, App. C., Amend 821 (Nov. 1, 2024) (citing USSC, *Recidivism of Federal Offenders Released in 2010* 26–27 & fig. 14 (2021), http://tinyurl.com/mr2bbb3r; USSC, *Public Data Presentation for Proposed Criminal History Amendment* 26 (2023), http://tinyurl.com/3h5bn9v9).

[4] *Id.*

does not exclude people convicted of criminal sexual abuse of a ward or person in custody.[5]

We continue to urge the Commission to not expand the already-lengthy list of §4C1.1 exclusions. As explained in Defenders' Comment on Simplification, one danger of a list within the Guidelines Manual is that it is vulnerable to changes related to policy shifts at the Commission, and we fear that expanding §4C1.1's list of exclusions—and so soon—sets a dangerous policy precedent.[6] However, to the extent the Commission agrees with the narrow policy concern raised by DOJ, it should adopt Option 1, which would fully address DOJ's concern by excluding people convicted of 18 U.S.C. § 2243(b) and (c) from §4C1.1 relief. Option 2, which would expand the definition of "sex offense" even further, should be rejected.

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[5] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm 40–43, (Feb. 27, 2023) (arguing that the proposed §4C1.1 would "offset in part the Commission's proposed amendment to raise the base offense level for §2A2.3, which covers sexual abuse of a ward," since prison officials generally lack prior criminal history, as well as requesting numerous offense-related additional exclusions if the Commission decided to promulgate §4C1.1; the list did not include the offense of sexual abuse of a ward).

[6] *See* Letter from Heather Williams on behalf of Fed. Defenders to the U.S. Sent'g Comm at Proposal 7, p. 10–11 (Feb. 22, 2024). Theoretically DOJ's list of potential exclusions, some of which were not promulgated, could be used for piecemeal expansion of §4C1.1's exclusionary criteria year after year, despite the Commission's carefully tailoring of §4C1.1 last amendment cycle.